

PUBLICATION

Department of Labor Moves to Rescind 2011 Tip Pooling Regulations

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On July 20, 2017, the Department of Labor (DOL) indicated via the federal government's Unified Agenda of Regulatory and Deregulatory Actions that it plans to propose a rule that would rescind some of the more onerous restrictions on "tip pooling" in the hospitality industry.

Background

The Fair Labor Standards Act (FLSA) permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least \$2.13) and the federal minimum wage. The FLSA, however, places certain restrictions on employers who take the tip credit. One of these restrictions is that employees who are paid on a tip credit basis may only be required to participate in a tip pool with other customarily-tipped employees. Thus, for employers who take a tip credit, "back-of-house" employees who are not customarily tipped may not benefit from a tip pool. The FLSA is silent, however, as to whether this tip-pooling restriction applies to employers who pay their tipped employees a full minimum wage. This silence led to much confusion and litigation.

In 2010, the Ninth Circuit Court of Appeals held in *Cumbie v. Woody Woo, Inc.* that the tip pooling restrictions did not apply to employers who paid their tipped employees the full minimum wage and that such employers could lawfully implement a program that included back of house employees under the FLSA tip pooling policies.

In response to the *Cumbie* decision, the DOL issued a new set of controversial rules in 2011, clarifying that all tip pools, including back-of-house employees, violated the FLSA. The DOL regulations established that tips given to an employee were solely the property of the employee who received the tip and could not be shared with non-customarily tipped employees (like cooks and dishwashers), even if the employee was not paid on a tip credit basis and received the full minimum wage. These regulations effectively extended tip-pooling restrictions to all employers, regardless of whether the employers took advantage of tip credits.

The DOL's regulations unsurprisingly led to litigation within the hospitality industry. In February 2016, a split Ninth Circuit held in *Oregon Restaurant and Lodging Association v. Perez* that, since the FLSA was silent on defining tip pools, the DOL had the authority to interpret the statute as it saw fit. Accordingly, employers within the Ninth Circuit paying full minimum wage to tipped employees were prohibited from utilizing tip pools that included back-of-house employees.

Recently, however, the Tenth Circuit came down on the other side and ruled that the DOL went beyond its authority in promulgating the 2011 regulations, since there is no gap or ambiguity in the FLSA statute. Thus, the court held in *Marlow v. New Food Guy, Inc.* that employers who pay employees the full minimum wage do not violate the FLSA by retaining tips or distributing them among other employees, including back-of-house workers.

As a result of the Circuit Court conflict, the National Restaurant Association, among others, has asked the United States Supreme Court to hear an appeal of the Ninth Circuit case. In light of the DOL's upcoming proposal, Supreme Court review may not be necessary to resolve the dispute.

DOL Proposal

The DOL proposes to rescind the restrictions on tip pooling for employers that pay tipped employees the full minimum wage. In other words, under the DOL's proposal, a tipped employee who is paid full minimum wage could be required to share any tips they receive on top of that wage with back-of-house staff or any other individual the employer designates as a tip-pool participant. The tip-pooling restriction would continue to apply to employers who take a tip credit for tipped employees.

The DOL's proposal has promising implications for the hospitality industry, as it will be easier for employers to attract good talent in the back of the house if these employees are able to benefit from a tip-pooling arrangement. It is important to note, though, that there is no change in the policy until the DOL issues a final rule, which could take up to a year. In the meantime, employers in the hospitality industry should continue to follow the restrictions currently in place until they are officially rescinded. Additionally, the DOL's proposal should serve as a reminder to employers of tipped workers to continually reevaluate their tipping procedures and be certain their framework meets current standards.