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## New Jersey's Rules for Tipped Employees

By Carolyn D. Richmond and Bryn Goodman

The New Jersey Department of Labor and Workforce Development (NJDOLE) announced new [regulations](#) on August 14 to protect tipped workers. The new regulations detail the rules for employers of tipped employees that were implemented pursuant to Governor Murphy's [February 2019 amendments](#) to the New Jersey Wage and Hour Law. New Jersey businesses that employ tipped workers in any industry (whether or not they take a tip credit) should review the new regulations to ensure their current policies and practices are in compliance.

An employer must ensure that workers receiving tips are properly classified as tipped employees (defined below). Once a worker is identified as a tipped employee, if the employer takes a tip credit, it must also ensure that tips received by the tipped employee plus the cash wage, equal or exceed the minimum wage. If not, the employer must pay the difference. Importantly, as detailed in the chart below, the minimum cash wage and tip credit amount will increase over the next five years.

<u>Effective Date</u>	<u>Min. Cash Wage</u>	<u>Min. Tip Credit</u>	<u>State Minimum Wage*</u> Cash Wage + Tips Must Equal Min. Wage or Employer Must Pay Difference
Jan. 1, 2020	\$3.13	\$7.87	\$11
Jan. 1, 2021	\$4.13	\$7.87	\$12
Jan. 1, 2022	\$5.13	\$7.87	\$13
Jan. 1, 2023	\$5.13	\$8.87	\$14
Jan. 1, 2024	\$5.13	\$9.87	\$15

\* Overtime pay must be 1.5 times an employee's hourly rate of pay for any hours worked over 40 hours per week. When an employer takes a tip credit, overtime is calculated on the *full* minimum hourly wage, not the lower cash wage payment. A larger tip credit for overtime is not permitted.

### Defining "Tipped Employees" and Notice Requirements

Similar to regulations in other states, New Jersey defines a "tipped employee" as someone who regularly and customarily receives more than \$30.00 in tips per month. Employers must provide tipped employees with notice before taking a tip credit. Notice to employees in advance of the employer's use of the tip credit must include: (1) the cash wage amount; (2) the tip credit amount, which may not exceed the value of the tips actually received; (3)

that all tips received must be retained by the employee who received them except for a valid tip pooling arrangement limited to tipped employees; and (4) the tip credit shall not apply to any employee who has not been informed of the requirements of the law.

### **Restrictions on the Use of Tips**

Employers cannot take a tip credit for sick leave pay under the NJ Earned Sick Leave Law. The employer must pay sick leave at the employee's normal rate of pay. The normal rate of pay is calculated by adding together the employee's total earnings, including tips (excluding overtime premium pay), for the seven most recent workdays when the employee did not take leave, and dividing the sum by the number of hours the employee performed the work.

### **Breaking from Recent Federal Policy**

In sharp contrast to the [U.S. Department of Labor's opinion letter](#) relaxing the 80/20 rule, NJDOL has codified the rule. Employers should review their tip pooling policies to ensure that only tipped workers are participating in tip pools. NJDOL notes that the 80/20 rule prohibits an employer from taking a tip credit where an employee spends more than 20% of their time during the workweek performing non-tipped duties (e.g. cleaning, setting tables, making coffee, etc.).

NJDOL's rules also conflict with the U.S. Department of Labor's position on the issue of credit card fees. In New Jersey, an employer is prohibited from using an employee's tips, whether or not the employer has taken a tip credit, for any reason other than for wages or a valid tip pool. Thus, the regulations prohibit an employer from recouping any portion of credit card or debit card processing fees from tip amounts. Employers should review their policies to ensure they do not run afoul of this rule.

### **Training Pay and Service Charges**

In a provision that seems more employer-friendly, the NJDOL rules permit employers to pay 90% of the minimum wage for established, on-the-job or other training programs, but this provision has numerous requirements that will make its application cumbersome. For instance, the training pay is only permitted for the first 120 hours of an employee's work and only if the employee was hired in an occupation in which the employee has not had previous or related experience. In addition, the trainee cannot displace any currently employed worker and the employer must make an effort to employ the trainee after the training period.

The regulations provide that a compulsory charge for service is not a tip and shall not be counted as a tip received. This means that the charge, even if distributed to employees, shall not be counted towards the tip credit.

Employers should review the new NJDOL regulations and the [NJDOL's explainer document](#) immediately, and implement any necessary changes with the assistance of counsel to avoid penalties and fees for violations of the rules.

For more information about this alert, please contact Carolyn D. Richmond at [crichmond@foxrothschild.com](mailto:crichmond@foxrothschild.com) or 212.878.7983 or any member of the firm's New Jersey Labor & Employment Group.

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