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DOL OKs Nontraditional Tip Pooling, Will Study Modifications to 80/20 Rule

By Tim Gumaer

The U.S. Department of Labor (DOL) has published a final rule permitting the immediate use of nontraditional tip pooling arrangements under the Fair Labor Standards Act (FLSA), but delaying implementation of modifications to the 80/20 Rule — which involves the application of the FLSA tip credit to employees who perform both tipped and untipped duties — until December 31, 2021.

Background

In 2011, under former President Barack Obama, the DOL issued regulations that prohibited employers from implementing tip pools that included “back-of-house” employees such as cooks, dishwashers and porters. Only “front-of-house” employees who customarily and regularly receive tips, such as servers, bartenders and bussers, were allowed to share tips with one another.

However, in 2018, Congress passed the Consolidated Appropriations Act (CAA), which amended the FLSA to permit employers to implement a tip pooling system requiring front-of-house employees to share their tips with back-of-house employees, provided that:

- No tip credit is taken by the employer
- No supervisory or managerial employees participate in the tip pool.

On December 22, 2020, the DOL promulgated final regulations implementing these amendments, which have now become known as the 2020 Final Tip Rule. They were set to become effective on March 1, 2021. However, in late February, the DOL delayed their effective date

until April 30, 2021 to enable the agency to further review issues of law, policy and facts.

Further Delays

On April 28, 2021 the DOL announced it was delaying for a second time the effective date of certain portions of the 2020 Final Tip Rule. These portions address the assessment of civil penalties under the FLSA and the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties (also known as the “80/20 Rule”). The DOL pushed back its decision on these provisions until December 31, 2021 to allow for further examination of the issues that may arise following their potential implementation.

Parties are invited to submit comments on the delayed portions of the 2020 Final Tip Rule no later than May 24, 2021 and can do so [here](#).

DOL Implements Remainder of 2020 Final Tip Rule

The DOL’s April 28, 2021 rule, however, does implement those provisions of the 2020 Final Tip Rule that address the keeping of tips, tip pooling and tip-related recordkeeping. These amendments will take effect on April 30, 2021. Of crucial importance is that:

- Employers that opt not to take a tip credit may now implement a mandatory “nontraditional” tip pool. This means that employers may administer a tip pooling system that requires front-of-house employees to share their tips with the establishment’s back-of-house employees.

- Employers that do not take a tip credit and implement a “nontraditional” tip pool must maintain adequate records with respect to tips received by back-of-house employees participating in such tip pools.
- Employers (including supervisors and managers), regardless of whether they take a tip credit against employees, are explicitly prohibited from keeping tips received by their employees.
- Employers that implement a mandatory tip pooling system must fully redistribute those tips no later than the regular payday for the workweek or pay period in which the tips were collected.

While employers must wait for the DOL’s decision with respect to the 80/20 Rule, the regulations that go into effect on April 30 provide additional clarity concerning tip pooling and will largely be welcomed by the hospitality industry. All restaurant workers, not merely those who are customer facing, contribute to the overall guest experience. The 2020 Final Tip Rule and its addition of “nontraditional” tip pools encourage employers not to take a tip credit, to establish a tip pool available to all staff in an effort to promote equity, provide additional income for “back-of-house” employees and enable employees to coordinate with one another to provide — and reap the benefits of — an above average guest experience.

Nevertheless, employers must remember that state law may restrict their flexibility with respect to tip pools. For example, in New York and Massachusetts, it is impermissible to have front-of-house employees share tips with back-of-house employees, irrespective of the FLSA. Therefore, employers should consult with counsel before they make any changes to their tip pool and tip share arrangements to ensure they do not run afoul of state law.

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or

ggrindlinger@foxrothschild.com, or Tim Gumaer at 646.601.7652 or tgumaer@foxrothschild.com, or any member of Fox Rothschild’s New York Labor and Employment Group.

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