



September 2021

Tip and Wage Violations by Employers Will Lead to More Penalties Under New DOL Rule

By Matthew C. Berger, Glenn S. Grindlinger and Carolyn D. Richmond

Employers who violate the Fair Labor Standards Act with respect to employee tips and minimum wage and overtime obligations will face more penalties under a new [Final Rule](#) published by the U.S. Department of Labor that takes effect on November 23, 2021.

While the Final Rule expands liability, it also provides employers some much-needed clarity with respect to managers and tips.

Expanded Liability Under the Final Rule

Under the Final Rule, the DOL can assess civil money penalties against employers who take tips earned by their employees, regardless of whether those violations are “repeated or willful.”

Employers who keep employee tips “shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary [of the DOL] determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages,” the Final Rule states.

In other words, the DOL no longer needs to make a determination that such conduct was “repeated or willful” before assessing a \$1,100 penalty each time an employer keeps an employee’s tips; it is up to the DOL to assess such penalties as it “deems appropriate.” This

penalty is *in addition* to back pay and liquidated damages that employees can recover.

The Final Rule also modifies the DOL’s broader civil money penalties regulations, addressing when a violation of the minimum wage and overtime sections of the FLSA is “willful” and thus subject to a civil money penalty.

Specifically, the rule modifies these regulations by clarifying that “multiple circumstances” – not just conduct deemed “knowing” (i.e., if the employer received advice from a “responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful”) or conduct deemed “reckless” (i.e., if the employer “should have inquired further into whether its conduct was in compliance with the [FLSA]”) – can be sufficient to show that a violation of the minimum wage and/or overtime provisions of the FLSA is willful.

This means that the DOL now has a lower burden to establish a willful violation of these provisions in order to obtain civil penalties.

Clarification Regarding Managers and Tips

Under the FLSA, an employer may not “include” managers and supervisors in tip pools or tip sharing arrangements. The Final Rule, however, clarifies that while managers and supervisors may not *receive* tips from mandatory tip pools or tip sharing arrangements, managers and supervisors are not prohibited from

contributing any tips they receive directly to eligible employees in mandatory tip pools or tip sharing arrangements. With tipped employees earning less in tips due to fewer customers dining out, restaurants can now rest assured that if they choose to have their managers contribute to a tip pool or tip share arrangement, they will not run afoul of the FLSA.

Finally, the Final Rule also modifies a provision of the DOL's tip regulations that currently explains that a manager or supervisor may keep tips that the individual receives directly from customers based on the service that the manager or supervisor directly provides. The rule clarifies that a manager or supervisor may keep such tips only when the tip is based on a service the manager or supervisor directly and "solely" provides.

For example, if a manager or supervisor is engaged in customer-facing work alongside a traditionally tipped employee, that individual may not keep any portion of a tip left by the customer; however, if a manager or supervisor is the only individual providing the service to the customer, they may keep any direct tip left for that service. Read in conjunction with that part of the Final Rule permitting managers and supervisors to contribute to a tip pool or tip share arrangement, employers may require a manager or supervisor to share some portion of the direct tips they receive with other eligible employees, but the manager or supervisor may not receive tips from the tip pool or tip share arrangement, even if they contribute tips to the pool.

Takeaways and State Law Concerns

The Final Rule is a mixed bag for employers. On one hand, it lowers the DOL's burden for assessing civil money penalties for violations of certain parts of the tip, overtime and minimum wage sections of the FLSA. On the other hand,

however, it provides some clarity and leeway to employers when dealing with managers or supervisors who receive tips directly from customers. Employers must remember, however, that state law may restrict their flexibility with respect to tip pools. For example, although managers in New York may keep any tips they receive directly from customers, New York law does not expressly permit employers to require that managers contribute tips to a tip pool (managers may, however, voluntarily contribute any tips they receive to a tip pool if they so choose). 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, Matthew C. Berger at 646.601.7658 or mberger@foxrothschild.com, or any member of Fox Rothschild's New York Labor and Employment Group.