

Blog Post

DOL's Final Rule on Tipped Employees Takes Effect December 28th

December 1, 2021

Beginning December 28, 2021, employers must pay tipped employees the full minimum wage for periods when non tip-producing work is performed for a substantial amount of time, in light of a new Department of Labor (DOL) [Final Rule](#) taking effect that date. To comply with the rule, employers should revisit their current policies regarding how tipped employees are compensated and ensure that they carefully track how tipped workers spend their time.

Tip Credit

A tip credit allows an employer the opportunity to satisfy a portion of its minimum wage obligation to a tipped employee by taking a partial credit toward the minimum wage based on the amount of tips an employee receives, provided that the employer meets certain requirements. *Please note that the references to minimum wage requirements in this article are based on the federal minimum wage; many states and localities have higher minimum wage requirements that must be honored. In addition, some states may not allow for a tip credit at all.*

Before utilizing the FLSA tip credit, employers must provide the following information to a tipped employee:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13

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per hour;

2. The additional amount claimed by the employer as a tip credit, which cannot exceed \$5.12 (the difference between the federal minimum required cash wage of \$2.13 and the current minimum wage of \$7.25);
3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

Employers may provide oral or written notice to their tipped employees informing them of the above. Any employer who fails to provide the required information cannot use a tip credit and therefore must pay the tipped employee at least \$7.25 per hour in wages and allow the tipped employee to keep all tips received.

Classifying Tipped Employees' Work

The Final Rule establishes that a tipped employees' work duties must be divided into three categories: (1) tip-producing work; (2) directly supporting work; and (3) work that is not part of a tipped occupation. By identifying work duties using these three categories, employers will be able to determine whether they may take a tip credit against their minimum wage obligations.

Tip-Producing Work

The Final Rule defines tip-producing work as work that provides service to customers for which tipped employees receive tips. Examples of tip-producing work are taking orders, serving food and drinks,

making drinks at a bar, or performing a pedicure at a nail salon.

Directly Supporting Work

Work is generally considered directly supporting if it is performed in preparation of or to otherwise assist tip-producing customer service work. The time spent doing work that is directly supporting tip-producing work may be paid at a tip credit rate, but only if the work is not performed for a substantial amount of time. The DOL defines a substantial amount of time as either: (a) more than 20 percent of the hours in the workweek for which the employer has taken a tip credit; or (b) more than 30 continuous minutes.

The Final Rule specifies that any time spent performing directly supporting work for a continuous period in excess of 30 minutes must be paid at full minimum wage. Furthermore, the 20 percent limitation applies only to the hours for which the employer took a tip credit, it does not consider the hours paid at full minimum wage. For example, if a tipped employee works a total of 40 hours in a week, but 10 of those hours are paid at full minimum wage, then the 20 percent calculation applies only to the 30 hours for which the employer took the tip credit. The employee could devote up to 6 hours (20 percent of 30 hours) to directly supporting work during those 30 hours before it is considered a substantial amount of time.

Examples of work that directly supports tip-producing work are refilling salt and pepper shakers, setting tables, sweeping or vacuuming under tables in the dining area, slicing fruit for drinks, or cleaning pedicure baths between customers in a nail salon.

Work That Is Not Part Of a Tipped Occupation

This category acts as a catch-all which includes any work that does not fall under either tip-producing work or directly supporting work. Under the Final

Rule, no tip credit can be taken when any time is spent towards this third category; this time must be compensated at full minimum wage.

Examples of work that is not part of a tipped occupation include cleaning kitchens or bathrooms as servers or bartenders, ordering supplies for a salon as a nail technician, or cleaning non-residential parts of a hotel as a hotel housekeeper.

The biggest challenge facing employers is keeping track of the time spent towards work that directly supports tip-producing work time in order to abide by the Final Rule, which is why it is important to revisit current timekeeping policies. If you have any questions or for further assistance with compliance, contact your Akerman attorney.

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