

Blog Post

Just A Tip: DOL One Step Closer To Rescinding Tip Pooling Regulation

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Good news for restaurant employers: the regulation that says tips belong to the employee – regardless of whether the employer takes the tip credit or pays the full minimum wage — may soon be history. Last week, the Department of Labor took another step toward rescinding the 2011 regulation by submitting a proposed rule to the Office of Management and Budget.

The proposed rule is not publicly available and neither the Department of Labor nor the Office of Management and Budget have publicly commented on its contents. But earlier this year, the Department of Labor announced its plan to rescind the current restrictions on tip pooling for employers that directly pay tipped employees the full minimum wage. Although the Fair Labor Standards Act is silent on the issue, in 2011 the Department of Labor issued a regulation saying tips belong to employees, regardless of whether employers take the tip credit or pay full minimum wage.

That resulted in a number of lawsuits, which in turn resulted in different rules depending on where the employer operates. In some places around the country — including Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming — courts have said that tips do not belong to the employees and employers can keep the tips or distribute them, even among workers who would do not customarily and

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regularly receive tips. A recent federal appellate decision from the circuit that includes Alabama, Georgia, and Florida, didn't go quite as far, but did find that employees do not have the right to sue employers for withheld tips unless they can assert that the employers violated the Fair Labor Standards Act by failing to pay minimum wage or overtime. Likewise, the federal appellate court in the circuit that includes Maryland, North Carolina, South Carolina, and Virginia also found that employees do not have the right to sue employers for withheld tips absent a violation of the Fair Labor Standards Act. In other places, such as Alaska, Arizona, California, and Hawaii, courts have held that employers are bound by the regulation and employees are entitled to the tips.

Given the differing interpretations, this issue is ripe for decision by the Supreme Court and in fact, a request to the Supreme Court to hear one of these recent cases is currently pending. Interestingly, the Department of Labor has requested and received a number of extensions to file its response to the petition in that case, with its response now due on November 7. Submitting the proposed rule may be an effort to moot the issues before the Court, since it could be difficult for the Department of Labor to defend the regulation while planning to rescind it.

While we haven't seen the proposed rule, we anticipate that if the current regulation is rescinded, employers who do not use the tip credit will be free to keep tips or distribute them among all employees, including traditionally non-tipped employees like kitchen staff. Rescission of the regulation likely would only apply prospectively, and not to tips received before the regulation is rescinded. In addition, even if the regulation is rescinded, it could be reinstated by a future administration, so employers should pay careful attention to this issue going forward.

For the moment, the tip pooling regulation remains on the books. Employers should know the law of the

states in which they operate because as noted, courts disagree about how to interpret both this regulation and the tip credit provision of the Fair Labor Standards Act. If you have questions, contact your Akerman Labor and Employment lawyer.

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