

## ISSUE ALERTS

### DOL PROPOSES NEW RULES FOR TIPPED EMPLOYEES

October 22, 2019

By: Boyd A. Byers and Forrest T. Rhodes Jr.

If your business has employees who receive tips, you need to know about the Department of Labor's (DOL) proposed changes to its tip regulations.

As background, the Fair Labor Standards Act (FLSA) generally requires covered employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour. However, the FLSA allows employers to pay tipped employees as little as \$2.13 per hour and apply their tips as a credit toward satisfying the full minimum wage (the "tip credit").

In 2018, the FLSA was amended to provide that an employer "may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." The 2018 amendment also rescinded DOL regulations that prohibited employers from requiring tipped employees (such as servers and bartenders) to share their tips with traditionally non-tipped employees (such as cooks and dishwashers), even when the employer does not take a tip credit.

The proposed new regulations would further implement and clarify these 2018 statutory changes. The main provisions are as follows:

- Employers, managers, and supervisors are prohibited from keeping employee tips (including participating in tip pools) under any circumstances.
- If the employer pays all employees at least the full federal minimum wage (meaning the employer is not taking a tip credit), then the employer can establish *required* tip pools between all workers, including customarily and regularly tipped employees (such as servers and bartenders) and employees who do not traditionally receive tips (such as cooks and dishwashers).

# FOULSTON

ATTORNEYS AT LAW

- If the employer takes a tip credit for employees who are not paid the full minimum wage, then it can still establish a tip pool, so long as the pool is limited to customarily and regularly tipped employees and excludes employees who do not traditionally receive tips.
- The proposed regulations would eliminate the “80/20” rule, which prevents employers from taking tip credit for employees who spend more than 20% of their time on non-tip-generating duties. The proposed rule would allow employers to take a tip credit for any amount of time that a tipped employee performs non-tipped duties contemporaneously with, or for a reasonable time immediately before or after performing, the tipped duties.

The DOL will take comments on the proposed regulations until December 9. It will then consider these comments before issuing final new regulations.

FLSA compliance for tipped employees can be tricky. In addition to tip pool restrictions, employers who take the tip credit are required to give prescribed notice to employees and to increase the cash wage for any pay period in which the tips are not enough to satisfy minimum wage. These issues are a hotbed for DOL enforcement actions and private collective action lawsuits. If you have tipped employees, and particularly if you take tip credit or utilize tip pools, you should consult with experienced legal counsel to ensure compliance.

## FOR MORE INFORMATION

If you have questions or want more information regarding the DOL's proposed regulations for tipped employees, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. You may also contact Boyd Byers, Employment and Labor Practice Group Chair, at [bbyers@foulston.com](mailto:bbyers@foulston.com) or 316.291.9716 or Forrest T. Rhodes, Jr. at [frhodes@foulston.com](mailto:frhodes@foulston.com) or 316.291.9555. For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston provides a full range of legal services to clients in the areas of administrative & regulatory; antitrust & trade regulation; appellate law; banking & financial services; business & corporate; construction; creditors' rights & bankruptcy; e-commerce; education & public entity; elder law; emerging small business; employee benefits & ERISA; employment & labor; energy; environmental; ERISA litigation; estate planning & probate; family business enterprise; franchise & distribution; government investigations & white collar defense; governmental liability; government relations & public policy; healthcare; immigration; insurance regulatory; intellectual property; litigation & disputes; mediation/dispute resolution; mergers & acquisitions; Native American law; oil, gas & minerals; OSHA; privacy & data security; private equity & venture capital; product liability; professional malpractice; real estate; securities & corporate finance; senior housing & care; supply chain management; tax exempt organizations; taxation; trade secret & noncompete litigation; water rights; and wind & solar energy.

---

*This update has been prepared by Foulston Siefkin LLP for informational purposes only. It is not a legal opinion; it does not provide legal advice for any purpose; and it neither creates nor constitutes evidence of an attorney-client relationship.*

## PRACTICE AREAS

---

- Employment & Labor