

FACT SHEET: NOTICE OF PROPOSED RULEMAKING (NPRM) TO IMPLEMENT CHANGES TO THE TIP PROVISIONS OF THE FAIR LABOR STANDARDS ACT

The Department is proposing revisions to its regulations regarding the tip provisions of the Fair Labor Standards Act (FLSA) at section 3(m). These revisions implement changes made by the Consolidated Appropriations Act, 2018, (CAA), which created a new provision, section 3(m)(2)(B), that prohibits employers, managers, or supervisors from keeping employees' tips, including from a tip pool, regardless of whether the employer takes a tip credit under the FLSA. The CAA also suspended the portions of the Department's 2011 regulations that restricted tip pooling by employers that do not claim a tip credit until further action by the Wage and Hour Administrator. The proposed regulatory changes would allow employers that pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit to have a mandatory tip pool that includes non-tipped workers, such as cooks or dishwashers.

The CAA did not impact longstanding regulations that apply to employers that take a tip credit under the FLSA. For example, employers that claim a tip credit must ensure that a mandatory tip pool only includes workers who customarily and regularly receive tips. This means cooks or dishwashers cannot be part of such a tip pool.

Additionally, the proposed regulations would reflect the Department's recent guidance that an employer may take a tip credit for any amount of time an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The proposed regulation also addresses which non-tipped duties are related to a tip-producing occupation.

Key Provisions of the NPRM

The NPRM proposes to:

- Explicitly prohibit employers from keeping employees' tips and prohibit managers and supervisors from keeping any portion of these tips, including from a tip pool.
- Clarify that an employer may exert control over an employee's tips only in the following ways:
 - by distributing tips to the employees who received them (e.g., cashing out credit card tips at the end of the shift);
 - by instituting mandatory tip pools in compliance with the FLSA regulations (e.g., tip pools that do not include managers/supervisors);
 - by facilitating a tip pool by distributing the tips to the employees in the pool.
- Use the duties test under the executive employee exemption to determine whether an employee is a manager or supervisor who may not keep any portion of an employee's tips. An employee who owns a 20-percent equity interest in the enterprise and who is actively engaged in its management would also be considered a manager or supervisor.
- Remove the regulatory language that imposes restrictions on an employer's use of employees' tips when the employer does not take a tip credit. This would allow employers that do not take an FLSA tip credit to include a broader group of workers, such as cooks or dishwashers, in a mandatory tip pool.

- Provide that any employer that collects cash tips to facilitate a mandatory tip pool must fully redistribute the tips no less often than when it pays wages, to align the policy for cash tips with the current policy for tips paid via credit card.
- Incorporate in the regulations, as provided under the CAA, new civil money penalties (currently not to exceed \$1,100) that may be imposed when an employer unlawfully keeps tips in violation of 3(m)(2)(B), stating that the Department will only assess such penalties when the violations are repeated or willful.
- Amend the recordkeeping regulation to apply recordkeeping requirements to employers that do not take a tip credit to require them to keep records of those employees that receive tips and the tip amounts they receive to ensure uniformity and consistent and effective administration of section 3(m)(2)(B).
- Amend the regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also provide that, in addition to the examples of related duties listed in the dual jobs regulation, a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET).
- Amend the regulations addressing payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) consistent with certain proposed corresponding changes to the FLSA tip regulations and to otherwise align those regulations with the authority provided in the Executive Order.
- Withdraw the Department's NPRM, published on December 5, 2017, that proposed changes to the Department's tip credit regulations as that NPRM has been superseded by the CAA.

Background

The FLSA generally requires covered employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour. Under section 3(m)(2)(A) of the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying a lower direct cash wage (no less than \$2.13 per hour) and counting a limited amount of its employees' tips (no more than \$5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage paid and the federal minimum wage (known as a "tip credit") if it follows certain requirements.

Since 1974, section 3(m) has provided that an employer that takes a tip credit may include only employees who customarily and regularly receive tips (*e.g.*, servers, bartenders, and bussers) in a mandatory tip pool. The Department's existing regulations, promulgated in 2011, apply these restrictions on mandatory tip pools to all employers, regardless of whether the employer takes a tip credit under the FLSA. This means cooks and dishwashers may not be part of such tip pools.

On March 23, 2018, Congress amended section 3(m) of the FLSA in the CAA. Among other things, the CAA suspended the operation of the Department's regulatory restrictions on the tip-pooling practices of employers that do not take a tip credit. The CAA also added section 3(m)(2)(B), which prohibits employers from keeping employee tips regardless of whether the employer takes a tip credit. The NPRM explains the impact of the CAA amendments on the Department's existing tip pooling regulations and proposes to amend its regulations to reflect the law's revisions to the tip provisions of the FLSA.

The proposed rule would allow employers that do not take a tip credit to distribute customer tips to larger tip pools that include non-tipped workers, such as cooks and dishwashers. The proposed rule would additionally provide employers greater flexibility in determining pay practices for tipped and non-tipped workers. It also may allow for a reduction in wage disparities among employees who contribute to the customers' experience.

The proposed rule would also allow an employer to take a tip credit for any amount of time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. This proposed regulation would replace past sub-regulatory guidance that stated an employer could not take a tip credit for the time an employee spent performing related non-tipped duties if that time exceeded 20 percent of the employee's workweek.

How to Comment

The Department encourages interested parties to submit comments on the NPRM. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at the Wage and Hour Division's [Proposed Rule website](#).

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