



## Legal Alert: Department of Labor Clarifies "Tip Credit" Regulations

4/13/2011

On April 5, 2011 the Department of Labor issued final regulations impacting an employer's use of a "tip credit" for tipped employees.

Generally, all employers covered by the Fair Labor Standards Act (FLSA) are required to pay non-exempt employees at least the federal minimum wage, currently \$7.25 per hour. Under the FLSA's tip-credit provisions, an employer is allowed to pay tipped employees a cash wage of \$2.13 and offset the remaining amount of the minimum wage by taking a "tip credit." In other words, an employer taking the maximum tip credit must pay a tipped employee a cash wage of \$2.13, but it can use up to \$5.12 of the employee's tips as a credit toward the rest of the minimum wage payment. However, an employer may only take the tip credit if (1) the employee has been informed by the employer of the provisions of the FLSA's tip credit subsection, and (2) the employee retains all tips received (except amounts paid into a valid "tip pool" to be shared among employees that regularly receive tips).

The final regulations clarify the Department of Labor's position on many issues surrounding an employer's use of the tip credit. Some of the changes include:

- **New Notice Requirements.** If an employer elects to take a tip credit, the final regulations require that an employer inform employees:

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Of the amount of the cash wage to be paid to the employee;

- Of the additional amount by which the wages of the employee are increased by the tip credit (the value of which may not exceed actual tips received);

- That all tips must be retained by the employee (except for a valid tip pooling arrangement); and

- That the tip credit shall not apply to any employee who has not been informed of the requirements stated above.

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**No Maximum Percentage for Tip-Pooling Agreements.** The Department of Labor previously took the position that tip-pooling agreements cannot require employees to contribute more than 15% of their tips. The final

regulations acknowledge that the FLSA does not impose a maximum tip pool contribution percentage.

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***Employer May Not Retain Any Employee Tips.*** Even for employers who do not take the tip credit, the Department of Labor has expressly taken the position in the preamble to the final regulation that tips are the property of employees. Therefore, by deleting some of the language previously used in the regulations, the Department of Labor has clarified its position that an employer may not retain employee tips *regardless* of (1) whether they take a tip credit, or (2) whether they pay an employee cash wages in excess of the minimum wage.

Employers with tipped employees should be especially mindful of the final regulation's new "notice" requirements. Even though the Department of Labor did not mandate that employers provide notice to employees in writing, employers who apply a tip credit should strongly consider using a written acknowledgement that adheres to the final regulation's requirements.

If you have any questions about the issues addressed in this Alert, please contact the authors, David Prather, [dprather@fordharrison.com](mailto:dprather@fordharrison.com), a partner in our Memphis office, or Dylan King, [dking@fordharrison.com](mailto:dking@fordharrison.com), an associate in our Memphis office, or the Ford & Harrison attorney with whom you usually work.