

# Wage & Hour Insights

Guidance & Solutions for Employers



## Restaurant Association Sues to Block Tip Credit Rules

By [Bill Pokorny](#) on June 17, 2011



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29 CFR Part 4, 516, 531, et al.  
Updating Regulations Issued Under the Fair Labor Standards Act; Final Rule

On April 5, 2011, the U.S. Department of Labor published new final regulations that among other things require employers to give new detailed notices to tipped employees in order to credit tips toward the minimum wage. The new regulations took effect on June 5, 2011. Yesterday, June 16, 2011, the [National Restaurant Association](#), the [Council of State Restaurant Associations](#) and the [National Federation of Independent Businesses](#) filed a lawsuit against the DOL seeking to block enforcement of the new rules. [National Restaurant Association v Solis \(PDF\)](#).

### The Tip Credit and the New Rules

Under the Fair Labor Standards Act (FLSA), employers must pay all employees a minimum hourly wage, currently \$7.25 per hour.

However, for tipped employees (*i.e.*, those who customarily and regularly earn more than \$30 per month in tips), the FLSA allows employers to pay a lower cash wage and take a "tip credit" to bring the employee's total compensation up to the minimum wage. Currently, federal law allows employers to take a tip credit of up to \$5.12 per hour. (Many states provide for a higher minimum wage. In Illinois, for example, the minimum is \$8.25 per hour. The tip credit in Illinois is limited to \$3.30 per hour, and tipped employees must receive a cash wage of \$4.95 per hour.)

The FLSA has long required employers to inform employees of the tip credit. However, the new final regulations published on April 5 provide that an employer may not take the tip credit unless it first provides all of the following information to each tipped employee:

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- The amount of the cash wage that is to be paid to the tipped employee by the employer;
- The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;
- That all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- That the tip credit shall not apply to any employee who has not been informed of these requirements.

Although the rules do not specify that this information must be provided in writing, employers who fail to do so are taking a serious risk, as it will be their burden to provide that the required notice was provided to each and every tipped employee.

## The Associations' Lawsuit

In their [complaint](#) challenging the new regulations, the plaintiffs allege that the new regulations violate the Administrative Procedure Act (APA), the federal law which governs how administrative agencies adopt new rules, because the DOL failed to provide adequate notice and opportunity for public comment, and because the rules contradict the FLSA as it has been construed by the courts and, previously, by the DOL itself. Additionally, the associations claim that the DOL failed to comply with Executive orders 12866 and 13563, which require federal agencies to assess costs and benefits of regulations, including the costs of compliance, and failed to conduct a regulatory flexibility analysis required by the APA. The complaint asks the court to declare the regulations invalid and to enjoin the DOL from enforcing, applying or implementing the new rules.

## What does this mean for employers?

This lawsuit is at its very earliest stages, and its outcome is anything but clear. In the mean time, unless the DOL announces that it will delay implementation of the new rules, employers with tipped employees are strongly advised to provide the notices required by the new regulations, and to do so in writing. If you have tipped employees and have not yet provided this notice, you should do so without delay - or risk being found liable for minimum wage violations.

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