



COMPLIANCE BULLETIN

HIGHLIGHTS

- Employers may not retain employees' tips, regardless of whether the tip credit is used.
- Tip pooling is allowed when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit.

FLSA Amendment Prohibits Employers from Retaining Tips, Allows Tip Pooling

A [2018 spending bill](#) enacted on March 23, 2018, amends the Fair Labor Standards Act (FLSA) to:

- ✓ **Prohibit employers from retaining employees' tips, regardless of whether the tip credit is used;** and
- ✓ **Eliminate prior regulations that barred tip pooling** when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit.

In addition, employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools. **However, employers must continue to comply with any state or local requirements that exceed federal standards.**

ADDITIONAL GUIDANCE

The Department of Labor (DOL) Wage and Hour Division (WHD) enforces FLSA requirements. On April 6, 2018, the WHD issued [Field Assistance Bulletin No. 2018-3](#) to provide guidance on these new tip credit rules. The WHD expects to issue regulations in the near future to fully address the impact of the 2018 amendments.

IMPORTANT DATES

March 23, 2018

A 2018 spending bill was enacted, amending the FLSA tip credit rules.

April 6, 2018

The WHD issued a Field Assistance Bulletin to provide guidance on these new tip credit rules.

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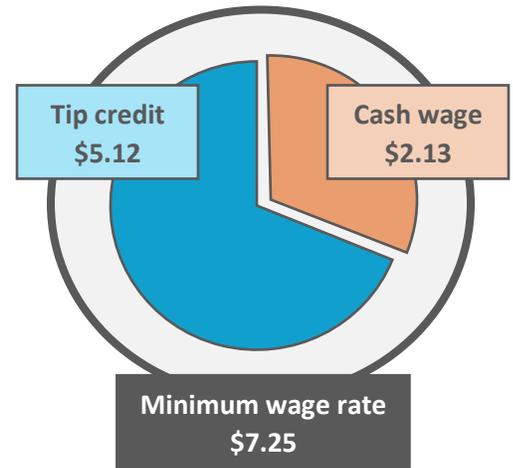
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Existing Tip Regulations under the FLSA

Under existing federal regulations, employers must pay their employees a wage rate that is at least equal to the current federal minimum wage rate (\$7.25 per hour).

However, the FLSA allows employers to pay tipped employees a minimum wage rate that is lower than the federal minimum wage rate. “Tipped employees” are individuals who customarily and regularly receive more than \$30 per month in tips. Federal law allows employers to reduce the federal minimum wage rate for tipped employees by an amount that is known as a “tip credit.” The current tip credit is \$5.12 per hour. Applying the tip credit results in a minimum wage rate for tipped employees of \$2.13 per hour (also known as the “cash wage”).



A lower minimum wage rate for tipped employees is possible because the FLSA assumes that the employee’s tips will be sufficient to offset the tip credit. Employers are required to ensure that each of their tipped employees receives a wage rate (cash wage plus tips) that is at least equal to the federal minimum wage rate.

Tip Retention

An employee’s tips are the employee’s property. With the exception of valid tip-pooling arrangements, the law prohibits employers from using or retaining any portion of an employee’s tips. As a result, tipped employees generally retain all tips they receive, regardless of whether the employer takes advantage of the tip credit.

However, on July 20, 2017, the DOL issued a non-enforcement policy, where the WHD would not enforce regulations prohibiting employers from retaining employee tips if the employer pays tipped employees at least the full FLSA minimum wage and does not take a tip credit. This non-enforcement policy does not apply to employers that pay a direct cash wage that is lower than the federal minimum wage rate.

Tip-pooling Arrangements

Historically, tip-pooling arrangements were valid only if the pool of participants:

- ✓ Was limited to employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers and service bartenders; and
- ✓ **Excluded employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs and janitors.**

When organizing tip-pooling arrangements, employers should remember that compulsory service charges (such as 15 percent of the bill) are not considered tips.

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FLSA Amendments

The 2018 spending bill amends the FLSA to:

- ✓ Prohibit employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit; and
- ✓ Eliminate prior regulations that barred tip pooling when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit.

In addition, employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools. However, this amendment prohibits managers and supervisors from participating in tip pools, because it equates this type of participation with the employer’s keeping the tips. As an enforcement policy, the WHD will use the duties test to determine whether an employee is a manager or supervisor for this purpose.

Enforcement

The amendment also provides enforcement authority to, among other things:

- ✓ Recover all tips unlawfully kept by the employer, in addition to an equal amount in liquidated damages; and
- ✓ Impose civil money penalties (CMPs) of up to \$1,100 when employers unlawfully keep employee tips. In assessing CMPs, the WHD will follow its normal procedures, including by determining whether the violation is repeated or willful.

In addition, as a result of the 2018 amendments, the **WHD’s July 20, 2017, non-enforcement policy concerning retention of tips by tipped employees paid the full FLSA minimum wage will not apply to new investigations beginning on or after March 23, 2018**. When an investigation covers periods before and after March 23, 2018, and the employee was paid at least the full FLSA minimum wage, tip retention violations may only be cited if they occurred after March 23, 2018.

State and Local Considerations

Regardless of the 2018 amendments, employers must continue to comply with any state or local requirements that exceed federal standards.