TIPPING POINTS: SHOULD THE LAW ON TIPPING STAY OR GO?

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Dane Steffenson, Department of Labor (Atlanta, GA)
Hope Pordy, Spivak Lipton LLP (New York, NY)
Loren B. Donnell, Burr & Smith, LLP (St. Petersburg, FL)
Todd S. Aidman, Ford & Harrison (Tampa, FL)

Whether – and how – employers should be allowed to pay employees who receive tips less than the minimum wage remains a hotly debated issue. Federal law permits employers to take a "tip credit" and pay tipped employees as little as $2.13 per hour if they satisfy certain prerequisites defined under the Fair Labor Standards Act ("FLSA"), its implementing regulations and interpretive guidance issued by the U.S. Department of Labor ("DOL"). However, seven states do not permit any tip credit and thus, require employers to pay tipped employees the full minimum wage *in addition to* tips. Another twenty-five states permit some tip credit, but not as much as under federal law, requiring employers to pay tipped employees a wage between $2.13 and minimum wage. *See* DOL Website: https://www.dol.gov/whd/state/tipped.htm (detailing state by state requirements).

Waiters and waitresses are often first thought of when discussing tipped employees but the vast number of positions in the United States that implicate tipping include not only food servers but maître des, bartenders, casino dealers, valets, housekeeping staff, concierge, transportation drivers, exotic dancers, bellman, sky caps, bathroom attendant, and doorman. Therefore, a wide range of industries have a vested interest in the future of the tip credit and the evolving law in this area will have a significant impact on the way many different kinds of workers will earn their wages and how businesses will adapt their businesses to stay in compliance.

THE TIP CREDIT UNDER THE FLSA

In general, the FLSA mandates that covered employees receive a minimum wage of at least $7.25 per hour. 29 U.S.C. § 206(a)(1)(c). However, the FLSA creates an exception for "tipped employees" according to which an employer may pay an employee a "tip credit" wage of $2.13 per hour. 29 U.S.C. § 203(m). For accessing whether tipped employees are paid the proper federal minimum wage, the starting point is 29 U.S.C. § 203(m).

Section 203(m) states:

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to –
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> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such employee on the date of the enactment of this paragraph; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the amount of tips actually received by an employee. The preceding two sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Effective May 5, 2011, the U.S. Department of Labor promulgated new regulations updating its existing regulations for tipped employees, 29 C.F.R. § 531 *et seq.* *See* 76 Fed. Reg. 18832, 18856 (April 5, 2011). Distilling the requirements of Section 203(m), the DOL explained for an employer to be eligible for a tip credit (up to maximum credit of $5.12 per hour under the FLSA) the following requirements must be met:

(1) the employer must pay the tipped employee a direct cash wage of at least $2.13 per hour for all hours worked in a work week;
(2) the employer must not seek to take a credit in excess of the amount of tips actually received by the employee in a work week;
(3) the employer must inform the tipped employee of the provisions of Section 3(m); and
(4) the tipped employee must get to keep all tips he or she receives, unless he or she is part of a valid tip pool comprised of employees who customarily and regularly receive tips.

29 C.F.R. § 531.50-.59; 76 Fed. Reg. 18832, 18856 (April 5, 2011).

While requirement (2) "the employer must not seek to take a credit in excess of the amount of tips actually received by the employee in a work week" is typically compiled with, requirements (1), (3) and (4) have been the subject of substantial litigation.

1. <u>Requirement 1: Direct Cash Wage of $2.13</u>

Deductions that reduce an employee's wages below the applicable minimum wage are illegal deductions under the FLSA, 29 C.F.R. § 531.35. Employers who claim the tip credit typically pay employees the minimum tipped amount required by law. Therefore, deductions for uniforms, walk-outs, or register shortages will often drop the employer payment of direct wages below the minimum direct cash wage threshold.

Paycheck deductions that reduce tipped employees' hourly rate below the minimum tipped rate violate the FLSA. Employers are required to pay their employees a minimum wage "finally and unconditionally, or 'free and clear'." <u>Id.</u> If an employee "kick[s] back" or returns wages "directly or indirectly to the employer or another person for the employer's benefit," <u>id.</u>, and that brings the employees' wages below minimum wage, the "kick back" is impermissible.

However, there are a few circumstances in which employers may seek a credit that allows them to pay an hourly rate that is below the applicable minimum wage under Section 203(m). An employer may seek a credit for the "reasonable cost" of providing "board, lodging, and other facilities" to employees toward their satisfaction of the minimum wage. However, the "reasonable cost" may not be "more than the actual cost to the employer" and shall not include "a profit to the employer or to any affiliated person" in providing board, lodging and other facilities. 29 C.F.R. § 531.3. Further, employers seeking a credit towards satisfaction of the minimum wage for "reasonable costs" for "board, lodging or other facilities" are required to keep records of costs incurred and the deductions taken from wages on a weekly basis in order to claim the credit. 29 C.F.R. §§ 516.27-28. "[A]n employer's unsubstantiated estimate of his cost, where the employer has failed to comply with the recordkeeping provisions of the FLSA . . . does not satisfy the employer's burden of proving reasonable cost." Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 473-474 (11th Cir. 1982); see Herman v. Collis Foods, Inc., 176 F.3d 912, 920 (6th Cir. 1999) ("Although employers are not required to account for each and every food item offered to or accepted by their employees, the burden of proving that a deduction from wages represents the reasonable cost of the meals furnished is on the employer.").

2. Requirement 3: Notice of Provisions of Section 203(m):

Because Section 203(m) does not elaborate on the type and level of notice required other than that the employee must be "informed" of the provisions of 203(m), the DOL's 2011 regulations addressed this by explaining an employer is not eligible to take the tip credit unless it has informed its tipped employees *in advance* of the employer's use of the tip credit of the provisions of section 3(m) of the Act, *i.e.*:

> 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 in this section.
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> 29 C.F.R. § 531.59.

Courts have relied on the DOL's clarification set forth above for guidance. See Howard v. Second Chance Jai Alai LLC, 5:15-cv-200, 2016 WL 3349022, *4 (M.D. Fla. June 16, 2016) (following the DOL's 2011 clarification of the notice requirements and the employers' duty to meet those requirements); Driver v. AppleIllinois, Inc., 917 F. Supp. 2d 793, 803 (N.D. Ill. 2013) (holding the tip-sharing agreement that the employer had tipped employees sign was insufficient to meet the notice requirements of 29 U.S.C. § 203(m) in part because "[i]t does not inform the employee of his wage rate or the fact his wage rate will actually be lower than the minimum wage; it does not state how much of the employee's tips will be used to make up the minimum wage. . ."); Perrin v. Papa John's Intern., Inc., 114 F. Supp. 3d 707, 729 (E.D. Mo. July 8, 2015) (explaining the importance of the notice requirement, including, that "the tip credit notice [required under the regulation] informs employees of their regular rate of pay and of the higher

rate to which they are entitled for overtime."); Dorsey v. TGT Consulting, LLC, 888 F. Supp. 2d 670, 681 (D. Md. 2012) (recognizing that DOL's regulation "includes a more detailed notice requirement than courts had previously mandated"); Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 287-88 (S.D.N.Y. 2011) ("providing employees with a copy of § 203(m) and informing them that their tips will be used as a credit against the minimum wage as permitted by law" is sufficient notice). See also, Perez v. Sophia's Kalamazoo, LLC, No. 1:14-CV-772, 2015 WL 7272234, at *7 (W.D. Mich. Nov. 17, 2015) (citing 29 C.F.R. § 516.28(a)(3) which provides "[t]he amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.")**.**

3. Requirement 4: Tip Pooling with Customarily and Regularly Tipped Employees and Retaining Tips

a. Mandatory Tip Pool

Under the FLSA, employees may only share in tips if they are "employees who customarily and regularly receive tips." 29 U.S.C. § 203(m). "Customarily and regularly," as referenced in 29 U.S.C. § 203(t), "signifies a frequency which must be greater than occasional, but which may be less than constant." 29 C.F.R. § 531.57. Employees who only receive tips through a tip pool, and do not receive tips directly from the customer, may still be "tipped employees" for purposes of Sections 203(m) and (t). *See* 29 CFR. § 531.57; FOH §30d04(a) ("It is not required that all employees who share in tips must themselves receive tips from customers").

Courts considering which employees are customarily and regularly tipped typically "focus[] on the amount of customer interaction." Ash v. Sambodromo, LLC, 676 F. Supp. 2d 1360, 1370 (S.D. Fla. 2009); see Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 240 (2d Cir. 2011) (holding a tip pool is invalid if "it requires tipped employees to share tips with (1) employees who do not provide direct customer service or (2) managers"); Roussell v. Brinker Int'l, Inc., 441 F. App'x. 222, 231 (5th Cir. 2011) (acknowledging direct customer interaction" is highly relevant to tip eligibility); Myers v. The Copper Cellar Corp., 192 F.3d 546, 550–51 (6th Cir. 1999) (finding inclusion of salad makers invalidates a tip pool because these employees did not receive tips directly from customers and did not interact with customers).

In Ford v. Lehigh Valley Rest. Grp., Inc., No. 3:14CV227, 2014 WL 3385128, at *4 (M.D. Pa. July 9, 2014), the court analyzed Section 203(m)'s language to require "more than *de minimis* direct customer interaction." The court explained:

> In section 203(m)'s plain meaning beckons the image of customer service employees who receive tips directly from customers in a recurring fashion and as a matter of occupational custom. Furthermore, the addition of the word "pooling," which means "to contribute" or "make a common interest," signifies that all customer service employees with direct customer interaction would "contribute" the tips they personally received into the "common interest" or tip pool. As such, section 203(m)'s plain meaning requires that employees who "customarily and regularly receive tips" have more than *de minimis* direct customer interaction.

In Montano v. Montrose Restaurant Assocs., Inc., 800 F.3d 186, 193 (5th Cir. 2015), the Fifth Circuit summarized "[t]he central difference between employees who are traditionally tipped and those who are not is that the former work primarily in the front of the house where they are seen by and interact with customers, while the latter work primarily or exclusively in the back of the house." See also, Rubio v. Fuji Sushi & Teppani, Inc., 2013 WL 230216, at *3 (M.D. Fla. Jan. 22, 2013) (granting plaintiffs summary judgment finding "[i]t was not the kitchen chefs' job to engage with customers, but to prepare food in the kitchen," and "whatever rare and unusual interaction the kitchen chefs had with customers was incidental" and "[did] not compare to those of servers … who [] interact[ed] with customers on a much more frequent basis"); Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714 (W.D. Tex. 2010) (granting plaintiff summary judgment after analyzing dishwashers' and preparation cooks' primary job duties and finding they were impermissibly included in the tip pool where their infrequent duties bussing tables, delivering food to tables, and performing as barbacks were ancillary duties, and dishwashers and cooks are non-tipped occupations); but see Turner v. Millennium Park Joint Venture, LLC, 767 F. Supp. 2d 951, 954–56 (N.D. Ill. 2011) (finding food serve function and contribution relevant to the inquiry).

Positions that are traditionally not eligible to participate in a valid tip pool include cooks, janitors, and dishwashers. Positions such as expediters and hostesses require a case-by-case approach to determine the level of customer interaction required. In many situations, managers and supervisors will not be eligible to participate in a valid tip pool. There is not a bright line rule, however, against supervisors participating in a valid tip pool. Rather, for a supervisor to be ineligible for tip pool participation, his/her supervisory responsibilities would have to be significant enough for he/she to be considered an "employer" under the FLSA. 29 U.S.C. § 203(d).

b. "Voluntary" Tip Sharing

The "sharing" of tips may be viewed as employees' voluntary choice to share their tips as opposed to having all tips placed in a pool and redistributed in a manner the employer established. Tip sharing may be a system that the employees decided on themselves or the practice of "tipping out" where each tipped employee decides to share tips with others and decides how much even if the employer has provided a "suggested" amount. According to the DOL's Field Operations Handbook tipped employees may "decid[e], free from any coercion whatever and outside of any formalized arrangement or as a condition of employment, what to do with their tips, including sharing them with whichever co-workers they please." FOH, § 30d04(c). Thus, for a tip-sharing arrangement to be lawful under the FLSA four requirements must be met. First, the tipped employees themselves must "decid[e]" to share the tips. Second, that decision must be "free from any coercion whatever." Third, the tip-sharing must be "outside of any formalized arrangement." Fourth, the tip-sharing must not be "as a condition of employment."

In Roussell v. Brinker Int'l, Inc., No. CIV.A. H-05-3733, 2008 WL 2714079, at *18 (S.D. Tex. July 9, 2008), *aff'd by*, 441 F. App'x 222, 230 (5th Cir. 2011), the district court found the "standard set forth by the Department of Labor is both persuasive and workable. Employees may share tips with other workers who are not customarily and regularly tipped if they do so 'free

from any coercion whatever and outside any formalized arrangement or as a condition of employment.'" This position is supported by the language of the statute and the legislative history. However, recently in Kubiak v. S.W. Cowboy, Inc., No. 3:12-CV-1306-J-34JRK, 2016 WL 659305, at *9 (M.D. Fla. Feb. 18, 2016), the court found the tip sharing agreement with kitchen staff potentially "voluntary" even though there appeared to be a formalized agreement for sharing tips with the kitchen. The Kubiak court nevertheless confirmed that employers can not share in tips, even if voluntarily, recognizing that "[w]ithout question, even if the Kitchen Tip Pool was voluntary, if Defendants themselves received any portion of the proceeds, the Kitchen Tip Pool would violate the retention requirement of the FLSA. This is so because the FLSA prohibits any agreement whereby the employees' tips become property of the employer." See DOL Field Operations Handbook § 30d01(a); Fact Sheet No. 15." Id. at *13.

OTHER COMMON TIP CREDIT RELATED ISSUES

1. Overtime Payment for Tipped Employees:

Employers must be careful to properly calculate the overtime rates for tipped employees. For tipped employees, the minimum overtime cash wage is the employee's regular rate of pay before subtracting any tip credit, multiplied by one and one-half, minus the tip credit. *See* 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.60, 778.5. For example, to calculate the overtime rate for an employee under the federal minimum wage, an employer would multiple $7.25 by 1.5 and the subtract the tip credit of $5.12 to obtain to the overtime rate of $5.76 per hour.

It is violation of the FLSA for an employer to subtract the tip credit first and then multiply the reduced rate by one and one-half. *See* 29 C.F.R. § 531.60. In addition, if an employer is found to have improperly taken a tip credit, then the full overtime wage without subtraction of the tip credit is due to the employee. Inclan v. New York Hosp. Grp., Inc., 95 F. Supp. 3d 490, 500 (S.D.N.Y. 2015) (finding that the restaurant failed to provide adequate notice of taking the tip credit and stating "[a]ccordingly, the Restaurant is liable to the extent that it failed to pay the minimum overtime wage, without a tip credit allowance, to plaintiffs for their hours worked in excess of forty per week").

2. Service Charges:

A mandatory service charge assessed by an employer (across the board or for tables of a certain size), even if it is paid to the employee, is not a "tip," and the tip credit may not be used. 29 C.F.R. § 531.55. In July of 2013, the DOL issued a fact sheet on tip credits and clearly stated that mandatory gratuities are considered to be "wages," not tips paid by customers. DOL website, http://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

According to the DOL, even though these mandatory gratuities would need to be considered wages, employers may still use the charges to satisfy prerequisites that employers must meet to claim a "tip credit" against the minimum wage. For example, in the case of tipped employees for whom a tip credit is taken, an employer could use money derived from mandatory service charges to pay the $2.13 cash wage required by the FLSA, or could use service charges to satisfy the entire minimum wage of $7.25 per hour, thus, arguably, eliminating the need to apply a tip credit at all. Additionally, because mandatory service charges are not tips, they are

not subject to the restrictions against tip sharing and tip pooling that apply to tips. Note, however, that state wage-and-hour laws may have different or more restrictive requirements regarding the use of mandatory service charges and the compensation of tipped employees, thus employers should ensure they are in compliance with any applicable state laws. The IRS has also issued a Revenue Ruling stating that it will no longer consider "mandatory gratuities" or services charges to be "tips." Thus, these amounts are not excludable from FICA withholding. *See* Rev. Rul. 2012-18.

In Hart v. Rick's Cabaret Int'l, Inc., . 967 F. Supp. 2d 901, 928 (S.D.N.Y. 2013), the district court provided a detailed analysis of whether the adult entertainers' performance fees were tips or service charges. The court noted the difference between a tip and a service charge explaining "a 'tip' is 'a sum presented by a customer as a gift or gratuity in recognition of some service performed for him'" but a 'service charge' is a 'compulsory charge for service ... imposed on a customer by an employer's establishment.'" *Id.* (quoting 29 C.F.R. § 531.52; 29 C.F.R. § 531.55(a)). In reaching its decision that performance fees were tips, not service charges, the court relied heavily upon the fact that the fees were not recorded in the employer's gross receipts, explaining "there are substantial policy reasons for such a bright-line rule" that for a "fee to constitute a service charge and therefore be properly applied against an establishment's statutory minimum-wage duty, it must have been included in the establishment's gross receipts." *Id.* at 929. The court also noted that the "regulations require that service charges be distributed *by the employer* in order to count toward wages," which they were not. *Id.* (citing 29 C.F.R. § 531.55(b)(emphasis in original)). The court also acknowledged that some courts had not used such a bright-line test, but rather relied upon a variety of factors. However, the court concluded that even given these factors, the performance fees were tips, not service fees, because they were not included in the gross receipts, were unrecorded by the employer, could vary in size, and included direct cash payment by the customer. *Id.* at 933.

Recent court opinions have followed this analysis and reach the same conclusions. See McFeeley v. Jackson St. Entm't, *LLC*, 825 F.3d 235, 246 (4th Cir. 2016) (defendants were not entitled to a service-charge "offset" because the performance fees were tips as they were not included in the gross receipts and were often paid by customers); Henderson v. 1400 Northside Drive, Inc., 110 F. Supp. 3d 1318, 1323 (N.D. Ga. 2015) (performance fees were tips as they were not included in the gross receipts and were often paid by customers); Degidio v. Crazy Horse Saloon & Rest., Inc., No. 4:13-CV-02136-BHH, 2015 WL 5834280, at *18 (D.S.C. Sept. 30, 2015)("defendant is not entitled to offset its obligation to pay minimum wage with the money customers paid to the entertainers for individual services"); Reich v. ABC/York-Estes Corp., 157 F.R.D. 668, 681 (N.D. Ill. 1994), *rev'd in part,* 64 F.3d 316 (7th Cir. 1995) ("table dance charges are tips, not service charges, and that Defendants may not apply these charges against their minimum wage obligations").

3. Tipped Wages for Non-Tip Producing Duties:

Whether the tip credit may be applied to hours employees work performing non-tip producing duties is a question fully addressed and evaluated in Fast v. Applebee's Int'l, Inc., No. 06-4146-CV-C-NKL, 2010 WL 816639, at *2 (W.D. Mo. Mar. 4, 2010), *aff'd by* 638 F.3d 872 (8th Cir. 2011). As Fast explains:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least [$30] a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning, and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips. 29 C.F.R § 531.56(e).
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> Thus, according to the regulation, just because an employee is not doing work that directly produces tips does not mean that a tip credit cannot be taken. So long as a tipped employee is doing related work *in his or her tipped occupation*, a tip credit is permitted.
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> The Department of Labor, however, has also developed guidelines for determining how much non-tipped work can be assigned to the employee before the employee effectively has moved into a non-tipped occupation and becomes a dual employee. Section 30d00(e) of the Department of Labor's Field Operations Handbook states:
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> (e) Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example, a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Recently, and overwhelmingly, courts have followed the analysis in Fast and have held the DOL's 20% rule is entitled to deference. See e.g. Knox v. Jones Grp., No. 115CV01738SEBTAB, 2016 WL 4371630, at *6–7 (S.D. Ind. Aug. 15, 2016) (concluding, "consistent with the Eighth Circuit's holding in Fast v. Applebees Int'l, Inc., that the DOL's interpretation of § 531.56(e) is entitled to deference"); Langlands v. JK & T Wings, Inc., No. 15-13551, 2016 WL 4073548, at *3 (E.D. Mich. Aug. 1, 2016) (same); McLamb v. High 5 Hosp., No. 16-00039 GMS, 2016 WL 3751946, at *4 (D. Del. July 12, 2016) (same); see also Flood v. Carlson Restaurants Inc., 94 F. Supp. 3d 572, 582–84 (S.D.N.Y. 2015) (collecting cases and recognizing district court across the country have "endorsed the twenty percent rule" and its application); Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729, 734 (D.S.C. 2015) (evaluating the application of 20% rule and finding "it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their

wages by 71%"); Crate v. Q's Rest. Grp. LLC, No. 813CV2549T24EAJ, 2014 WL 10556347, at *3–4 (M.D. Fla. May 2, 2014) (finding the "the [DOL] Handbook's twenty percent limitation persuasive and practical").

In light of the developing case law on this issue, employers may be well-served by tracking employees' non-tipped work, e.g.: (1) do not use tipped employees to perform back of house functions; (2) have tipped employees sign in under separate payroll codes when performing non-tip-producing work; (3) have employees perform pre-and post- shift work at full minimum wage; and (4) divide non-tip-producing duties among all tipped employees. Indeed, the FLSA imposes specific requirements on employers to maintain records of tipped employees including but not limited to the hours worked each workday in any occupation in which the employee does not receive tips, and the total daily or weekly straight-time payment made by the employer for such hours. 29 C.F.R. § 516.28(a)(4)-(5).

MUST EMPLOYEES BE ALLOWED TO RETAIN THEIR TIPS WHEN NO TIP CREDIT IS TAKEN?

Significant litigation has arisen around whether the DOL has any authority to regulate what happens to tips where the employers pay all employees the full minimum wage. The issue is best framed by the battle arising in the Ninth Circuit.

In Cumbie v. Woody Woo, 596 F.3d 577 (9th Cir. 2010), the plaintiff was a server who was paid more than the Oregon state minimum wage, but a portion of her tips were distributed to kitchen staff, including cooks and dishwashers. The Ninth Circuit held that "[t]he FLSA does not restrict tip pooling when no tip credit is taken." Id. at 580-583. Guided by Williams v. Jacksonville Terminal Co., 315 U.S. 386, 397 (1942), in which the Supreme Court held "where tipping is customary, the tips, *in the absence of an explicit contrary understanding,* belong to the recipient . . . [w]here, however, [such] an arrangement is made ..., *in the absence of statutory interference, no reason is perceived for its invalidity*," the court held that because there was an agreement to redistribute the plaintiff's tips to kitchen employees, and because the FLSA does not prohibit such a practice when no tip credit was taken, the employer's practice did not violate the FLSA. Id. at (Emphasis in Cumbie).

To address the purported statutory silence in the FLSA exposed in Cumbie, in 2011, the DOL revised 29 C.F.R. § 531.52 "to make it clear that tips are the property of the employee." 76 FR 18841–42. The DOL clarified:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

The DOL explained:

> Under the 1974 amendments to section 3(m), an employer's ability to utilize an employee's tips is limited to taking a credit against the employee's tips as permitted by section 3(m). Section 3(m) provides the only method by which an employer may use tips

received by an employee. An employer's only options under section 3(m) are to take a credit against the employee's tips up to the statutory differential, or to pay the entire minimum wage directly. See Wage and Hour Opinion Letter WH-536, 1989 WL 610348 (October 26, 1989) (defining when an employer does not claim a tip credit as when the employer does not retain any tips and pays the employee the minimum wage).

76 FR 18832-01.

However, the revised rule did not pass without challenge. The Oregon Restaurant and Lodging Association filed suit against the DOL and various casino dealers sued Wynn Las Vegas, LLC challenging the revised rule. Or Rest.. & Lodging v. Solis, 948 F. Supp. 2d 1217, 1218, 1226 (D.Or. 2013); Cesarz v. Wynn Las Vegas, LLC, No. 2:13–cv–00109–RCJ–CWH, 2014 WL 117579, at *3 (D. Nev. Jan. 10, 2014). Relying in large part on Cumbie, the district courts determined "that Cumbie foreclosed the DOL's ability to promulgate the 2011 rule and that the 2011 rule was invalid because it was contrary to Congress's clear intent." These rulings were consolidated for appeal in Oregon Rest. & Lodging Ass'n ("ORLA") v. Perez, 816 F.3d 1080, 1085 (9th Cir. 2016).

In ORLA, Ninth Circuit reversed both district court decisions holding "the FLSA [was] silent regarding the tip pooling practices of employers who do not take a tip credit" and accorded Chevron deference to the DOL's new regulations filling in this statutory gap. Specifically, the Court stated, "[W]e conclude that Congress has not addressed the question at issue because section 203(m) is silent as to the tip pooling practices of employers who do not take a tip credit. There is no convincing evidence that Congress's silence, in this context, means anything other than a refusal to tie the agency's hands. In exercising its discretion to regulate, the DOL promulgated a rule that is consistent with the FLSA's language, legislative history, and purpose."

On September 6, 2016, the Ninth Circuit denied rehearing *en banc*. Oregon Rest. & Lodging Ass'n v. Perez, No. 13-35765, 2016 WL 4608148 (9th Cir. Sept. 6, 2016). Ten judges joined in dissenting. On the same day, the Oregon Restaurant and Lodging Association, among other amici, filed a petition with Supreme Court for review in Cesarz v. Wynn Las Vegas, LLC.

Among the arguments for cert review, is that ORLA v. Perez creates a circuit split with Trejo v. Ryman Hosp. Properties, Inc., 795 F.3d 442, 448 (4th Cir. 2015), which held "the statutory requirements that an employer inform an employee of § 203(m) and permit the employee to retain all his tips unless the employee is in a tip pool with other regularly tipped employees does not apply to employees . . . who are seeking only the recovery of the tips unrelated to a minimum wage or overtime claim." Several district courts have endorsed the reasoning in Trejo.

In addition, several federal district courts have declined to follow ORLA. See Aguila v. Corp. Caterers II, Inc., No. 1:15-CV-24350-KMM, 2016 WL 4196656, at *3 (S.D. Fla. Aug. 9, 2016) (rejecting OLR and finding the DOL lacked authority to find that Section 203(m) requires employees to retain their all their tips even when they are paid the full minimum wage); Malivuk v. Ameripark, LLC, No. 1:15-CV-2570-WSD, 2016 WL 3999878, at *3 (N.D. Ga. July 26, 2016) (finding"[t]he weight of authority holds that 'Section 203(m)...does not require an

employer to return tip money to an employee where the employer does not claim to have used those tips to satisfy the employees' minimum wage'"); Brueningsen v. Resort Express Inc., No. 2:12-CV-843-DN, 2016 WL 1181683, at *1 (D. Utah Mar. 25, 2016) (rejecting ORLA as nonbinding precedent and unpersuasive). However, ORLA is the law in the Ninth Circuit.

Notwithstanding ORLA, however, employees may seek to recover their tips under other theories of relief unrelated to the tip credit. See e.g. Carol Carter, et al., Plaintiffs, v. PJS of Parma, Inc., et al., Defendants., No. 1:15 CV 1545, 2016 WL 1618132, at *2 (N.D. Ohio Apr. 22, 2016) (allowing plaintiffs to continue with common law unjust enrichment claim for tips because the claims are not dependent upon the application of the FLSA and declining to address the DOL's regulation in 29 C.F.R. § 531.52 that "[t]ips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA"); Guerra v. Guadalajara, IV, No. 3:16CV00020, 2016 WL 3766444, at *3 (W.D. Va. July 7, 2016) (holding ". . . in the absence of any authority for the proposition that 29 C.F.R. § 531.52 creates a private cause of action for improper retention of tips, it appears that state law provides the only viable remedy for plaintiffs seeking the return of additional tip money withheld by their employer.").

WHO DOES THE TIP CREDIT BENEFIT?

With so many potential landmines to navigate in order to comply with Section 203(m) of the FLSA, would employers benefit from not electing to take the tip credit and instead paying the full minimum wage? Would tipped employees be content with this change even though employers could (outside the Ninth Circuit) retain their tips? Would customers prefer to be relieved of tipping but pay higher costs for meals? Below are reference materials addressing this issue.

1. Resource Materials

New York restaurants Eliminate Tips to Offset Wage Hike
http://smallbiztrends.com/2016/02/no-tipping-policy-new-york.html

More Restaurants Opting for No-Tip Policies: Survey
http://www.cnbc.com/2016/06/02/more-restaurants-opting-for-no-tip-policies-survey

This Restaurant Killed Tipping…and now it's Bringing it Back
http://money.cnn.com/2016/01/19/pf/no-tipping-reversed-bar-agricole-trou-normand/

I Dare You to Read This and Still Feel Good About Tipping
https://www.washingtonpost.com/news/wonk/wp/2016/02/18/i-dare-you-to-read-this-and-still-feel-ok-about-tipping-in-the-united-states/

The Tipping Point: Why some Portland Restaurants are Ditching Gratuities
http://www.oregonlive.com/dining/index.ssf/2016/07/the_tipping_point_why_some_por.html

APPENDIX

DOL Wage and Hour Division (WHD)

Minimum Wages for Tipped Employees

Table of Minimum Hourly Wages for Tipped Employees, by State				
Jurisdiction	**Basic Combined Cash & Tip Minimum Wage Rate**	**Maximum Tip Credit Against Minimum Wage**	**Minimum Cash Wage 1**	**Definition of Tipped Employee by Minimum Tips received (monthly unless otherwise specified)**
FEDERAL: Fair Labor Standards Act (FLSA)	$7.25	$5.12	$2.13	More than $30
State requires employers to pay tipped employees full state minimum wage before tips				
Alaska			$9.75	
California			$10.00	
Guam			$8.25	
Minnesota:				
Large employer 2			$9.50, effective August 1, 2016	
Small employer 2			$7.75, effective August 1, 2016	

Montana: 10				
Business with gross annual sales over $110,000			$8.05	
A business not covered by the Fair Labor Standards Act whose gross annual sales are $110,000 or less may pay $4.00 per hour, however, if an individual employee is producing or moving goods between states or otherwise covered by the federal Fair Labor Standards Act, that employee must be paid the greater of either the federal minimum wage or Montana's minimum wage.			$4.00	
Nevada With no health insurance benefits provided by employer and received by employee			$8.25	
With health insurance benefits provided by employer and received by employee			$7.25	
Oregon			$9.75, effective 07/01/2016	
Washington			$9.47	
State requires employers to pay tipped employees above federal minimum wage				
Arizona	$8.05	$3.00	$5.05	Not specified
Arkansas	$8.00	$5.37	$2.63	More than $20
Colorado	$8.31	$3.02	$5.29	More than $30

Connecticut	$9.60			At least $10 weekly for full-time employees or $2.00 daily for part-time in hotels and restaurants. Not specified for other industries.
Hotel, restaurant		36.8% ($3.53)	$6.07	
Bartenders who customarily receive tips		18.5% ($1.78)	$7.82	
Delaware	$8.25	$6.02	$2.23	More than $30
District of Columbia	$11.50, effective 07/01/2016	$8.73	$2.77	Not specified
Florida	$8.05	$3.02	$5.03	
Hawaii	$8.50	$0.75	$7.75	More than $20
*Tip Credit in Hawaii is permissible if the combined amount the employee receives from the employer and in tips is at least $7.00 more than the applicable minimum wage.				
Idaho	$7.25	$3.90	$3.35	More than $30
Illinois	$8.25	40%	$4.95	$20
Iowa	$7.25	$2.90	$4.35	More than $30
Maine	$7.50	50%	$3.75	More than $30
Maryland	$8.75, effective 07/01/2016	$5.12	$3.63	More than $30
Massachusetts	$10.00	$6.65	$3.35	More than $20
Michigan	$8.50	$5.27	$3.23	Not specified
Missouri	$7.65	50% ($3.825)	$3.825	Not specified
New Hampshire	$7.25	55%	45%	More than $30
New York	$9.00 effective 12/31/2015			Not specified

Food service workers		$1.50	$7.50	
Service Employees		$1.50	$7.50	
Service Employees in Resort Hotels if tips average at least $5.05 per hour		$1.50	$7.50	
North Dakota	$7.25	33%	$4.86	More than $30
Ohio [5] Employers with annual gross receipts of $297,000 or more	$8.10	$4.05	$4.05	More than $30
Oklahoma [6]	$7.25	$5.12	$2.13	Not specified
Pennsylvania	$7.25	$4.42	$2.83	More than $30
Rhode Island	$9.60	$6.21	$3.39	Not specified
South Dakota	$8.50	50% ($4.25) [3]	$4.25	More than $35
Vermont *An employees of a hotel, motel, tourist place, or restaurant who customarily and regularly receives more than $120.00 per month in tips for direct and personal customer service.*	$9.60	50% ($4.80)	$4.80	More than $120
Wisconsin [8]	$7.25	$4.92	$2.33	Not specified
West Virginia [7]	$8.75	70% ($6.13)	$2.62	Not specified
State minimum cash payment is the same as that required under the federal Fair Labor Standards Act ($2.13/hr.)				
Alabama [9]			$2.13	
Georgia [9]			$2.13	
Indiana	$7.25	$5.12	$2.13	Not specified
Kansas	$7.25	$5.12	$2.13	More than $20
Kentucky	$7.25	$5.12	$2.13	More than $30
Louisiana [9]			$2.13	

Mississippi 9			$2.13	
North Carolina 4	$7.25	$5.12	$2.13	More than $20
Nebraska	$9.00	$6.87	$2.13	Not specified
New Jersey	$8.38	$6.25 3	$2.13	Not specified
New Mexico	$7.50	$5.37	$2.13	More than $30
Puerto Rico	$7.25	$5.12	$2.13	More than $30
South Carolina 9			$2.13	
Tennessee 9			$2.13	
Texas	$7.25	$5.12	$2.13	More than $20
Utah	$7.25	$5.12	$2.13	More than $30
Virginia	$7.25	$5.12	$2.13	Not specified
Virgin Islands	$7.25	$5.12	$2.13	Not specified
Wyoming	$5.15	$3.02	$2.13	More than $30

Some states set subminimum rates for minors and/or students or exempt them from coverage, or have a training wage for new hires. Such differential provisions are not displayed in this table.

FOOTNOTES

1 Other additional deductions are permitted, for example for meals and lodging, except as noted in footnote 8.

2 **Minnesota.** Effective August 1, 2014, a large employer means an enterprise whose gross volume of sales made or business done is not less than $500,000. A small employer means an enterprise whose gross volume of sales made or business done is less than $500,000.

3 In **New Jersey** and **South Dakota**, the listed maximum credit is the total amount allowable for tips, food and lodging combined, not for tips alone as in other states.

In **New Jersey**, in specific situations where the employer can prove to the satisfaction of the Department of Labor and Workforce Development that the tips actually received exceed the creditable amount, a higher tip credit may be taken.

4 **North Carolina**. Tip credit is not permitted unless the employer obtains from each employee, monthly or for each pay period, a signed certification of the amount of tips received.

5 **Ohio**. For employees of employers with gross annual sales of less than $297,000, the state minimum wage is $7.25 per hour. For these employees, the state wage is tied to the federal minimum wage of $7.25 per hour which requires an act of Congress and the President's signature to change.

6 **Oklahoma**. For employers with fewer than 10 full-time employees at any one location who have gross annual sales of $100,000 or less, the basic minimum rate is $2.00 per hour.

7 **West Virginia**. For employers with six or more employees and for state agencies.

8 **Wisconsin**. $2.13 per hour may be paid to employees who are not yet 20 years old and who have been in employment status with a particular employer for 90 or fewer consecutive calendar days from the date of initial employment.

9 The following states do not have state minimum wage laws: Alabama, Louisiana, Mississippi, South Carolina, and Tennessee. Georgia exempts tipped employees under the law.

10 A business not covered by the federal Fair Labor Standards Act whose gross annual sales are $110,000 or less may pay $4.00 per hour, however, if an individual employee is producing or moving goods between states or otherwise covered by the federal Fair Labor Standards Act, that employee must be paid the greater of either the federal minimum wage or Montana's minimum wage.

Prepared By:

Wage and Hour Division

Division of Communications

U.S. Department of Labor

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