

# Revised Law Says Employers Cannot Pocket Tips, Even if Not Using the Tip Credit

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A specific provision was included in the congressional spending bill approved on March 23, 2018, to amend the tip credit provisions of the Federal Labor Standards Act (FLSA) to expressly provide that employers cannot keep any portion of the tips earned by their workers, regardless of whether the employer utilizes the tip credit.

However, the new law does not ban mandatory tip pooling with traditionally non-tipped employees (so long as the tipped employee is also being paid the full federal minimum wage) as long as the tip pool excludes supervisors, managers, and owners.

The government's position on this matter has seesawed over the past decade. Historically, tips were considered owned by the tipped employees. Tip pools could only include traditionally tipped workers, which meant that tip pools could not include "back-of-house" employees such as kitchen workers. Case law in certain states called this interpretation into question when the employer did not utilize the tip credit.

In response, the U.S. Department of Labor (DOL) enacted a controversial regulation in 2011 that strictly prohibited employers from forcing tipped employees to share any of their tips with traditionally non-tipped employees such as cooks and dishwashers, even when the employer does not use the tip credit and pays full minimum wages to tipped employees.

In late 2017, the DOL took a 180-degree turn and proposed a repeal of that 2011 regulation and adoption of a rule allowing employers who pay all of their employees the full minimum wage to retain tips and not share those funds with any employees, which is a practice that is common when mandatory gratuities are imposed by the house.

The new law seems to be a compromise position, disallowing an employer from seizing the tips of workers who are paid the full minimum wage, but falling short of disallowing tip pools with non-management, non-tipped employees when the tipped employee is being paid the full federal minimum wage.

**ACTION ITEM:** Review any tip pool arrangements in place to ensure that no management employees can share in tips. If tipped workers are paid at least minimum wage, consider whether to institute a mandatory tip pool that includes back-of-house employees.

For more information regarding this alert, please contact a member of the firm's Labor & Employment Team.

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