

Tip Pool Changes – Will You Wade In?

Many employers use a “tip pool,” which is a system of collecting all tips earned by workers and redistributing them to a pool of workers. Employers using tip pools have had to take care not to include “non-tipped” workers, including back-of-house staff like cooks and dishwashers, when tip pooling as this violated wage and hour law. Now, there are new and potential changes to the tip-pool rules.

Under the Trump administration, the U.S. Department of Labor (DOL) finalized a new rule that would have offered employers more flexibility in who could be included in the tip pool, and would have narrowed potential liability for willful violations. The rule was originally scheduled to take effect March 1, 2021, but the Biden administration’s DOL pushed its effective date to April 30, 2021. On March 23, 2021, the DOL announced that it will proceed with the new rule in three different ways: allowing a portion of the rule to take effect on April 30, and announcing two Notices of Proposed Rulemaking addressing other parts of the new rule.

Parts of the new rule that will take effect on April 30 include:

- Restricting employers, supervisors and managers from sharing or keeping any tips received by workers;
- Requiring that tips be fully redistributed to employees no less often than when the employer regularly pays its employees;
- Permitting a tip pool that includes non-tipped workers (such as dishwashers and cooks) for employers that do not take the tip credit; and
- Requiring employers to communicate the terms of the tip pool to its employees.

In addition, the DOL is re-opening the Proposed Rulemaking process to public comment on different parts of the rule.

The first Proposal considers whether to further extend the effective date for two parts of the new rule until December 31, 2021. Those parts include:

- Narrowing the circumstances in which the DOL may pursue civil money penalties; and
- Applying the “tip credit” to tipped employees who perform both tipped and non-tipped work (that is, eliminating the 80/20 rule) if the non-tipped work is “related” to the tipped work and is performed “contemporaneously” or within “a reasonable time” before or after the tipped work.

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The second Proposal considers:

- Whether to withdraw and re-propose the part of the rule narrowing the circumstances under which the DOL may pursue civil monetary penalties; and
- The part of the rule that addresses who counts as receiving a tip to determine whether someone is engaged in tipped work.

Importantly, the new tip pool rule only relates to changes under the Fair Labor Standards Act (FLSA). State law may have different requirements that employers should be aware of and must comply with, if applicable.

Performing audits of your wage and hour practices, including tip payment procedures, can be a valuable effort for employers to help protect against any potential liability. If you have any questions regarding the new rule, performing an audit, or other wage and hour issues, please contact wage and hour law attorneys [Lynn M. Stathas](#), [Matthew DeLange](#) or your Reinhart attorney.

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