

# DOL Issues Final Rule on Tip Sharing and Employer Penalties

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**T**he U.S. Department of Labor (DOL) may fine employers in more circumstances when they violate federal tip-sharing regulations under a recently issued rule. The rule also clarifies when managers and supervisors can keep gratuities they received.

"The final rule (<https://www.federalregister.gov/documents/2021/09/24/2021-19795/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal>) ... strengthens protections for tipped workers—who are largely women, immigrants and people of color—and advances equity in the workplace," said DOL Wage and Hour Division Acting Administrator Jessica Looman.

The rule will take effect on Nov. 23.

## Who Can Share in Tip Pools?

Under the Fair Labor Standards Act (FLSA), restaurants and other hospitality employers may be eligible to take a tip credit, meaning they can pay tipped workers (such as servers and bartenders) less than the standard minimum wage, as long as workers' tips make up the difference.

But employers have more flexibility to pool tips when they pay at least the standard minimum wage. "An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip-pooling arrangement that includes dishwashers, cooks or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly receive tips," according to the DOL.

Employers—including managers and supervisors—are prohibited from participating in a tip pool or otherwise keeping employees' tips, regardless of whether the employer takes a tip credit.

However, the final rule clarifies that managers and supervisors may contribute to mandatory tip pools. Additionally, the rule explains that managers and supervisors may keep tips they receive directly from customers for services they "directly" and "solely" provide.

"The DOL's final rule has now better identified the circumstances under which a manager or supervisor may retain customer tips and share those tips with others under the FLSA," said Justin Barnes, an attorney with Jackson Lewis in Atlanta, and Jeffrey Brecher, an attorney with Jackson Lewis in Long Island, N.Y., in a joint statement.

Although the rule provides some clarity, employers also must consider any applicable state law requirements. "Importantly, some state laws expressly prohibit tip sharing between tipped and non-tipped employees under any circumstances," they explained.

### Civil Monetary Penalties

A now-revoked rule issued by the prior administration would have allowed the DOL to assess penalties for tip-rule violations only when the department found that the employer repeatedly or willfully withheld employees' gratuities.

Under the new rule, employers may face fines of up to \$1,100 each time the department finds that an employer retained employee tips, regardless of whether the violation is repeated or willful, noted Christopher Cognato and Steven Suffas, attorneys with Ballard Spahr, based in Philadelphia and Salt Lake City, respectively.

"The rule represents yet another move by the agency to protect tipped workers, putting hospitality-sector employers and others with tipped employees on clear notice that it intends to enforce [FLSA] requirements aggressively," they said.

The rule also revises the definition of "willful" in the tip-credit regulations to include employer violations that are committed with "reckless disregard" for the FLSA's requirements, Cognato and Suffas noted.

"An employer is in reckless disregard of the FLSA when, among other situations, the department determines based on all of the facts and circumstances that the employer should have inquired into whether its conduct was lawful but failed to do so adequately," according to the rule.

### Performing Tipped and Nontipped Duties

The final rule did not address the so-called 80/20 rule, Barnes and Brecher noted.

The 80/20 rule allows employers to take a tip credit only for workers who spent no more than 20 percent of their time on nontipped duties.

A revoked rule from the prior administration would have codified DOL guidance eliminating the 80/20 rule. The withdrawn rule would have more broadly allowed employers to take a tip credit when tipped employees perform related side jobs (such as rolling silverware into napkins) either during, just before or a reasonable time after tipped duties.

The preamble to the current administration's final rule, however, noted that the DOL is still evaluating the issue and the department will address it in a separate final rule.

### Background on Revoked Rule

Former President Donald Trump's administration issued a final rule amending the FLSA's requirements for tipped workers, which was scheduled to take effect on March 1. After President Joe Biden's inauguration, however, the White House asked federal agencies to freeze proposed and pending regulations to give new leaders time to review pending rules, and the DOL delayed the tip-sharing rule.

In March, the DOL announced that, "after considerable review," the following portions of the final rule would take effect on April 30:

- The provision that prohibits employers from keeping workers' tips, regardless of whether the employer takes a tip credit.
- The provision that allows employers that do not take a tip credit to include nontipped workers—such as cooks and dishwashers—in tip pools.

The final rule's record-keeping requirements also took effect. However, the DOL proposed new rules to withdraw and replace other portions of the prior administration's rule.

"Tipped workers are among those hardest hit amid the pandemic, and the Wage and Hour Division has made protecting these essential front-line workers a priority," Looman said.

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