

## U.S. Department of Labor: Final Rule on Tip Regulations Under Fair Labor Standards Act

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On December 30, 2020, the United States Department of Labor published a long-anticipated Final Rule on tip pooling and payment for side tasks by tipped employees when the tasks do not lead to tips. The Final Rule takes effect March 1, 2021.

The Final Rule was prompted by the Consolidated Appropriations Act of 2018's (the "CAA") amendment to section 3(m) of the Fair Labor Standards Act ("FLSA"). Under the FLSA, employers are required to pay their employees the federal minimum wage. However, where an employee is in a tip-earning occupation, the FLSA allows employers to take a "tip credit." The credit permits employers to pay tipped employees a lower wage, because customer tips can be applied to the employer's minimum wage obligation.

Key provisions of the Final Rule are summarized below:

### **Permissible Tip Pooling Practices May Include "Back of the House" Employees**

Under the CAA, employers, managers, and supervisors may not keep any tips received by employees, even if the employer is providing the minimum wage as a base rate of pay and choosing not to utilize the tip credit exception under the FLSA.

Where the employer utilizes the tip credit, the employer can require that tip-earning employees pool their tips. However, the pool of employees sharing tips shall only include tip-earning workers. Thus, employees who traditionally do not receive tips cannot be included in the tip pool and must be provided the minimum wage.

Where an employer is not taking advantage of the tip credit, the Final Rule clarified that the employer may pool tips of tipped employees and also include back of the house employees. Thus, employees such as cooks or dishwashers can now be included in a tip pool, if an employer does not elect to take advantage of the subminimum wage "tip credit" for its tipped employees.

### **Tip Credit Permitted for All Tasks Related to Tip-Producing Occupation**

The Final Rule codifies previous guidance that employers are permitted to take a tip credit for any amount of time an employee in a tip-earning occupation performs work that will not earn tips, so long as that work is performed simultaneously with or within a reasonable time before or after the tipped duty. The Final Rule identifies certain front-of-house tasks that may qualify, such as cleaning, setting tables, or occasional washing of dishes. Any work for which tips cannot be received must be related to the tip-earning occupation, or the work may be considered a "dual job."

The DOL has posted frequently asked questions and a press release concerning the Final Rule. If you have any questions about the Final Rule or how to ensure compliance, please contact your Miller Canfield attorney or any of the authors of this alert.