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WAGE AND HOUR

Amendment to the FLSA: The Tip Income Protection Act of 2018

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Special to the Legal

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Restaurants and hotels increasingly have found themselves over the last several years as defendants in lawsuits or the subject of investigation by the DOL's Wage and Hour Division challenging their "tip pooling" practices. Hospitality industry employers typically collect a percentage of the tips received from staff who receive tips and redistribute, which often provides additional wages to staff who typically earn less in tips, like hosts or bellhops. On March 23, Congress got into the act via The Omnibus Spending Bill.

Generally, the Fair Labor Standards Act (FLSA) governs minimum wage, overtime, child labor, and recordkeeping; however, in 2011 the DOL's Wage and Hour Division issued regulations related to tip pooling for workers who were paid at least the federal minimum wage. Prior to that time, the FLSA permitted employers to pay less than minimum wage (now $2.13 per hour under federal law and $2.83 per hour under Pennsylvania law) and take a "tip credit" for employees who "customarily and regularly received tips," so long as employers met certain requirements. The statute also permitted pooling of tips only with other employees who customarily and regularly received tips. In December 2017, the DOL issued a proposal to rescind portions of the 2011 regulations that restricted tip pooling for employees who earned at least the federal minimum wage, questioning whether the DOL acted outside of its authority in regulating the payment of wages beyond the minimum wage or overtime context.

As part of the budget bill signed into law by President Donald Trump on March 23, Congress entered the tip-pooling fray by including The Tip Income Protection Act of 2018 in the bill. This amended the FLSA to provide that "an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." An employer who violates this section is liable to employees "in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages." This amendment is a significant departure from the remedies previously available under the FLSA, which permitted recovery of the difference between the minimum wage ($7.25 per hour) and the amount paid as the tip credit wage ($2.83 per hour in Pennsylvania), so $4.42 per hour.

The act also provides that any person who violates the new FLSA subsection "shall be subject to a civil penalty" not to exceed $1,100 per violation, as determined by the Secretary of Labor. Of significant note, the act indicates certain of the 2011 revisions to the tip credit and tip pooling regulations "shall have no further force or effect until any further action taken by the

Administrator of the Wage and Hour Division of the Department of Labor."

BACKGROUND REGARDING THE TIP CREDIT

Over the last several years restaurants have seen a spike in litigation challenging, among other things, the implementation of tip pooling arrangements. The cases often focus on two different areas, although at the core of the controversy is which categories of employees should be included in a valid tip pool and under what circumstances.

The DOL field operations handbook specifically lists wait staff, bellhops, counter personnel, bussers, and service bartenders as employees who "customarily and regularly receive tips," while it excludes back-of-the-house staff such as janitors, dishwashers, chefs and laundry room attendants from eligibility for participation in tip pooling.

The DOL also further creates a distinction between wait staff performing duties that are essential to serving customers and other ancillary tasks, providing that employers cannot take the tip credit if employees are performing nontipped work. The "dual jobs" regulation provides that where an employee works in two different jobs for the employer, for example as a waiter and as a "maintenance man," he only qualifies as a tipped employee (and can be eligible for the tip credit) for his waiter duties. The DOL distinguishes this from what it refers to as "related duties," of a waiter or waitress like "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." These related duties do not need to be "directed toward producing tips."

The DOL field operations handbook also provides that "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." Courts have diverged as to whether to defer to the DOL's handbook.

COMPETING INTERESTS, BLURRY LINES AND AN INCOMPLETE CONGRESSIONAL FIX

In amending the FLSA, Congress certainly has a laudable goal—to ensure that tips provided to employees, even by those employers that do not use the "tip credit," are retained by employees earning those tips. Yet neither the amendment nor any other provision of the FLSA defines manager or supervisor under the act, leaving open whether "lead" workers or other wait staff that has some traditional supervisory-type functions (like setting the schedule, obtaining coverage or covering for a vacationing manager) can permissibly retain tips.

Employers and employees in this area crave bright-line rules to create an environment where employers can more easily comply with their obligations and employees can be paid properly.

The amendment also is silent as to the other fundamental challenges with tip pooling where the tip credit is taken or the compliance difficulties created by the "dual jobs" regulation which is further exacerbated by divergent case law as to the level of deference to be afforded the DOL's handbook. Can employers now provide for tip pools that include "back-of-house" staff? The answer is everyone's favorite lawyerly answer, it depends. In statements made to multiple media outlets following the signing of the budget bill, Angelo I. Amador, a senior official with the National Restaurant Association said they were pleased that "the new legislation would make it possible for cooks, dishwashers and other workers to share tips." Yet this is only where the workers participating in the tip pool all are paid at least the federal minimum wage. Where employers use the tip credit, only employees who customarily and regularly receive tips can participate. Sound confusing? That's because it is—confusing to employees and challenging to employers—the perfect conditions to serve as a breeding ground for litigation.

Employers and employees in this area crave bright-line rules to create an environment where employers can more easily comply with their obligations and employees can be paid properly. Such an environment would hopefully stem the tide of wage and hour litigation and enforcement activity focused on this industry. Maybe the DOL will take up Congress' invitation to issue further regulations. Only time will tell. •