

Employer Update: Controversial DOL Regulation Regarding Tip-Pooling Headed to Repeal

McGlinchey Labor & Employment Alert

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Employers in service industries may soon be able to require their tipped employees to share their tips with “back of the house” employees. The catch: the tipped employees must be paid at least minimum wage with no use of the tip credit.

The U.S. Department of Labor (DOL) announced that it is proposing a new rule that would repeal its controversial 2011 regulation that strictly prohibits employers from forcing their tipped employees to share any of their tips with its 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 its tipped employees.

Several courts have held that the DOL did not have legislative authority to adopt the rule in 2011 and that the rule was invalid because the law does not restrict employers' use of tips to augment the wages of non-tipped employees when those employers pay the tipped employees full minimum wage.

In fact, a case titled *National Restaurant Association et al. v. Department of Labor*, Case No. 16-920 is currently pending before the US Supreme Court to determine the validity of the 2011 rule. Rather than wait for the Supreme Court's ruling, the DOL appears to be admitting defeat and is proposing to repeal the restriction altogether.

Importantly, this proposed rule would not affect employers who continue to utilize the tip credit. In such cases, tip pooling would continue to be legal only among traditionally tipped employees, and back of house employees cannot share in such tip pools.

The proposed repeal of the 2011 regulations may also allow 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. However, the legality of allowing employers to retain discretionary tips left by customers for tipped employees would have to be determined in the future.

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