

Electronic Alert

Volume 21, Issue 7

April 11, 2018

Tip Pooling Laws Change Again

By Nicole Elgin & Sean Ray

Those in the hospitality industry are no strangers to the frequent changes in tip pooling requirements and restrictions from state and federal agencies. This time, the tip pooling rule change came from Congress, who recently enacted amendments to the Fair Labor Standards Act (FLSA) in the Consolidated Appropriations Act, 2018. The Tip Income Protection Act of 2018, as it was titled when it was introduced in the House of Representatives, was folded into the Consolidated Appropriations Act, 2018. If you missed it when you perused the omnibus spending bill, you can find it in Title XII on page 2,025 of that Act.

The amendments to the FLSA contained in the Act explain 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 or share in the tip pools, regardless of whether or not the employer takes a tip credit. It also rescinds portions of the 2011 Department of Labor (DOL) regulations that prohibited tip pooling when employers paid at least minimum wage and did not claim the tip credit. This means that if an employer pays at least minimum wage to employees, back-of-the-house employees (such as cooks and dishwashers) can once again participate in tip pools.

The Wage and Hour Division of DOL issued a [bulletin](#) after the Act's enactment advising employers that it will proceed with rulemaking in order to address these amendments to the FLSA through new or revised regulations. The bulletin also explained that in the meantime, DOL will use its current regulations to determine whether an individual qualifies as a manager or supervisor—namely, whether the employee qualifies for the executive exemption, whether or not he or she is paid a salary.

Before changing your tip pooling practices, make sure to also check your state laws. For example, Oregon law prohibits employers from using tips as a credit toward paying minimum wage. If you have specific questions about how the new tip pooling laws apply to your workplace, contact Nicole Elgin at (503) 276-2109, nelgin@barran.com, or Sean Ray at (503) 276-2135, sray@barran.com. You can also register [here](#) for our next breakfast seminar on advanced wage and hour laws.