

Congress Passes Law Prohibiting Sharing of Employee Tips with the Company

In a political climate where gridlock has prevented the passage of any major employment laws by the United States Congress, the recent federal budget deal gave us a rare exception. As a result of a bill passed by Congress last week, and signed into law by President Trump on March 23, 2018, that extended the funding of government for up to 18 months, a rider attached to that law formally prohibits employers from sharing in their employees' tips. In doing so, Congress acted to preempt what had been a Trump Administration push to allow possible tip sharing by employers.

Most retail employers are familiar with how tips can impact wages earned by employees under the federal Fair Labor Standards Act (FLSA). Under what is called a "tip credit," employers may pay tipped employees significantly less than the federal minimum wage, as long as employees' tips make up the difference to the point where the employees earn at least the federal minimum wage. What has not been clear under the FLSA is how and when employers can allow tips to be shared either with employees who do not receive tips, such as dishwashers at a restaurant (called "back-of-house" employees), and even with the actual employer itself.

Employee advocates had sought to prevent employers particularly from sharing in employee tips. In 2011, the Obama Administration issued a new regulation, which significantly limited any tip sharing arrangement. The regulation only allowed tip sharing among "customer service" employees. As a result, tips received could not be shared with back-of-house employees and likewise could not be shared with the employer itself. This regulation applied that same rule regardless of whether a tip credit was taken. This regulation was not a law, but a U.S. Department of Labor regulation, which has been subject to numerous legal challenges, and the courts were split on whether it was a legally binding regulation.

After President Trump's election, the new administration sought to reverse the Obama-era tip regulation. Although the Obama regulation was never formally reversed, that process was begun by the new administration, as part of its well-publicized goals of reducing business regulations. Under the proposed Trump rule, any restriction on tip sharing would have been lessened or even eliminated, leading to the real possibility that tips could be shared with not only back-of-house employees but even the employer (presumably to help pay for the tip credit, or where no tip credit was utilized).

A surprising development occurred as this proposed Trump rule was in process. In a new law passed and signed on March 23, 2018 --- the same law which avoided a government shutdown and funded the government on a (somewhat) long-term basis --- a number of federal laws were amended. Among these was an amendment to the FLSA, passed with little fanfare and inserted into the law only days before its final passage. According to this FLSA amendment, an employer is now prohibited from keeping or sharing any tips received by its employees. This rule applies uniformly to all tipped employees, and regardless of whether any tip credit is being used. This FLSA amendment was proposed by several Democratic legislators, and included in the final bill, in order to sway sufficient support for passage of the funding bill in the U.S. Senate.

The end result is a strange being --- an actual amendment to the FLSA. The Trump proposed rule is now on the trash heap, at least as far as the possibility of employers keeping employee tips, because this actual FLSA amendment would "trump" any regulation proposed by the administration. Further action on sharing tips with back-of-house employees may be possible. But, at least as far as employers sharing tips, the law is now clear - employers cannot try and take all or part of its employees' tips, whether a tip credit is being used or not.

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