

# PUBLICATION

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## Here's a Tip: Proceed with Caution on Tip-Pooling

Authors: Zachary B. Busey

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**In passing the omnibus spending bill earlier this year, Congress included an amendment to the Fair Labor Standards Act (FLSA) that significantly changed the rules for pooling/splitting tips. The amended rules have been in place for a few months now, and here is what we've learned.**

First, a quick recap. Prior to the amendments, employers could satisfy federal minimum wage requirements with respect to tipped employees by taking credit for some but not all of the tips actually received by the employees. As part of this approach, employers were allowed to pool and then re-distribute tips, but only among "tipped" employees (i.e., those employees customarily and regularly receiving tips). Based on a Department of Labor regulation, employers were barred from including non-tipped employees, such as kitchen staff, in any tip pools, regardless of whether the employer was relying on a tip credit.

On March 23, 2018, Congress passed the omnibus spending bill. The bill, in relevant part, amended the FLSA. Now, if an employer is not taking a tip credit – i.e., the employer is paying an hourly rate at or above federal minimum wage to tipped employees – an employer can include non-tipped employees in the tip pool. If, however, an employer is taking a tip credit, the same restrictions on tip pooling still apply, i.e. tips may only be shared with employees who customarily and regularly receive tips (such as waiters, waitresses, bellhops, bartenders, and counter personnel). Additionally, under no circumstances can an employer take or retain a portion of tips received. In other words, management and supervisory personnel cannot ever share in pooled or split tips.

Under the amendments, employees may now file suit to recover all tips unlawfully retained by the employer, plus an equivalent amount in liquidated damages. Any tip-pooling or tip-splitting practice that allows supervisory or management personnel to retain a portion of the tips should be discontinued immediately. If supervisory personnel rotate between tipped and non-tipped positions, they can only retain pooled or split tips with respect to shifts worked in tipped positions. Tip-pooling violations that occurred before March 23 can and will be investigated by the DOL and otherwise decided under the pre-amendment rules. Alleged violations occurring on or after March 23 are subject to the amended rules. For more information on the topics in this article, please contact the author, [Zachary Busey](#), or any member of Baker Donelson's [Labor & Employment Group](#).