

# Tip Pooling

## *Employer Tip Pools Are Legal Again in Oregon*

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**M**oving forward it is officially legal to tip pool in Oregon under certain circumstances, according to the federal spending bill passed through Congress earlier this Spring. The action taken in Washington, D.C. abolishes the 2011 rule passed by the U.S. Department of Labor which stated that tip pools in states like Oregon can only be allowed amongst employees who are ‘regularly and customarily’ tipped.

Removal of the rule means newfound flexibility and relief for certain segments of Oregon’s restaurant industry.

### **The Clear Tip Pooling Win**

The omnibus appropriations bill passed on March 23, 2018 includes a bipartisan statutory provision to ensure that workers in the back-of-the-house (i.e., cooks, bussers, dishwashers) can participate in tip pools in states like Oregon. Clarity around this central issue will be welcome news for tens of thousands of restaurant operations across the United States where there is no tip credit.

### **Is ORLA’s Court Case Over?**

On June 25 the Supreme Court denied our certiorari petition. Although the Court did not provide a reason (which it typically does not do when denying certiorari), the Court most likely denied our

petition because the result we seek to obtain in the litigation—invalidating the 2011 regulations—has already been achieved through Congress’s actions earlier this year, coupled with the injunction against the regulations that has been in place since 2013. Thus, there is not, from the Court’s standpoint, much purpose to be served by further litigating the matter. Our case became moot, for all intents and purposes, because of the victory obtained on the legislative front. As things now stand, there is no further action to take in the litigation, pending any further notification from the Ninth Circuit or the District Court.

### **Supervisors and Managers**

What about my supervisors and managers who have shared in tips in the front of the house and are now restricted from doing so?

A number of ORLA members have hybrid approaches in how they approach their service positions. Supervisors and managers in some of Oregon’s smallest restaurant operations commonly serve guests and have participated in front of the house tip pools as a part of a team approach to food service. In some cases this reality extends to mom and pop restaurant owners who are also the janitor, cook, supervisor, etc. These “jack of all trades” positions need further evaluation by the U.S. Department of Labor.

The relevant sentence in the omnibus appropriations bill states 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...”

The words “supervisor” and “manager” are not defined. Until now, court cases have looked at the actual duties of the supervisors and managers. For example, the Second Circuit found it to be legal for Starbucks’ “shift supervisors” to participate in tip pools. In this case, the court held that an employee having limited supervisory responsibilities may share in tips, as long as “personal service to patrons is a principal or regular part of [that employee’s] duties.”

Our hope is that the U.S. Department of Labor will act soon on addressing these important definitions and also address those with “hybrid” or “dual” roles as well.

### **Further Clarification**

ORLA will continue to communicate with members as the U.S. Department of Labor provides further clarification. Stay up-to-date on all industry news at [OregonRLA.org](http://OregonRLA.org).