

Tip Pooling

Employer Tip Pools Are Legal Again in Oregon

Moving forward it is officially legal to tip pool in Oregon under certain circumstances, according to the federal spending bill passed through Congress. The action taken in Washington, D.C. abolished 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 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, 2018 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—had already been achieved through Congress’s actions 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

A final rule on tip pooling in the United States was released on December 22, 2020 and will go into effect across the country on March 1, 2021. The final rule further establishes the legality of overseeing and managing a tip pool that includes staff who do not customarily and regularly receive tips by directly interfacing with a customer. Managers and supervisors are still prohibited from participating in tip pools. The final rule does define further, explaining as follows:

“...the final rule defines a manager or supervisor for purposes of section 3(m)(2)(B) as any employee (1) whose primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise; (2) who customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and

(3) who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing are given particular weight. The definition also includes as managers or supervisors any individuals who own at least a bona fide 20 percent equity interest in the enterprise in which they are employed and who are actively engaged in its management.”

The DOL recently clarified that an employer does not violate the FLSA when a manager or supervisor keeps tips that *“he or she received directly from customers based on the service that he or she directly and solely provides.”*

Employers must still proceed with caution. In situations where a manager helps serve a customer along with an employee, they may not keep any tip that the customer leaves because the managers did not “solely” provide service.¹

Further Clarification

The actual regulation and summary of the final rule can be found through the following link: dol.gov/agencies/whd/fls/tips.

For additional questions about your legal rights to create a tip pool for your staff, please reach out to your ORLA Regional Representative.

¹ Fisher Phillips, “4 Reminders for Employers After a Texas BBQ Chain’s \$900K Tip Pooling Mistake,” 5.18.22