

LEGAL UPDATE

DOL Proposes Rule To Clarify When Tip Wages Apply

On June 21, 2021, the U.S. Department of Labor (DOL) announced a proposed rule to clarify when employers can claim a tip credit to compensate their tipped employees. The proposed rule is scheduled for publication in the federal register on June 23, 2021. Employers will have 60 days from the date of publication to submit their comments about the proposed rule to the DOL.

Tip Credit

The Fair Labor Standards Act (FLSA) allows employers to claim a tip credit when compensating tipped employees for tipped work. This credit allows employers to pay their tipped employees a cash wage in the amount of the difference between the minimum wage rate and the tip credit.

When an employee's tips are insufficient to offset the tip credit, employers are required to ensure the employee is paid at least the minimum wage rate.

Tipped Work

The proposal clarifies that employers can claim the tip credit only for employees who perform tip-producing work. Tip-producing work includes work that is part of an employee's tipped occupation, along with any activities that "directly support" tip-producing work.

Work that directly supports the work for which employees receive tips is work that assists a tipped employee to perform the work for which the employee receives tips. However, the proposed rule clarifies that employers cannot use the tip credit for activities that directly support tip-producing work when the activities in question:

- Exceed, in the aggregate, 20% of the employee's hours worked during the workweek; or
- Are performed for a continuous period of time exceeding 30 minutes.

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Tip Credit and Cash Wages

- The FLSA defines "tipped employee" as any employee engaged in an occupation in which the employee receives more than \$30 per month in tips.
- The current federal minimum wage rate is \$7.25 per hour.
- The current federal tip credit is \$5.12 per hour.
- The current federal cash wage is \$2.13 per hour.

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JP Griffin Group