

CAN BACK-OF-THE-HOUSE STAFF PARTICIPATE IN A TIP POOL

By *Gwyneth Borden* Posted *March 30, 2018* In *News*

When Congress passed the \$1.3 trillion omnibus spending bill, many people missed that embedded in this large package, was a change to how tips are allocated. Now tips can be shared across the restaurant, which is a victory for back of the house employees in California and other non-tip credit states. Please see our full guidance and explanation prepared here by [Marie Trimble Holvick](#) and [Sara Moore](#) of Gordon & Rees. Marie will be on our 2018 Compliance Updates panel at the [Industry Conference](#), so to learn more firsthand, please join us April 9 – 10, 2018.

New Federal Law

Under the Obama Administration and in the years prior, the Department of Labor (“DOL”) consistently took the position that employees who do not provide direct service to the customer are not allowed to participate in a tip pool. In other words, kitchen and back-of-the-house staff who did not have direct service contact were not able to share in a tip pooling arrangement.

However, in December 2017, the DOL published a proposed amendment to the federal Fair Labor Standards Act (“FLSA”). This amendment would allow some back-of-the-house workers to share in tip pools earned by front-of-the-house workers, if the restaurant chose to implement this type of arrangement. The proposed amendment sparked outrage from worker advocate groups, arguing that the suggested rule would allow management to potentially skim gratuities by participating in the pools themselves. The opposition included the California Attorney General, and led to an audit of the rulemaking process.

On March 23, 2018, President Trump passed the omnibus congressional spending bill, which included a revised version of the FLSA amendment. The revised bill – which is now law – states that tips can be redistributed to non-tipped workers only if the employer pays its employee the regular minimum wage in their jurisdiction – not the lower federal minimum wage for tipped workers. (This is not an issue in California as tip credits are forbidden under California law.) The final version of the bill also confirms that employers – including managers or supervisors – cannot keep any portion of the tips earned by their workers. Of note, neither the bill nor the FLSA define “supervisors” and “managers,” which may present some uncertainty in future enforcement.

California Law

California already has state-specific laws in effect which make clear that tips are the property of the employee and that the employer cannot take tips from employees. Even though the federal rule has now become final, it does not change California law in this regard. California law also prohibits management from sharing in tips that customers have left for employees. In California, employer-mandated tip pooling is generally considered legal as long as certain conditions are met. These conditions include: (1) the people participating must be employees; (2) tips included in the pool are given to employees; (3) the participants in the tip pool do not include people who do not customarily and regularly receive tips or gratuities; and (4) the employer, owner, manager, and supervisors do not share in the tip pool.

Although this framework generally requires that tip pools should include employees who customarily and regularly receive tips and are in the chain of service – such as servers, bussers, and bartenders – tip pooling arrangements are not necessarily limited to those who provide services directly to the customer.

Where federal and state laws overlap, employers must follow the law which is most favorable to the employee. There is currently a “circuit split” involving two competing cases concerning who may participate in a tip pool. In the Ninth Circuit (which covers California), a 2016 ruling provided that employers could no longer mandate a tip pool distribution that included employees who are not in the chain of service or have direct contact with customers (i.e. cooks, dishwashers, kitchen staff). There is currently an appeal pending before the U.S. Supreme Court on this issue, and it is unclear whether the Supreme Court will elect to resolve this split, especially now that the Ninth Circuit’s prior ruling has been challenged by the latest federal amendment to the FLSA.

Practical Tips for Compliance

In summary, a company that pays its employees at least minimum wage (\$11.00 in California, \$14.00 in San Francisco) can impose a tip pool that allows all non-management employees – even those who are not directly in the line of service – to participate in the tip pool. Back-of-the-house staff such as kitchen workers, cooks, and dishwashers can share in the tip pool.

If you elect to institute a tip pool, employers should take the following steps:

1. Ensure that a tip pool includes only non-management employees;
2. Review the employee's day-to-day job duties – not their job title – in determining whether the employee has customer interaction;
3. Make sure the tip pool is distributed to participating employees in a reasonable manner, proportionate to the employees' direct interaction with the customers. The employee who has greater level of contact with the customer receives a greater percentage of the tip pool;
4. Do not distribute any portion of the tip pool to any owner, manager, or supervisor. This is prohibited.

It is important to conduct an audit and review your current tip pooling arrangement if you have one. You should revise your arrangement as needed to comply with the new federal rules. It is also important to consult competent legal counsel to analyze your current policy, especially given the recent changes in the law.

