



Assessing The Risk:

Wage and Hour Tip Of The Week

Tip Off Employees to the Tip Credit

TIP: Ensure that your tipped employees are properly “informed” of the tip credit.

Many restaurants and others in the service industry take advantage of the tip credit that is available under the FLSA to offset minimum wage obligations for tipped employees. Under the applicable regulations, an employer is required to “inform” employees that it intends to utilize the tip credit. Whether an employee has been “informed” of the tip credit can arise as an issue in litigation, and if the employer has not “informed” the employee, the tip credit is invalidated. Therefore, it is critical for employers to ensure that their employees are properly informed of their use of the tip credit.

Employers are required to inform tipped employees of the following:

- The employer’s intention to use the tip credit;
- The direct cash wage that the employer is paying the tipped employee;
- The amount of tips the employer is using as a credit towards the minimum wage, which cannot exceed the difference between the minimum wage and the actual cash wage paid by the employer to the employee;
- That the amount claimed by the employer on account of the tips as a tip credit cannot exceed the amount of the tips actually received by the employee;
- That the tip credit shall not apply to any tipped employee unless the employee has been informed of the tip credit provisions; and
- That all tips received by the tipped employee must be retained by the employee except for those contributed to a valid tip pool among employees who customarily and regularly receive tips.

In addition, employers that require tip pool contributions must notify tipped employees (1) of the tip pool contribution amount or percentage, and (2) that the employer is limited to use of the tip credit to the amount of the tips the employee ultimately receives and cannot retain any of the employees’ tips for any other purpose.

Although an employer is not required to provide this notice in writing, the Wage and Hour Division has indicated that employers may wish to do so “since a physical document would, if the notice is adequate, permit employers to document that they have met” the requirements. Thus, employers should consider providing written notice to all tipped employees for whom the tip credit will be applied that includes each of the required notifications listed above. In addition, employers may

want to obtain a signed acknowledgment from each employee stating that he or she received the notifications. Providing written notice and obtaining acknowledgments provides employers with a record that these requirements have been met.

As an additional note, certain states have their own laws regulating tipped employees, which may provide greater protections for employees, such as limiting the tip credit to a lesser amount than the federal law allows or prohibiting the use of the tip credit altogether. Employers should ensure compliance with all applicable state laws regarding tips in addition to the FLSA.

Disclaimer: The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

By: [Julie K. Collins Reyes](#)

[Julie K. Collins Reyes](#) is located in Seyfarth Shaw's Chicago office. If you would like further information please contact your Seyfarth Shaw attorney or Julie Collins Reyes at jreyes@seyfarth.com.

www.seyfarth.com



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