

## **Alert** | Labor & Employment



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### **Federal Law Reaches a Tipping Point**

On March 23, 2018, President Trump signed into law the 2,232-page Omnibus Appropriations bill – HR 1625, Consolidated Appropriations Act for FY 2018, which funds the government for the rest of the fiscal year. Included in that bill were a few paragraphs that prohibit restaurant owners from sharing server tips with supervisors, managers, or themselves.

Known as the “tip pooling provision,” this text amends the Fair Labor Standards Act (FLSA) and negates a recent Labor Department rule to prevent employers such as restaurant owners from “pooling” and redistributing employee tips. In December 2017, the DOL proposed using the redistribution of tips as a way of closing the gap between front-of-house and back-of-house compensation, undoing an Obama-era prohibition on the practice. The DOL’s proposal received a great deal of public input causing the DOL to extend the comment period to 60 days.

The new provision signed into law last week allows employers, in some circumstances, to share tips with dishwashers, cooks, and other back-of-house employees. The sharing is only permitted by restaurants that do not take a tip credit (*i.e.*, count gratuities as part of the servers’ legally mandated pay). This portion of the provision will immediately affect businesses in seven states that already require employers to pay tipped workers the full minimum wage, including Nevada and California, by enabling those restaurants to share tips with back-of-house staff. Employers in other states, who may currently claim the tip credit, will need to decide whether to modify their pay practices in order to permit tip sharing with non-tipped employees.

Additionally, the provision amends [29 U.S.C. § 203\(m\)](#) to add (2) (B):

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, regardless of whether or not the employer takes a tip credit.

The penalties for a violation is that an employer shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer, in addition to all tips unlawfully kept by the employer and an additional equal amount as liquidated damages. Additionally, any person who violates the newly enacted provision shall be subject to a civil penalty not to exceed \$1,100 for each violation, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages.

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