

Fact Sheet #15A: Ownership of Tips Under the Fair Labor Standards Act (FLSA)

This fact sheet addresses ownership of tips by the employee under the FLSA.

Tip Credit: Section 3(m) of the [FLSA](#) permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least \$2.13) and the federal minimum wage (currently \$7.25). Employers must provide oral or written notice to tipped employees of the use of the tip credit in advance. [29 C.F.R. § 531.59\(b\)](#). Employers using the tip credit must be able to show that tipped employees receive at least the minimum wage when direct wages and the tip credit amount are combined. If the employee's tips combined with the direct wages do not equal the minimum wage, the employer must make up the difference during the pay period. For general information on tipped employees, please see [Fact Sheet #15: Tipped Employees Under the FLSA](#).

2011 Final Rule: The Department's tip credit regulations were updated effective May 5, 2011 to codify the Wage and Hour Division's (WHD) longstanding position that:

Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA.¹ The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted: As a credit against its wage obligations to the employee, or in furtherance of a valid tip pool.

[29 C.F.R. § 531.52.](#)

Under the regulation, an employer that satisfies the requirements to take a tip credit may use an employee's tips only:

1. as a partial credit against its minimum wage obligation to the tipped employee, and/or
2. in furtherance of a valid tip pool.

¹ In *Oregon Restaurant and Lodging Ass'n et al. v. Solis*, 948 F. Supp. 2d 1217 (D. Or. 2013), the U.S. District Court for the District of Oregon declared the Department's 2011 regulations that limit an employer's use of its employees' tips when the employer has not taken a tip credit against its minimum wage obligations to be invalid, and imposed injunctive relief. On February 23, 2016, the Court of Appeals for the Ninth Circuit reversed the judgment entered by the district court. See *Oregon Restaurant and Lodging Ass'n et al. v. Perez*, 816 F.3d 1080 (2016), *pet. for reh'g and reh'g en banc denied* (Sept. 6, 2016). Notwithstanding the Ninth Circuit's decision, the Department continues to be constrained by the injunctive relief entered by the district court until the Ninth Circuit issues its mandate, which formally notifies the district court of the court of appeals' decision. On September 13, 2016, the Ninth Circuit issued a Stay of the Mandate "until final disposition [of this litigation] by the Supreme Court." *Oregon Restaurant and Lodging Ass'n et al. v. Perez*, No. 13-35765 (9th Cir., Sept. 13, 2016).

For these reasons, the Department is currently prohibited from enforcing its tip retention requirements against the Oregon Restaurant and Lodging Association plaintiffs (which include several associations, one restaurant, and one individual) and members of the plaintiff associations that can demonstrate that they were a member on June 24, 2013. The plaintiff associations in the Oregon litigation were the National Restaurant Association, Washington Restaurant Association, Oregon Restaurant and Lodging Association, and Alaska Cabaret, Hotel, Restaurant, and Retailer Association. As a matter of enforcement policy, the Department decided that while the injunction is in place it will not enforce its tip retention requirements against any employer that has not taken a tip credit in jurisdictions within the Ninth Circuit. The Ninth Circuit has appellate jurisdiction over the states of California, Nevada, Washington, Oregon, Alaska, Idaho, Montana, Hawaii, and Arizona; Guam; and the Northern Mariana Islands.

Even if the employer does not take a tip credit, tips remain the property of the employee that received them and the employee cannot be required to turn over his or her tips to the employer. Similarly, the employer may not take the employee's tips to further an invalid tip pool, such as one that includes employees who do not customarily and regularly receive tips, like cooks, janitors, or dishwashers.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website:

<http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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