

Tips Anyone? The Department of Labor Proposed Changes to Tip Credits

On June 21, 2021, the U.S. Department of Labor (DOL) [announced](#) a Notice of Proposed Rulemaking to limit the amount of non-tip producing work that a tipped employee can perform when an employer is taking a tip credit. In other words, when an employee is working in a tipped occupation and the employee has performed a substantial amount of non-tipped labor (more than 20% or 30 consecutive minutes), the employer can no longer take a tip credit and must pay the full federal minimum wage to the worker. As background, the Fair Labor Standards Act (FLSA) currently allows employers with tipped employees to pay as little as \$2.13 per hour in direct wages, while taking a credit against the tips earned by the employee to make up the balance of the federal minimum wage, which is \$7.25 per hour. (Note, however, that many states have enacted higher minimum wage rates, including for tipped employees, and some states do not allow tip credits at all.) The DOL proposed rule also clarifies that employers may not take a tip credit for work that is not part of the tipped occupation. Work that is subject to the tip credit is work that must be part of the "tipped occupation," which includes labor that produces tips and labor that *directly supports* tip-producing work, so long as the employee does not perform it for a substantial amount of time—no more than 20% of all hours worked during the employee's workweek or exceeding 30 continuous minutes. If the employee works more than 20% of all hours worked during the workweek, or exceeds 30 continuous minutes on work *directly supporting* tip-producing work, the employee is no longer performing labor that is part of the tipped occupation. Examples of labor that *directly supports* an employee's tip producing work includes folding napkins or refilling salt and pepper shakers. The DOL has invited comments from the public on the proposed rule. Any comments must be submitted by August 23, 2021 at www.regulations.gov and will become a matter of public record. Employers with tipped employees and questions about any potential changes in applying tip credits should contact experienced counsel.

Authors



[Jill L. Ripke](#)

Senior Counsel

JRipke@perkinscoie.com [310.788.3260](tel:310.788.3260)

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