



## Tip Credits and Tip Pooling for Craft Breweries

*by Jon Hyman, Wickens Herzer Panza*

No employment law is more misunderstood and misapplied by employers than the federal wage and hour law, the Fair Labor Standards Act ("FLSA"). There are more than 8,000 federal FLSA lawsuits filed per year. Importantly, nearly one quarter of those lawsuits are filed against employers in the accommodation and food service industry, including craft breweries.

Craft breweries get themselves in legal trouble under the FLSA because of the special manner in which service industry employees are compensated.

Employees in traditionally tipped positions, including bartenders and servers in craft breweries, almost always rely on tips to supplement their wages. The FLSA has certain rules that permit the employer to benefit from those tips and allow non-tipped employees to participate in tipped wages. The FLSA permits employers to take a *tip credit* against their minimum wage obligation to tipped employees and permits non-tipped employees to participate in *tip pools*. Critically, both tip credits and tip pools have specific rules under the FLSA that an employer must follow to avoid significant and expensive liability.

### *What is a Tip Credit?*

Tip credits permit an employer to credit a portion of an employee's tips toward the employer obligation to pay minimum wage. The FLSA generally requires employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour (check your state's minimum wage, which may be higher). The FLSA allows employers of tipped employees to count a limited amount of the tips as a credit toward this federal minimum wage obligation. Employers may satisfy the federal minimum wage by paying a base hourly rate (a minimum of \$2.13) and accounting for the remainder (\$5.12) through earned tips. The employer must notify qualifying employees that their tips are being credited toward the minimum wage and employees must be able to retain all tips that they receive.

Each of the following factors must be met to claim a tip credit against a tipped employee's minimum wage,

1. The employee must regularly earn at least \$30 per month in tips.

2. The tip credit is only applied to hours worked that produce tips or directly support tip-producing work (e.g., clearing tables, wrapping silverware, washing glasses, etc.).
3. The time spent performing any directly supporting work does not comprise more than 20 percent of the hours worked during the employee's workweek, or does not occur for longer than 30 minutes at time.

If any of these factors are not satisfied, the employee must be paid the statutory minimum wage per hour worked.

### *What is a Tip Pooling?*

Tip pooling permits non-tipped employees to collect a portion of tips earned by tipped employees. Employees that do not regularly and customarily receive tips (dishwashers, cooks, brewers and brewery line workers) may participate in a tip pool, but only if the employer pays the tipped employees participating in that pool their full statutory minimum wage; an employer cannot take the tip credit if non-tipped workers participate in the tip pool. Additionally, employers, including managers and supervisors, are prohibited from participating in a tip pool or otherwise keeping employees' tips, regardless of whether the employer takes a tip credit. (Managers and supervisors may keep tips they receive from customers for services they directly and solely provide.)

If you are considering taking tip credits or implementing a tip pool, it is best first to consult with your friendly neighborhood craft brewing employment lawyer. Compliance on the front end is *always* less painful and less expensive than litigation on the back end.



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