



**FLSA2025-03**

September 30, 2025

Dear **Name\***:

This is in response to your letter requesting an opinion concerning whether an employer may include “front-of-house” oyster shuckers in a restaurant’s tip pool with servers for whom the employer takes a tip credit under section 3(m)(2)(A) of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 203(m)(2)(A).

It is the Department of Labor’s Wage and Hour Division’s (WHD or “the Department”) opinion that the front-of-house oyster shuckers described in your letter are employed in a customarily and regularly tipped occupation based on the facts set forth below. Therefore, the employer may require employees for whom the employer takes a tip credit to share tips in a tip pool with the front-of-house oyster shuckers.

This opinion is based exclusively on the facts as presented below that you provided to the Department and may not apply to different facts in this or other situations.

## **BACKGROUND**

The employer is a seafood restaurant that requires its servers to contribute tips to a tip pool that includes other service team members who do not receive tips directly from the restaurant’s customers. We assume from the question presented that the employer takes a tip credit towards its federal minimum wage obligation for the servers.

The restaurant serves freshly shucked oysters from an oyster bar. The oyster bar is located at the restaurant’s bar where customers are seated and served. The oyster bar is visible and accessible to the dining room, and customers watch the front-of-house oyster shuckers—who are stationed behind the bar with the bartenders—perform their work. These front-of-house oyster shuckers do not initiate sales from customers directly; servers and bartenders take orders for oysters. However, the front-of-house oyster shuckers directly interact and engage with customers by sharing and detailing oyster offerings, making suggestions regarding the oyster offerings, and fielding other questions about the different options, while preparing the oysters for and in front of the customers. The employer includes these front-of-house oyster shuckers in the tip pool.

The restaurant also employs oyster shuckers whose workstation is in the restaurant’s kitchen, which is out of sight from the dining room and bar. These kitchen-based oyster shuckers do not have any direct contact with the restaurant’s customers, and the employer does not include them in the restaurant’s tip pool.

## GENERAL LEGAL PRINCIPLES

### *Tip Credit*

The FLSA generally requires covered employers to pay nonexempt employees no less than the federal minimum wage for all hours actually worked in a given workweek. *See* 29 U.S.C. § 206. However, section 3(m) of the FLSA permits an employer to satisfy a portion of its minimum wage obligation for tipped employees by taking a tip credit equal to the difference between the required direct wage<sup>1</sup> (which must be at least \$2.13 per hour) and the federal minimum wage (currently \$7.25). 29 U.S.C. § 203(m)(2)(A). Thus, the maximum FLSA tip credit that an employer can currently claim for the tips received under this section is \$5.12 per hour (\$7.25 minus the minimum required direct wage of \$2.13). Payment of a higher cash wage by the employer results in a lower tip credit and vice versa. If an employee's direct wage plus the tips the employee actually receives fall short of the federal minimum wage, the employer must supplement the difference to ensure the employee's wages equal at least \$7.25 per hour for the workweek. 29 U.S.C. § 203(m)(2)(A).

An employer may take a tip credit only for “tipped employees”—that is, employees engaged in occupations in which employees customarily and regularly receive a certain amount of tips. 29 U.S.C. § 203(t). To do so, the employer must inform the employee of the tip credit and meet other requirements. 29 U.S.C. § 203(m)(2)(A).

### *Tips Pools with Employees that Customarily and Regularly Receive Tips*

“When an employer takes a tip credit pursuant to section 3(m)(2)(A)[,] [t]he employer may require an employee for whom the employer takes a tip credit to contribute tips to a tip pool *only*” if the pool “is limited to employees who customarily and regularly receive tips[.]” 29 CFR 531.54(c)(1) (emphasis added); *see* 29 U.S.C. § 203(m)(2)(A) (explaining that when an employer takes a tip credit, the employee must “retain[.]” “all tips received,” “except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.”). A tip pool limited to employees who “customarily and regularly” receive tips is sometimes described as a “traditional” tip pool. 85 FR 86756 (Dec. 30, 2020).<sup>2</sup>

The legislative history of the 1974 Amendments to the FLSA indicates that “employees who customarily and regularly receive tips” include “e.g., waiters, bellhops, waitresses, counter men, busboys, service bartenders, etc.” S. Rep. No. 93-690, at 43 (1974). On the other hand, employees who do not customarily and regularly receive tips include “e.g., janitors, dishwashers, chefs, laundry room attendants, etc.” *Id.*; *see* [WHD Opinion Letter FLSA2009-12 \(Jan. 15, 2009\)](#)

---

<sup>1</sup> For clarity we have used the phrase “direct wage.” The statutory framework refers to a “cash wage” and provides a formula that results in an hourly rate.

<sup>2</sup> “An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip pooling arrangement that includes dishwashers, cooks,” or other non-managerial employees “who are not employed in an occupation in which employees customarily and regularly receive tips.” 29 CFR 531.54(d). This is sometimes called a “nontraditional” tip pool. 85 FR 86756. Employees also can voluntarily share tips with other non-managerial employees, but under no circumstances can any tips be shared with the employer, or managers or supervisors. *See* 29 U.S.C. § 203(m)(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.”).

(recognizing that the use of the words “e.g.” and “etc.” in this Senate Report indicates that these examples of occupations form a non-exhaustive list).

And, importantly, courts have recognized that “sufficient[] interact[ion] with customers” and whether the employee is engaged in customer service functions are two important factors to help courts decide whether an employee customarily and regularly received tips. *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 301-2 (6th Cir. 1998) (holding that certain employees who derived their tip income solely from the tip pool were employees who “customarily and regularly” received tips because they “sufficiently interact[ed] with customers”); *Montano v. Montrose Restaurant Associates Inc.*, 800 F.3d 186, 193 (5th Cir. 2015). Employees need not receive tips directly from customers to be lawfully included in a traditional tip pool under 3(m)(2)(A). See [WHD Opinion Letter FLSA2009-12 \(Jan. 15, 2009\)](#) (finding barbacks to be employees who customarily and regularly received tips even though barbacks receive tips exclusively from bartenders and not directly from customers).

It has been the Department’s longstanding position that counter person(s) who interact with and serve customers may participate in tip pools.<sup>3</sup> In addition to those occupations listed by Congress in the legislative history, WHD also recognized that itamae-sushi chefs or teppanyaki chefs, sommeliers, and hibachi waiter-chefs are occupations in which employees customarily and regularly receive tips. See [WHD Opinion Letter FLSA2008-18 \(Dec. 19, 2008\)](#) (explaining that itamae-sushi chefs and teppanyaki chefs provide customer service similar to counter persons); [WHD Opinion Letter FLSA-858NA \(June 28, 1985\)](#) (describing sommeliers who directly interact with customers, including explaining the wine list and serving wine to customers); [WHD Opinion Letter WHD-OL-1983-0006 \(Jan. 25, 1983\)](#) (describing hibachi waiter chefs who interact with customers by bringing food orders from the kitchen to the table and cooking it on hibachi grill in front of customers).

On the other hand, a dishwasher with minimal presence in the dining room who occasionally responds to customer requests when setting up glasses is not an employee who customarily and regularly receives tips. See WHD Opinion Letter, 1997 WL 998047 (Nov. 4, 1997) (explaining that a dishwasher is not an occupation that customarily and regularly receives tips).

The common thread in WHD’s guidance, *Kilgore*, and *Montano*, is that to be an individual who customarily and regularly receives tips, an employee must engage in service-related functions and have sufficient interaction with the customers who leave tips, a portion of which are subsequently contributed to a tip pool. Thus, an employee will typically not be considered to customarily and regularly receive tips if the employee’s work is not customer service oriented and the employee does not have sufficient interactions with customers. See *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 550-51 (6th Cir. 1999) (finding that a restaurant’s salad makers did not engage in customarily “tipped” occupation where salad preparers abstained from any direct interaction with diners, worked entirely outside view of restaurant patrons, and solely performed duties traditionally classified as food preparation or kitchen support work).

---

<sup>3</sup> See [WHD Opinion Letter WHD-OL-1983-0006 \(Jan. 25, 1983\)](#); [WHD Opinion Letter FLSA-858NA \(June 28, 1985\)](#); [WHD Opinion Letter FLSA2008-18 \(Dec. 19, 2008\)](#); [WHD Opinion Letter FLSA2009-12 \(Jan. 15, 2009\)](#); see also [WHD Field Operations Handbook § 30d08\(c\)\(1\)](#); see also S. Rep. No. 93-690, at 43 (1974).

## OPINION

The Department concludes that the front-of-house oyster shuckers described in your letter may be considered employees that customarily and regularly receive tips based on the facts set forth above. These employees may lawfully participate in a traditional tip pool with servers paid with a tip credit under section 3(m)(2)(A). As described in your letter, these front-of-house oyster shuckers directly service the customers by sharing and detailing oyster offerings to customers, making suggestions to customers regarding the oyster offerings, and fielding questions about the different options. This is similar to how sommeliers—an occupation that the Department has determined to be a customarily and regularly tipped occupation—explain the wine list to customers and provide expertise on wine pairings. [WHD Opinion Letter FLSA-858NA \(June 28, 1985\)](#). The front-of-house oyster shuckers also prepare the oysters in plain view of the restaurant's customers similar to a front-of-house itamae-sushi chef or Teppanyaki chef—additional occupations that the Department has determined to customarily and regularly receive tips. [WHD Opinion Letter FLSA2008-18 \(Dec. 19, 2008\)](#). Like sushi chefs, these front-of-house oyster shuckers are similar to counter persons who serve customers, and whom WHD has long regarded as employees who customarily and regularly receive tips. Because the front-of-house oyster shuckers are employees who customarily and regularly receive tips, the employer may require servers, for whom the employer takes a tip credit, to share tips in a pool with them.

Conversely, a dishwasher who occasionally shucks oysters and peels shrimp in a restaurant's kitchen, absent more, is not an employee that customarily and regularly receives tips because the dishwasher lacks sufficient interaction with the customers who leave tips, a portion of which are subsequently contributed to a tip pool. *See also Pedigo v. Austin Rumba, Inc.*, 722 F.Supp.2d 714, 732 (W.D. Tex. 2010) (explaining that dishwashers who occasionally shucked oysters and peeled shrimp did not “have more than minimal customer interaction”).

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Macy', with a stylized, flowing script.

James R. Macy  
Acting Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).** You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your request. This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of

the question presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This is an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.