



FLSA2021-4

January 15, 2021

Dear **Name***:

This letter responds to your request for an opinion concerning whether a restaurant may institute a tip pool under the Fair Labor Standards Act (FLSA) that includes both servers, for whom the employer takes a tip credit, as well as hosts and hostesses, for whom a tip credit is not taken. We cannot conclude based on the information you have provided that your hosts and hostesses are tipped employees who may participate in a traditional tip pool with employees for whom you take the tip credit. However, under new regulatory changes that will soon go into effect, they may participate in a nontraditional tip pool comprised of tipped and non-tipped employees so long as certain conditions described in more detail below are met.

BACKGROUND

Your restaurant company employs servers and hosts and hostesses. Servers are tipped by customers and the restaurant takes a tip credit for them. Hosts and hostesses do not receive tips directly from customers, are paid the minimum wage, and the restaurant does not claim a tip credit for them. The hosts and hostesses greet and seat guests, present menus to the guests and inform them of any specials, generally interact with guests, take names for the waitlist, run the floor plan, and clean and wipe down tables. The practice at the restaurant is to require servers to pay a percentage of the tips they receive to hosts and hostesses.

GENERAL LEGAL PRINCIPLES

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 that satisfies certain requirements 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 per hour) and the federal minimum wage. *Id.* § 203(m)(2)(A). Thus, the maximum tip credit that an employer can currently claim under the FLSA section 3(m) is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13). *See* Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs15.pdf>. An employer may take a tip credit only for “tipped employees” who work in occupations in which employees customarily and regularly receive tips. 29 U.S.C. § 203(t).

An employer that takes a tip credit may require an employee to contribute tips only to a traditional tip pool, that is, one limited to employees who customarily and regularly receive tips.

See 29 U.S.C. 203(m)(2)(A).¹ An employer requiring such a pool must abide by certain requirements: it must notify its employees of any required tip pool contribution amount, may take a tip credit for only the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purposes. 29 C.F.R. § 531.54.

Recent regulatory changes slated to soon go into effect, however, will now also allow an employer that does *not* take a section 3(m)(2)(A) tip credit to institute a nontraditional tip pool that includes employees in both tipped and non-tipped occupations. See Final Rule: Tip Regulations under the Fair Labor Standards Act, 85 Fed. Reg. 86756 (Dec. 30, 2020) (to be codified at 29 C.F.R. § 531.54(d)). The employer must pay the full minimum wage to both the tipped employees who contribute to the pool and the non-tipped employees who receive tips from the pool.

Regardless of whether an employer takes a tip credit, an employer may not participate in a tip pool and may not include supervisors and managers in that pool. *Id.*

OPINION

Because there is no information in your request from which we could conclude that your hosts and hostesses are employed in an occupation in which employees customarily and regularly receive tips, we cannot determine that your hosts and hostesses may participate in the same tip pool as the servers for whom you take a tip credit. However, as discussed in more detail below, your hosts and hostesses may participate in a nontraditional tip pool comprising tipped and non-tipped employees, so long as: (1) the pool does not include any managers or supervisors, and (2) you do not take a tip credit and pay the full minimum wage to both the tipped employees who contribute to the pool and the non-tipped employees who receive tips from the pool.

A. Your request does not include sufficient information to conclude that your hosts and hostesses may participate in a traditional tip pool.

Because your restaurant takes a tip credit for its servers, paying them \$2.13 per hour in cash wages, it may require the servers to contribute tips only to a traditional tip pool—that is, a pool limited to employees working in occupations that customarily and regularly receive tips. See 29 U.S.C. 203(m)(2)(A). The tip pool that you describe includes hosts and hostesses who receive a percentage of the servers' tips. This would be permissible only if your hosts and hostesses are employees who customarily and regularly receive tips.

The legislative history of the 1974 FLSA Amendments 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.* As the Wage and Hour Division (WHD) has previously recognized, the use of the words “*e.g.*” and “*etc.*” in this Senate Report indicates

¹ A tip pool is an arrangement whereby employees share tips—one employee gives a portion of a tip to another. WHD’s regulations limit only mandatory, not voluntary, tip pools. See, *e.g.*, 29 C.F.R. § 531.52. We assume that your request concerns a mandatory tip pool.

that the occupations in these two lists are examples, and that the lists are not meant to be exhaustive. See WHD Opinion Letter FLSA2009-12, 2009 WL 649014, at *2 (Jan. 15, 2009).

Hosts and hostesses are “not listed in the Senate Report as employees who customarily and regularly receive tips,” and the Department’s *Occupational Outlook Handbook* states that “[a]lthough some workers in [the food and beverage serving industry] earn tips, most get their earnings from hourly wages alone.” Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, Food and Beverage Serving and Related Workers, available at <https://www.bls.gov/OOH/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm> (visited October 29, 2020). These observations lend support to a conclusion that hosts and hostesses are not considered to be in a tipped occupation. However, WHD has explained that in most situations hosts and hostesses “may also be regarded as tipped employees,” when “it is demonstrated that hosts and hostesses in similar establishments in the area have received and are now receiving tips, either directly or from a tip pool.” WHD Opinion Letter, FLSA-900 (May 26, 1987). Here, although you note that in your operation servers share tips with hosts and hostesses, there is no information in your request showing that hosts and hostesses in similar establishments in your locality customarily and regularly receive tips.²

Accordingly, we cannot conclude based on the information you have provided that your hosts and hostesses are tipped employees who may participate in a traditional tip pool with employees for whom you take the tip credit.

B. Hosts and hostesses who are not tipped employees may participate in a nontraditional tip pool subject to certain conditions.

Although hosts and hostesses who are not tipped employees may not participate in a traditional tip pool with employees for whom you take a tip credit, WHD recently made regulatory changes that will soon go into effect that will allow you to create a nontraditional tip pool in which the hosts and hostesses who are not tipped employees could participate subject to certain restrictions.

In 2011, WHD revised its tip regulations to restrict mandatory tip pools to occupations that customarily and regularly receive tips, even if the employer did not take a tip credit. This regulatory change prompted multiple lawsuits addressing the Department’s authority under section 3(m) of the FLSA to regulate employers’ use of tips when they pay a direct cash wage of at least the federal minimum wage. See *Oregon Rest. & Lodging Ass’n et al. v. Perez et al.*, 816 F.3d 1080, 1090 (upholding the validity of the 2011 regulations), *reh’g & reh’g en banc denied*, 843 F.3d 355, 356 (9th Cir. 2016) (declining *en banc* review of the panel decision over the

² Although the Sixth Circuit has found that hosts and hostesses at a specific restaurant were tipped employees the hosts and hostesses in that case performed server-like duties such as refilling customers’ water glasses, providing complementary appetizers or drinks, and taking appetizer orders to customers, and the court heavily focused on whether they “sufficiently interact[ed] with customers.” *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 301 (6th Cir. 1998). While customer interaction may indeed be one factor in determining whether specific workers are tipped employees, customer interaction alone is not generally dispositive. For example, the decision does not consider whether hosts and hostesses in similar establishments in the locality customarily and regularly receive tips. WHD therefore declines to apply the conclusion reached in this case as applicable to all hosts and hostesses.

dissent of ten judges); *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163–64 (10th Cir. 2017) (holding that the Department lacked authority to regulate an employer’s use of tips when an employer does not take a tip credit).

On March 23, 2018, Congress amended section 3(m) of the FLSA in the Consolidated Appropriations Act of 2018 (CAA), Pub. L. No. 115-141, Div. S., Tit. XII, § 1201, 132 Stat. 348, 1148–49 (2018). Among other things, the CAA added a new section 3(m)(2)(B) to the FLSA which prohibits employers—whether or not they take a tip credit against their minimum wage obligations—from keeping their employees’ tips. In addition, Congress stated that those portions of the 2011 final rule that “are not addressed by section 3(m) . . . shall have no further force or effect until any future action taken by [the Department of Labor].” As WHD explained in a Field Assistance Bulletin (FAB) published shortly after the CAA amendments were enacted, that congressional suspension applied to those portions of WHD’s regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not claim a tip credit. *See* WHD FAB No. 2018-3, Amendment to FLSA Section 3(m) Included in Consolidated Appropriations Act, 2018 (Apr. 6, 2018), available at <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2018-3>.

In light of the CAA’s amendments to the FLSA, WHD introduced new changes to its tip regulations on December 30, 2020. *See* 85 Fed. Reg. 86756. Relevant here, the Final Rule amends § 531.54 to set forth the different tip pooling requirements for employers that take a tip credit and those that do not. Because the CAA did not substantively amend the statutory requirements under section 3(m)(2)(A) that apply to employers that take a tip credit, the Final Rule retains existing tip pooling requirements for such employers. However, the regulation now will also include § 531.54(d), which will allow an employer to require tipped employees who are paid at least the full minimum wage to contribute tips to a “nontraditional” pool that includes employees who are not employed in a tipped occupation.

Based on these regulatory changes, we conclude that your restaurant would be permitted to institute a nontraditional tip pool that includes hosts and hostesses who are not tipped employees. Importantly, you must pay the full minimum wage to both the tipped employees who contribute to the pool and the non-tipped employees who receive tips from the pool. This means that servers for whom you take the tip credit may not be required to participate in the same tip pool as your hosts and hostesses. Additionally, as with a traditional tip pool, none of your restaurant’s supervisors or managers may participate in that tip pool. A tip pool that fits these criteria would comply with 29 C.F.R. § 531.54(d).

CONCLUSION

For the reasons stated above, we cannot conclude based on the information you have provided that your hosts and hostesses are tipped employees who may participate in a traditional tip pool with employees for whom you take the tip credit. However, they will be able to participate in a nontraditional tip pool comprised of tipped and non-tipped employees, so long as: (1) the pool does not include any managers or supervisors and (2) you do not take a tip credit and you pay the full minimum wage to both the tipped employees who contribute to the pool and the non-tipped employees who receive tips from the pool.

This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the WHD is currently investigating or for use in any litigation that commenced prior to your request. This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink that reads "Cheryl M. Stanton". The signature is written in a cursive, flowing style.

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**