

**Member Question:** The 2018 Consolidated Appropriations Act (Public Law No. 115-141) (the “Act”) made changes to current tip pooling arrangements. Specifically, the Act provided: “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.” Many restaurants charge employees a service charge for tips received via a credit card. Does the “for any purpose” language of the Act change that and prohibit employers from deducted the service charge from employee tips?

**Ask An Attorney Response:**

The short answer is, no. Here is why. President Trump signed the Act on March 23, 2018. The Act is 878 pages long, but it’s Title XII (pages 801-802 in the attached link), that contains an easy-to-overlook section titled “Tipped Employees” that amended the Fair Labor Standards Act’s (FLSA) provision (section 3(m)) regarding tipping.

Before discussing the changes the Act made, here is what stays the same. The Fair Labor Standards Act requires employers to pay employees a minimum wage, which is currently \$7.25 at the federal level and \$8.30 at the state level. Under FLSA Section 3(m), however, employers may count up to \$5.12 per hour of employees’ tips against their total minimum wage obligation. Ohio allows employers to take a tip credit of 50%. This means employers may pay employees as little as \$4.15 an hour for 2018, as long as the employees earn enough in tips to bring their total hourly wage up to at least the state minimum.

The Department of Labor (“DOL”), in its rules and guidance materials, has consistently maintained that employers cannot take the “tip credit” if any tips are kept by the house, or if the employer requires employees to share tips with managers or employees who do not customarily and regularly receive at least \$30 per month in tips, e.g., “back of the house” staff such as dishwashers, cooks, bussers, etc. This has not changed.

The issue has been that no one knew whether the FLSA imposed any restrictions on tip pooling for employers who do not take the tip credit. The reason is that the added paragraph creates a new standard for tip pools in states where federal law (as opposed to a more restrictive state law) controls the payment of wages to tipped employees. The new law makes clear that, yes, employees in the back of the house can participate in tip pools in certain circumstances and, no, employers themselves cannot keep tips.

Specifically, the relevant new paragraph provides: “Any employer may not keep tips received by its employees for any purpose, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.” This new language applies to all employees, not simply “tipped employees” as before, meaning that a tip pool can apply to all, not just those regularly and customarily receiving tips, as long as they are paid at least minimum wage for each hour worked.

The new law allows employers to pool all tips collected and divide the proceeds among all employees in the establishment, regardless of whether they interacted directly with customers, as long as they are not supervisors or managers and all other applicable requirements are met.

Some states have laws that limit tip pools only to tipped employees with direct interactions with guests, or that impose more stringent requirements on tip pools. These state laws will take precedence over this new provision. Ohio is not one of them. As such, for those in Ohio, employers will be able to implement new tip pools that may change how their employees are paid, particularly the back of the house and managers/supervisors who formerly shared in tip pools.

**Impact on credit card service fees**

As the Act is being interpreted, the “for any purposes” language is not construed broad enough to prohibit employers from deducted the credit card service fee from employee tips. Look no further than where the money from the tips goes and you will see why. When a service fee is deducted from a tip that was charged to a credit card, the employers does not actually retain that money. Rather, the money is paid to the credit card company to process the charges and to allocate distributions. The DOL has been clear that employers can deduct this amount so long as the charge on the tip does not reduce the

employee's wage below the minimum wage. DOL Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act is on point and was revised in April 2018, after the March 2018 passage of the new law.

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