

## Fact Sheet #15A: Ownership of Tips Under the Fair Labor Standards Act (FLSA)

This fact sheet addresses ownership of tips by the employee under the FLSA.

**Tip Credit:** Section 3(m) of the [FLSA](#) permits an employer 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) and the federal minimum wage (currently \$7.25). Employers must provide oral or written notice to tipped employees of the use of the tip credit in advance. [29 C.F.R. § 531.59\(b\)](#). Employers using the tip credit must be able to show that tipped employees receive at least the minimum wage when direct wages and the tip credit amount are combined. If the employee's tips combined with the direct wages do not equal the minimum wage, the employer must make up the difference. For general information on tipped employees, please see [Fact Sheet #15: Tipped Employees Under the FLSA](#).

**2011 Final Rule:** The Department's tip credit regulations were updated effective May 5, 2011 to codify the Wage and Hour Division's (WHD) longstanding position that:

Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA.<sup>1</sup> The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

### [29 C.F.R. § 531.52.](#)

Under the regulation, an employer that satisfies the requirements to take a tip credit may use an employee's tips only:

1. as a partial credit against its minimum wage obligation to the tipped employee, and/or
2. in furtherance of a valid tip pool.

Even if the employer does not take a tip credit, tips remain the property of the employee that received them and the employee cannot be required to turn over his or her tips to the employer. Similarly, the

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<sup>1</sup> In *Oregon Restaurant and Lodging Ass'n et al. v. Solis*, -- F. Supp. 2d --, 2013 WL 2468298 (D. Or. 2013), the U.S. District Court for the District of Oregon declared the Department's 2011 regulations that limit an employer's use of its employees' tips when the employer has not taken a tip credit against its minimum wage obligations to be invalid. As a result of that decision and the judgment entered in that case, at least until the resolution of any appeal that may be taken in this case, the Department is prohibited against enforcing its tip retention requirements against plaintiffs (which include several associations, one restaurant, and one individual) and members of the plaintiff associations that can demonstrate that they were a member of one of the plaintiff associations in this litigation on June 24, 2013. The plaintiff associations in the Oregon litigation were the National Restaurant Association, Washington Restaurant Association, Oregon Restaurant and Lodging Association, and Alaska Cabaret, Hotel, Restaurant, and Retailer Association. As a matter of enforcement policy, the Department has decided that it will not enforce its tip retention requirements against any employer that has not taken a tip credit in jurisdictions within the Ninth Circuit while the federal government considers its options for appeal of the decision. The Ninth Circuit has appellate jurisdiction over the states of California, Nevada, Washington, Oregon, Alaska, Idaho, Montana, Hawaii, and Arizona; Guam; and the Northern Mariana Islands.

employer may not take the employee's tips to further an invalid tip pool, such as one that includes employees who do not customarily and regularly receive tips, like cooks, janitors, or dishwashers.

### **Where to Obtain Additional Information**

**For additional information, visit our Wage and Hour Division Website:**

**<http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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