

DOL's Proposed Rule on Tipped Workers: Legalizing Wage Theft in Tipped Industries

DOL's long-held position, embodied in its guidance, opinion letters and in litigation, is that under the Fair Labor Standards Act (FLSA) 1974 amendments, tips are the property of workers who receive them, regardless of whether or not the employer pays a sub-minimum wage, or pays a wage of at least the federal or state minimum wage, whichever was applicable.¹ This position was finally codified in regulations issued by DOL in 2011.²

The National Restaurant Association (NRA) and its members have long wanted control over how, and to whom, tips are distributed. And they have sued DOL, challenging the 2011 regulations, claiming that if employers pay the full minimum wage, they should be able to essentially take workers tips and distribute them however they see fit, for example, not only to back of the house staff — but also to managers and owners. The likely outcome here isn't really "tip pooling," so much as "tip stealing."

To be clear, restaurant workers are not the only tipped workers in this country. Other occupations where workers customarily receive tips include, but are not limited to, delivery people, bellhops, concierges, valets and parking attendants, airport workers, and car wash workers. But the NRA and restaurants are the only ones challenging DOL's 2011 regulation and indeed, the NPRM had many details about the restaurant industry and why restaurant owners want more control over workers' tips, but makes no mention of other industries and how tip stealing will hurt those workers.

And though the NPRM provides examples of how restaurant employers **could and might** use pooled tips to compensate back of the house workers, it also talks about how the employer may use them to make capital improvements or investments on the backs of workers. Indeed, the proposed regulation contains no safeguards at all against an employer simply pocketing the tips and using them however it sees fit.

This proposed regulation is bad for the tipped workers who can now have their tips stolen by their employers, and it is bad for consumers who think that they are tipping the workers who serve them, but may be unknowingly lining the pockets of businesses at the expense of workers.

Endnotes

1. See DOL Amicus Brief in *Cumbie v. Woody Woo*, No. 08-35178 (9th Cir. 2009), [https://www.dol.gov/sol/media/briefs/cumbie\(A\)-4-29-2009.htm](https://www.dol.gov/sol/media/briefs/cumbie(A)-4-29-2009.htm).
2. The new tip credit regulations, which became effective on May 5, 2011, incorporate Wage and Hour's longstanding position that the 1974 amendments to the FLSA established that tips are the property of the employee, and that an employer can use its employees' tips only in the limited ways prescribed by section 3(m) even when the employer has not taken a tip credit against its minimum wage obligations. See 29 C.F.R. 531.52." https://www.dol.gov/whd/FieldBulletins/fab2012_2.htm.