

Labor and Employment Alert: The Ninth and Tenth Circuits Split on Tip Credits

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Under the federal Fair Labor Standards Act tip-credit provision, employers may use an employee's tips as a credit against the employee's minimum wage. So under the FLSA, tipped employees may be paid a reduced hourly wage of \$2.13 as long as they receive enough tips to bring them to the \$7.25 federal minimum wage. In 2011, the U.S. Department of Labor adopted a regulation stating that "tips are the property of the employee whether or not the employer has taken a tip credit." This means that an employer who pays a tipped employee more than the minimum wage may not retain any tips the employee received.

Recently, the Tenth Circuit Court of Appeals (which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) invalidated this regulation as "beyond the DOL's authority" to adopt. Last year, the Ninth Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) came to the exact opposite conclusion.

The Tenth Circuit

In *Marlow v. The New Food Guy, Inc. d/b/a Relish Catering*, the employees were paid significantly more than the \$7.25 federal minimum wage – \$12 per hour and \$18 per hour overtime. Relish Catering accepted tips from customers on their final bill but did not share those tips with the employees. The employee argued that the DOL's regulation required Relish Catering to turn to her a share of all tips paid by the customers. The Tenth Circuit rejected this argument: "An employer that pays its employees a set wage greater than the minimum wage does not violate the FLSA when it retains tips paid by customers."

The Court explained that the "clear text of the FLSA" restricts employers' use of tips "only when the employer uses tips received by the employee as a credit against the employee's minimum wage." And so, if the employer pays more than the minimum wage without regard to tips (as Relish Catering did here), "the FLSA does not restrict the

employer's use of tips." Relish Catering, therefore, was not required to turn over any of the customers' tips. The Court then held that the DOL had no authority to adopt its regulation concerning the ownership of tips. The fact that the FLSA is "silent" about the ownership of tips when the employer is not taking a tip credit did not create statutory ambiguity or a "gap" that the DOL was permitted to fill.

The Ninth Circuit

Previously, in *Oregon Restaurant & Lodging Ass'n v. Perez*, the Ninth Circuit (in a 2-1 decision) reached the opposite conclusion and upheld the DOL's regulation in two cases in which the employers did not take a tip credit against the minimum wage but required employees to participate in tip pools with both tipped and non-tipped employees. The Court held that the FLSA's "clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule." The Court then upheld the DOL's rule as "consistent with the FLSA's language, legislative history, and purpose."

Conclusion

In the Tenth Circuit, employers that pay tipped employees more than the minimum wage may retain employees' tips as a condition of employment without violating the FLSA. In the Ninth Circuit, however, employers must turn over those tips regardless of whether they pay minimum wage. A petition for certiorari was filed with the U.S. Supreme Court in January 2017 in the *Oregon Restaurant* case. The Court has not indicated whether it will hear the appeal, but given the clear conflict between the two Circuits, this appears to be a likely case for review. We will report on any developments. In the interim, contact your Vorys lawyer if you have questions about tipped employees.