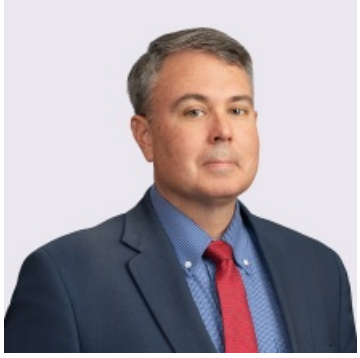
Legal Update Article

Tipping in New Jersey: Proposed Regulations to Affect All Employers Utilizing Tip Credits

By James M. McDonnell & Justin B. Cutlip

January 7, 2020

Meet the Authors



James M. McDonnell
Principal
908-795-5208
James.McDonnell@jacksonlewis.com

Justin B. Cutlip
Of Counsel
908-795-5136
Justin.Cutlip@jacksonlewis.com

Related Services

Hospitality
Wage and Hour

The New Jersey Department of Labor (NJDOL) has proposed regulations revising the current definition of "wages" to expressly exclude "any gratuities received" by a tipped employee from the employer's obligations under the state's hourly minimum wage requirement.

The proposed regulations also define exceptions to the state's minimum wage increases (*e.g.,* for seasonal employers, small employers, and training wages) through 2024 and identify the minimum rates across all potential definitions of "employment."

The proposed regulations appear to depart significantly from federal law, and trends, on the lawful implementation or use of a tip credit against the minimum wage.

Definition of Tipped Employee and Cash Minimum

The proposed regulations follow federal law. They define a "tipped employee" to include "any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips."

The NJDOL proposal sets out the cash minimum an employer must pay an employee to lawfully utilize the tip credit against the planned state minimum wage increases over the next several years. (See chart.)

If the employer does not utilize the tip credit, even where an employee receives $30 or more a month in gratuities, the employer must pay the applicable minimum wage. The regulations expressly apply the tip credit on a workweek basis.

Tips, Tip Pools, Service Charges, Credit Card Recoupment

Much like its federal counterpart, New Jersey regulations define "tips" as the property of the employee. The proposed regulations explain that, to qualify as a gratuity, the customer must determine whether to pay a tip and its amount. They exclude compulsory service charges or negotiated gratuities (*e.g.,* between a hotel and a customer for a banquet) from the definition of a tip.

Since the tip is the property of the employee, the proposed regulations prohibit an employer from utilizing any portion of the gratuity for any reason other than wages or in furtherance of a tip pooling arrangement. The prohibition expressly extends to an employer using a portion of the gratuity to offset any credit or debit card processing fees; the employer must pay to convert a customer's credit or debit card tip into an employee's wages at no cost to the employee.

The proposed regulations also acknowledge the lawfulness of voluntary tip pooling arrangements. Under such circumstances, the employer would have an affirmative obligation to notify employees of the required tip pool contributions. The employer may only take a tip credit in the amount an individual employee receives through the pool.

Revival of 80/20 Rule

The Code of Federal Regulations (29 C.F.R. § 541.56(e)) gives examples of when a tipped employee may perform non-tipped duties (*e.g.,* setting tables, toasting bread, and making coffee) that are related to the tipped functions and the employer may lawfully utilize the tip credit against the minimum wage, even though the employee did not dedicate 100 percent of his or her workweek to tipped duties.

In 1988, a U.S. Department of Labor (DOL) Field Operations Handbook (FOH) enforcement policy under the Fair Labor Standards Act (FLSA) provided that employers may pay the lower cash wage applicable to tipped employees if the employee spends at least 80 percent of her or his workweek hours on tipped duties and functions (*i.e.,* providing waiter service that generates the tip). This became known as the "80/20 Rule." The enforcement policy led to confusion, administrative difficulties for employers, and litigation.

On October 8, 2019, the DOL proposed rules to eliminate the "80/20 Rule." (See our article, DOL Proposes FLSA Regulations to Close Door on '80/20' Rule, Implement Tip Pooling Amendments.) The DOL's proposal would permit the employer to utilize the tip credit for hours a tipped employee spends performing non-tipped duties related to tipped duties. Moreover, they define and include examples of "related" non-tipped duties (*e.g.,* setting tables, toasting bread, and making coffee). They also refer individuals to the Occupational Information Network for additional information on whether a function that qualifies as a non-tipped duty is related to a tip-producing occupation. However, they omit any specific proportional duties requirement (*i.e.,* 80/20) and, as a matter of policy, the DOL no longer enforces the 80/20 Rule.

The NJDOL's proposed regulations adopt the very 80/20 rule the DOL abandoned because of the confusion and burden they put on employers. The proposed regulations state, "[W]here a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties." If implemented, this rule may lead to the same confusion, administrative burdens for employers, and litigation that led to the federal abandonment of the rule.

Next

A public hearing on New Jersey's proposed regulations is scheduled for February 26, 2020, and comments will be accepted through April 3, 2020.

Employers who employ tipped employees should carefully review their current practices against the proposed regulations and determine their potential business impact. Jackson Lewis attorneys will continue to monitor developments and provide updates on the proposal. Please contact us with any questions.