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DC Employers Must Comply with New Obligations To Continue Taking a Tip Credit

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The Tipped Wage Workers Fairness Amendment Act of 2018 (TWWFAA) allows employers in the District of Columbia to continue to take a tip credit towards their minimum wage obligations to qualifying employees and instead pay a cash wage rate of \$3.89 per hour. Nevertheless, there's a big catch – employers that take a tip credit must comply with several new and burdensome training, reporting and notice requirements. Failure to follow these new requirements results in the loss of the tip credit.

Background

For several months in 2018, the tip credit appeared to be on the verge of extinction in DC. In June 2018, voters passed a referendum (Initiative 77) that eliminated the tip credit by gradually increasing the tipped minimum wage until it was equal to the standard minimum wage. (See our previous [Alert](#).) However, in October 2018, the DC Council passed the TWWFAA, which repeals Initiative 77 and allows employers to continue to take a tip credit towards their minimum wage obligations to qualifying employees and instead pay a cash wage rate of \$3.89 per hour. The TWWFAA became effective on Dec. 13, 2018.

Training, Policy and Reporting Requirements Concerning Sexual Harassment

The TWWFAA directs the DC Office of Human Rights (OHR) to create a sexual harassment prevention training course for employees or to certify a list of providers who can provide approved training. The training must include, at a minimum, instruction on how to respond to, intervene in, and prevent sexual harassment by coworkers, management, and patrons. Other content requirements will be forthcoming from the OHR. For employers taking the

tip credit, all employees must attend training within 90 days of hire unless they have attended training within the preceding two years. All managers, owners, and operators must attend training every two years. For non-managerial employees, owners and operators, training may be done in person or online; managers must attend in-person training.

Employers must submit certifications to the OHR within 30 days of the completion of training, and OHR will keep the certifications on file for at least five years.

In addition, no later than July 1, 2019, employers taking a tip credit must file with the OHR a policy outlining how employees can report sexual harassment to management and the OHR. Employers must also distribute their sexual harassment policies to employees and post the policies in a conspicuous place. Beginning immediately, employers must document instances of sexual harassment reported to management, including whether the alleged harasser was a manager, owner, operator, or non-managerial employee. By July 1, 2019, and annually thereafter, employers must report the number of reported instances of sexual harassment to OHR and the number of alleged harassers who were managers, owners, operators, or non-managerial employees.

If an employer fails to comply with these training and reporting requirements, the employer may not take a tip credit towards its minimum wage obligations and instead must pay all employees at least the regular minimum wage for all hours worked.

Additional Training Requirements for Managers, Owners and Operators

Managers, owners, and operators of employers who take a tip credit toward their minimum wage obligations must attend yearly training on the requirements of the Minimum Wage Act. As with the sexual harassment prevention training requirement, managers must attend in-person, while owners and operators may attend in-person or online. Employers must also make the training available to other employees (at their option), either in-person or online, and must certify by the end of each year that the foregoing training requirements have been fulfilled.

Payroll Processing, Wage Statement and Wage Reporting Requirements

Beginning Jan. 1, 2020, employers taking a tip credit (other than hotels) must use a third-party payroll processor to prepare their payroll. Beginning immediately, with each payment of wages, each employee must be given a wage statement (pay stub) showing:

- date of payment;
- gross wages;
- deductions and additions, with a separate line for gratuities;
- net wages;
- hours worked; and
- the employee's tip declaration form for the period, delineating between cash tips and credit card tips.

For the remainder of 2019, employers taking a tip credit must file quarterly reports certifying that each employee was paid at least the required minimum wage, including gratuities. The report must contain:

- the name of each employee;
- the number of hours each employee worked during each week;
- the total pay, including gratuities, received by each employee for each week;
- the average weekly wage for each employee; and
- the employer's current tip-out policy that was supplied to its payroll processor for calculation of wages.

Beginning Jan. 1, 2020, the third-party payroll processor must submit the required quarterly reports, except that hotels may continue to self-report. The TWWFAA directs the Mayor's office to create a website for the submission of these quarterly reports and for employees to report violations.

Again, should an employer (or its third party payroll processor) fail to comply with these reporting and wage statement requirements, the employer cannot take a tip credit with respect to any DC employee.

Notice Requirements

Employers may not take a tip credit towards their minimum wage obligations unless employees receive notice of the following:

- the provisions of subsection 4(f) of the Minimum Wage Act;
- if tips are not shared, that each employee shall retain all of his or her tips;
- if tips are shared, the employer's tip-sharing policy; and
- the percentage by which tips may be reduced for credit card fees.

In addition, the employer must post its tip-sharing policy. Further, any revisions to an employers' tip-sharing policy must be provided to employees before implementation.

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