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## New Labor Regulation Would Allow Nontraditional Tip Pooling

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The U.S. Department of Labor has proposed a new rule to allow employers who do not take a tip credit to establish “nontraditional” tip pools that include back-of-the-house employees and others who are not traditionally tipped. Other proposed rulemaking would clarify who qualifies as a “manager” or “supervisor” and what duties qualify as “related” to a tip-producing occupation.

Notably, state and municipal laws may prohibit the tip pooling practices advanced by the DOL’s proposed rule. Employers should make it a priority to determine whether any state or local laws where they operate may affect their tip pooling capacities.

### Nontraditional Tip Pools

Employers who take a tip credit may require tip pooling only among traditionally tipped employees, such as servers, bartenders and the like. The proposed rule would apply only to employers who pay employees at least the full federal minimum wage rate—currently \$7.25 per hour—and do not take a tip credit against their minimum wage obligations. Those employers may establish tip pools where traditionally tipped employees are required to contribute their tips to a pool that distributes a share to employees not traditionally tipped, including back-of-the-house restaurant workers such as dishwashers and cooks. Existing recordkeeping requirements for traditionally

tipped employees and traditional tip pools would be extended accordingly.

Under the new rule, as under existing regulations, employers may not keep any tips and may not mandate or allow “managers” or “supervisors” to participate in any tip pool. This applies equally to traditional and nontraditional tip pools.

### Updated Definition of “Managers” and “Supervisors”

In reinforcing the longstanding rule excluding managers and supervisors from tip pools, the DOL clarified who qualifies and is thus excluded. The terms “manager” and “supervisor” are coextensive and mean: (i) any employee who owns at least 20% of the business and is actively engaged in the management of the business; and (ii) any employee whose duties otherwise match the duties of an “executive employee” as defined for purposes of overtime exemptions. To qualify as an executive and thus a manager or supervisor, an employee must:

- Have as his or her primary duty the management of the business or a customarily recognized subdivision;
- Customarily and regularly direct the work of at least two other employees; and
- Have authority to hire/fire other employees or to make suggestions and recommendations given particular

weight as to hiring, firing, advancement, promotion, etc. of other employees.

### **Duties “Related” to a Tip-Producing Occupation**

Under federal law, an employer may only take a tip credit for time an employee spends in a tip-producing occupation. That time includes both tip-producing duties and non-tip-producing duties so long as the latter are “related” to the tip-producing occupation. Currently, the regulations give as examples of “related” duties “time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses.” For counter personnel, the regulations even allow a rotation as a short order cook.

The proposed regulations would both expand and limit the universe of “related” duties. The duties listed above would be continue to be deemed “related,” but any duties not specifically listed would only qualify as “related” if they are listed in the DOL’s description for a given position on its [O\\*NET website](#). For “waiters and waitresses,” for example, the description lists twenty-five tasks, including some limited food preparation. Any duty not listed in the O\*NET description would not qualify as “related.”

### **How Employers Are Affected**

For all of the foregoing proposed rule changes, please note that applicable state law may still be more burdensome than federal law. For example, New York law prohibits front-of-house employees from sharing tips with back-of-house employees irrespective of whether a tip credit is taken. Indeed, these proposed rules promulgated by the DOL will not have any impact on New York employers as state law continues to prohibit the activities that the proposed rules permit. Accordingly, employers should consult with counsel to determine

whether the states and municipalities in which they operate prevent the tip pools that these proposed regulations would permit.

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