

Tip Credit Laws Made Clear:

Get The Benefits For Your Bottom Line!



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2012: Mario Batali settles wage class action for \$5.25 million dollars



2012: East Japanese Restaurant in NYC settles wage class action for \$1.25 million



2010: Bobby Flay's Bold Food LLC settles wage class action for \$800,000



**Employees filed 1562 FLSA suits
in 1998.**

**By 2012, employees filed 7764
wage suits.**

Overview

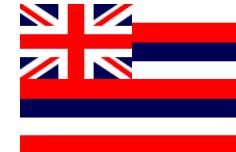
- ◆ Interaction of State and Federal Law
- ◆ Federal and State Tip Credit Calculation
- ◆ Mandatory Service Charges
- ◆ Tip Pooling Arrangements
- ◆ Credit Card charges
- ◆ Recordkeeping
- ◆ Enforcement



Tip Credit: Federal vs. Hawaii Law

- ◆ Different requirements exist under federal and state wage and hour laws.
- ◆ Hawaii employers must apply the state or federal law that is **more beneficial to employees**. Federal FLSA requirements establish minimum requirements only – states are free to set more stringent requirements.

Federal vs. Hawaii Law

- ◆ When calculating **amount** of tip credit, use method under **Hawaii law**. 
BUT
- ◆ You must comply with **Federal notice requirements** to tipped employees.
- ◆ Federal law determines which employees can participate in **mandatory** tip pool.



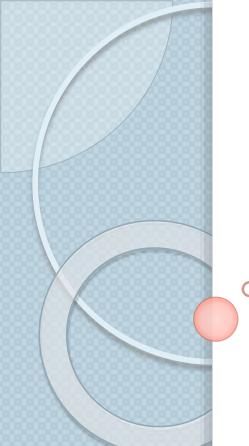
What is a “Tip Credit”?

- ◆ Employers must pay minimum wage of \$7.25 per hour (current minimum wage under state and federal law)
- ◆ However, employers can pay **lower** wage to tipped employees who receive a specific minimum amount of tips during the work week.
- ◆ Employers benefit from a “tip credit” against the minimum wage

Federal Tip Credit Requirements

- ◆ Direct wage (payment from employer to worker) of **\$2.13** per hour
- ◆ Tips plus direct wages of \$2.13/hr must at least result in minimum wage of \$7.25 per hour for workweek (employee must average \$5.12/hr in tips over workweek)
- ◆ Employee must customarily receive \$30/month in tips





Federal Notice Requirements (Apr. 2011)

1. Your wages will be subject to a “tip credit” as permitted by state and federal law.
2. You will be paid a direct wage of at least _____ per hour.
3. The employer will be taking a tip credit of _____ against the employer’s minimum wage obligation, but the tip credit taken cannot be greater than the tips you actually receive.
4. All tips received by tipped employees will be retained by the employee except in the case of a valid tip pooling arrangement.

Federal Notice Requirements (Apr. 2011)

5. The tip credit shall not apply to any employee who has not been informed of these requirements.
6. If the employer requires participation in a tip pool, employee must be told:
 - The required contribution amount (i.e. 20% of tips)
 - The employer will only take a tip credit against the minimum wage for the amount of tips ultimately kept by the employee.

Federal Notice Requirements (Apr. 2011)

- ◆ Federal notice of tip credit can be oral. However, Hawaii labor regulations require that employees be informed **in writing** that employer is taking tip credit towards payment of minimum wage.
- ◆ Provide written notice that tip credit will be taken **before** taking tip credit for any employee

Hawaii Tip Credit Requirements

- ◆ Must inform employee in writing at time of hiring or transfer into tipped position that tip credit will be taken.
- ◆ Employee must “customarily and regularly” receive at least \$20 per month in tips (actually **\$30** per month because of FLSA)

Hawaii Tip Credit

- ◆ Employers can take a **tip credit of 25¢** per hour against the required minimum wage (currently \$7.25), so long as the tips retained by the employee plus direct wages paid by the employer equal at least 50¢ above Hawaii minimum wage (i.e. \$7.75)
 - ▶ **You must pay tipped employees no less than \$7.00 per hour**
 - ▶ **Employee must make at least 75 cents/hour in tips**

Hawaii Tip Credit

- Tip credit is calculated on “**workweek**” basis
 - ◆ If combination of tips plus direct wage does not average to \$7.75/hr. for workweek, employer must pay direct wages to employee to make up difference.
 - ◆ Workweek is 168 hour period (7×24) established by employer (e.g., 12:00 am Sunday to 11:59 p.m. Saturday or similar)

Hawaii Tip Credit

2013 Legislative Session

- ◆ Tip credit was last increased from 20¢ to current 25¢ in 2001
- ◆ 2013 Legislature considered increase in tip credit to 35¢ (House) or \$2.00 (Senate), tied to proposal to increase minimum wage.
- ◆ Not passed

Hawaii Tip Credit - Calculation

- Example:

Kimo works **10 hours** in Week 1. Direct wages must be at least $10 \times \$7.00 = \70 .

Minimum tips to qualify for tip credit = $10 \times \$0.75 = \underline{\$7.50}$
(Total \$77.50 wages + tips)

Kimo works **40 hours** in Week 2.

Direct wages = $40 \times \$7.00 = \280

Minimum tips to qualify for tip credit = $40 \times \$0.75 = \30
(Total \$310 wages + tips)

NOTE: If Kimo only made \$29 in tips for Week 2, employer must pay at least \$281 (vs. \$280) in direct wages.

Overtime Calculation

- ◆ For non-tipped employees, OT wages for hours worked beyond 40 per week are calculated by multiplying regular rate of pay times 1.5.
- ◆ For tip credit employees, OT wages for hours over 40/wk is calculated as follows:

(Minimum wage) × (1.5) - (tip credit taken)
= (\$7.25 × 1.5) - \$0.25 = \$10.88 - \$0.25 = 10.63
= **You must pay direct wage of at least \$10.63 for hours worked beyond 40 in week**
- ◆ During overtime weeks, an employee must also average at least 75 cents/hr. in tips for all hours worked in order to use tip credit

Hawaii OT Calculation - Example

Example:

Shelly worked 47 hours this workweek.

Minimum Direct Wage for 40 hrs = $40 \times \$7 = \280

Minimum DW for 7 OT hrs = $7 \times \$10.63 = \74.41

Total DW including OT pay = **\$354.41**

Minimum tips for 47 hrs = $47 \times \$.75 = \underline{\$35.25}$

Minimum DW + tips = **354.41 + 35.25 = \$389.66**

(NOTE: If Shelly received less than \$35.25 in tips for workweek, employer must make up difference by paying more in direct wages.)

No Tip Credit For Service Charges

- ◆ Under federal and Hawaii law, mandatory service charges to customers are **not** considered “tips,” because not voluntarily given to employees.
- ◆ **You cannot count mandatory service charges towards tip credit** (even if you distribute service charge to workers).
- ◆ If mandatory service charges are the worker’s only source of “tips,” then you **cannot** take a tip credit for that worker.

No Tip Credit For Service Charges

Example:

You assess mandatory service charge of 18%, and you distribute entire amount to waitstaff. Customer Sheila E. has a bill of \$100 and she leaves a 20% tip. (\$20) which goes to Sandra, her waitress.

You can count only the additional \$2.00 (2%) towards the 75¢ per hour which Sandra must receive in tips to be eligible for tip credit.

Mandatory Service Charges- Disclosure

Under Hawaii law, if a hotel or restaurant applies a **mandatory** charge for food or beverage service, the establishment must either:

- I. **Distribute** the entire charge to employees as tip income, **OR**
2. **Disclose** to customer that the service charge will be used for costs and expenses **other than** wages or tips.

Haw. Rev. Stat. 481B-14.

Employees with “Dual” Duties

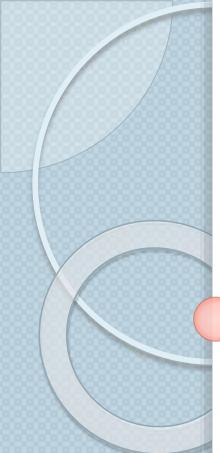
- ◆ If an employee performs both tipped work and non-tipped work for the employer, tip credit can only be taken for those **hours worked in the “tipped work.”**
- ◆ Ex.: Billy works as a waiter for 20 hours per week, but also works as a quality assurance person in the kitchen for 20 hours per week. Employer can only take tip credit for 20 hours worked as waitstaff (and he must average at least \$30/mo. in tips)

Limit on Non-Tipped Work

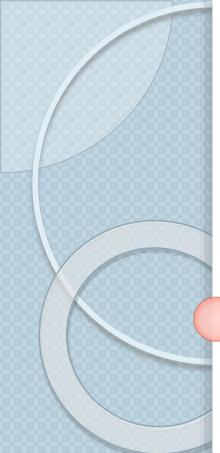
- ◆ **20 Percent Rule:** If employee in a single occupation (i.e. waitperson) spends more than **20 percent** of time doing “non-tipped” work (cleaning silverware, restocking, sweeping floors, dishwashing), then DOL’s position is that **tip credit cannot apply to hours spent in non-tipped work.** See Fast v. Applebee’s (8th Cir. 2011)



Summary of Tip Credit Requirements

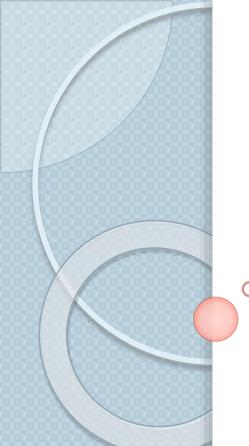
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1. Can apply tip credit to employees who “regularly and customarily” receive at least \$30/month in tips.
 2. Tips of \$30/month need not be directly given to tipped employee, but can come from valid tip pool.
 3. Tip credit may only be taken for “front of the house” employees who have regular customer contact (e.g., waitstaff, host/hostesses, bartenders, bussers, etc.)

Summary of Tip Credit Requirements

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- 4. Before applying the tip credit, you must provide written notice to the employee that tip credit will be taken against their minimum wage.
 - 5. In Hawaii, maximum tip credit is 25¢ (you pay direct wage of \$7.00 per hour) AND employee must at least 75¢ per hour in tips for work week. If employee averages less than 75¢/hour in tips per week, employer must make up difference by paying higher wage.
 - 6. Cannot count tips from “mandatory service charges” towards tip credit.

Summary of Tip Credit Requirements

- 7. If employee has 2 or more separate jobs, can only take tip credit for time spent in “tipped” job.
- 8. If tipped employee is asked to spend more than **20%** of time performing tasks generally performed by non-tipped employees (e.g. cleaning up, paperwork), cannot take tip credit for time spent in “non-tip” work

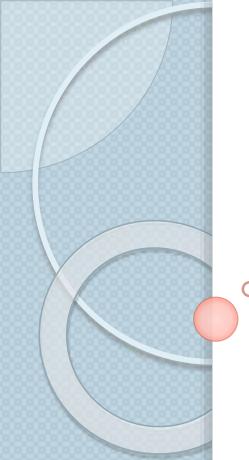


Tip Pooling and Tip Sharing

- Tips are considered the property of the employee who receives the tips (not employer)
- Only “**customarily and regularly**” tipped employees can participate in a valid tip pool
- Employers can only take a tip credit for employees who are part of a **valid tip pool**
- Employers/supervisors **cannot** participate in a tip pool arrangement
- Cannot take tip credit for “back of house” staff, **AND** back of house staff cannot participate in valid tip pool

Tips Are Property of Employee

- ◆ DOL contends tips are the **property of the employee**, and should **not be controlled** by employer
- ◆ Employees can establish purely **voluntary** tip pool and “tip out” whoever they want (no control by employer)
- ◆ However, strict rules apply to “mandatory” tip pool which is imposed or supervised by employer



Tips Are Property of Employee

- ◆ **Two Exceptions To “Tips Are Property of Employee” Rule:**

- ✓ Employers may use a portion of tips actually retained by an employee as a **tip credit**.
- ✓ Employers may establish a **mandatory tip pool** consisting purely of “**customarily tipped**” employees. Employers can take tip credits for participants in a valid tip pool.

Only “Front of the House” Qualifies

- ◆ Worker must regularly receive at least \$30 per month in tips (\$20 under HI law, but \$30 under FLSA)
- ◆ Must be in occupation which “**customarily and regularly**” receives tips.
- ◆ DOL determines “customary” tipped occupations with reference to custom in the industry and geographic area, BUT it always considers “back of the house” restaurant staff as ineligible for tip credit or valid tip pool

Tipped Employees Must Have Regular Customer Contact



CANNOT Require Tipping Out of Back of the House Staff



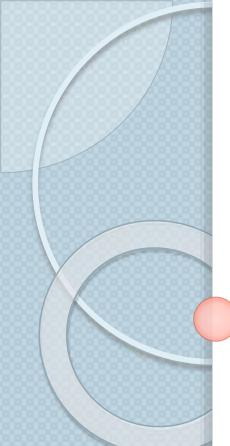
DOL Tipped Employees

Tip-Pool Eligible Employees:

- ✓ **YES:** Waitstaff, counter help, sushi chefs working in front of customers, buspersons, bar-backs, wine stewards, service bartenders, hosts and hostesses, doormen, porters.
- ✓ **NO:** Dishwashers, chefs, cooks, kitchen helpers/prep staff working “back of the house, janitors, laundry workers, and other employees with little regular customer contact.

Other Ineligible Employees

- Bouncers at a nightclub. *Stewart v. Coyote Ugly*, (M.D. Tenn. 2011)
- Quality assurance “expediters” who had little customer contact. *Roussell v. Brinker Intern.*, (5th Cir. 2011)
- “Boxmen” and “floormen” at a casino. (DOL Op. Ltr. 10-26-1989)



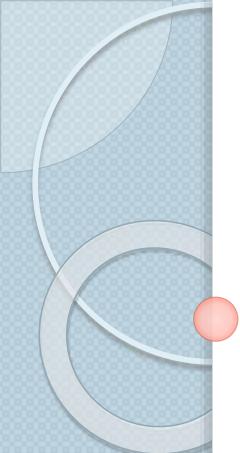
No Tips for Employers and Supervisors

- ◆ Workers cannot be required to surrender any portion of their tips to management or to supervisors.
- ◆ Supervisors cannot participate in tip pools where tip credit is taken for any employee (or else tip credit is invalid). See e.g. Gionfriddo v. Zink LLC, (4th Cir. 2011).

No Tips for Employers and Supervisors

Supervisors cannot participate in tip pool if they function as the representative/agent of the employer. “Employer” status is determined by the following non-exclusive factors:

- Authority to (or effectively recommend) hire, fire, or discipline
- Directs activities of other employees and controls work schedules or other conditions of employment
- Determines rate of pay
- Maintains employment records



No Tips for Employers and Supervisors

- June 2013 -New York Court of Appeals (interpreting New York law) ruled that shift supervisors at Starbucks could participate in tip sharing, but not Assistant Managers
- 2012- Mass. court decides that shift supervisors could not participate in tip pool, awards \$14 million
- Generally, if employee is only a “working lead” person, who sometimes direct work of co-workers (but does not have authority to discipline, hire, fire etc.) DOL is unlikely to find that he/she is a “supervisor”

Mandatory Tipping Out

- ◆ Cannot require employees to “tip out” co-workers who are not considered “tipped employees.”
Treated as **invalid tip pool**.
- ◆ Consequences of invalid tip pool:
 - Cannot take tip credit for any employees participating in pool
 - Employer may be required to **refund** tip-out amounts to employees contributing to tip pool

No Limit on Valid Tip Pool Contributions

- ◆ Under prior DOL guidance, mandatory tip pools where employees contributed more than 15% of their tips were considered excessive and unlawful.
- ◆ Courts have rejected DOL guidance
- ◆ New April 2011 amendments state that there is **no maximum** contribution percentage on valid mandatory tip pools (e.g., contribution to tip pool or tip-out requirement can be greater than 15%)

Tip Pools – Ninth Circuit Law

- DOL's position on “invalid” tip pools was **rejected** by Ninth Circuit in Cumbie v. Woody Woo, Inc., 2010 U.S.App. LEXIS 3686.
 - ◆ Waitstaff was paid Ore. minimum wage of \$7.95, when federal min. was \$5.85
 - ◆ Waitstaff required to contribute to tip pool where 55-70% of tips distributed to “back of the house” staff (cooks, chefs, dishwashers)
 - ◆ Cumbie claimed employer must pay her minimum wage plus all tips she actually received

Tip Pools – Ninth Circuit

- ◆ Ninth Circuit in *Cumbie*: **as long as employee is paid full minimum wage and employer does not take tip credit, it can require waitstaff to “tip out” back of the house staff.**
- ◆ Court held that restrictions on who can participate in mandatory tip pool only occurs **when the employer takes a tip credit**

Should I Follow DOL or Ninth Circuit?

- ◆ DOL disagrees with Cumbie decision, and has ordered investigators to ignore Cumbie. DOL Field Bulletin 2012-2 (Feb. 29, 2012)
- ◆ If you follow Cumbie and are cited/audited by DOL, you can only win if you file court appeal.
- ◆ Attorneys fees for court appeal can easily reach \$70,000 or more

Should I Follow DOL or Ninth Circuit?

BUT

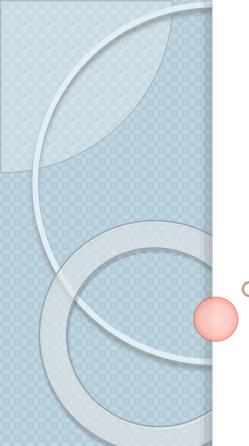
- ◆ Oregon federal district court in Oregon Restaurant Assn v. Solis (D. Or. 2013) held that Cumbie was properly decided, and DOL rule is improper interpretation of statute.
- ◆ Oregon Rest. Assn: so long as employer does not take tip credit, employer can require waitstaff (and others receiving tips) to share tips with back of the house staff.

[Note: Supervisors can never participate in mandatory tip pool, regardless of whether tip credit is taken]



Summary: DOL Tip Pool Rules

- Give written notice of tip credit to employees
- Participants regularly receive at least \$30/mo. in tips.
- DOL Position: No participation by management, supervisors, or “back of house” employees in mandatory tip pool (**cannot** require tipping out of “back of the house” staff).
- 9th Circuit: Can allow “back of house” staff in tip pool if no tip credit is taken by employer



Tipping Out Alternatives

- ◆ Assess mandatory service charge (i.e. 18%) and do not take the tip credit (like “Chez Panisse”).
 - service charge are gross receipts
 - so long as entire service charge is distributed to employees, no disclaimer required
- ◆ Include “directed tip” on check for “back of the house” staff
- ◆ Purely voluntary tipping out of “back of house” staff

Credit Card Charges

- Credit card companies commonly charge 2-4% transaction fee.
- Employer can charge tipped employee with credit fee attributable to tip. -- I.E., if fee is 2%, employee receives 98% of tip.
- DOL: if processing results in delay of payment, employer must nevertheless pay charged tip amount (less processing fee) to employee for pay period in which tip given. Field Op. Manual, 30d05(b).



Credit Card Charges

- ◆ Where employer pays charged tip amount to employee and charge is never paid by credit card company, employer may recover uncollected tip already paid by payroll deduction or direct reimbursement.
- ◆ However, unlawful to recover “fronted” uncollectible charged tips if recovery would reduce employee’s direct wages plus tips for payperiod below \$7.75 per hour during week in which payroll deduction is made.

Wage Recordkeeping:

- ◆ Pay records must identify tipped employees by symbol or designation
- ◆ Record of weekly tips actually received by employee (e.g. retained by employee)
- ◆ Record of amount per pay period of direct wages plus tips received by employee
- ◆ Record of amount per hour taken as tip credit. If amount per hour changes from previous week, must report actual amount of tip credit in writing to EE.

IRS Recordkeeping

- Employees must provide you with “tip report” for each payroll period (IRS recommends Form 4070A, “Employee’s daily record of tips”)
- If total tips reported by employees at a “large” (more than 10 employees) establishment are less than 8% of gross receipts, employer must allocate difference (8% minus actual tip receipts) among employees and report on their W-2s (but should not withhold income tax or FICA on allocated amounts)

Enforcement of Wage Violations

Hawaii Law:

- ◆ DLIR can bring enforcement and collection action
- ◆ DLIR can seek injunction to stop further violations
- ◆ Willful violations are misdemeanors
- ◆ Employees can file suit. Willful violations can result in **2X** the amount of wages owed. Successful plaintiffs entitled to attorneys fees and costs.
- ◆ Statute of limitations period is 6 years after violation occurs.

Enforcement of Wage Violations

FLSA Enforcement:

- ◆ DOL can bring enforcement and collection action, seek injunctive relief.
- ◆ Criminal penalties and fine of up to \$10,000 for willful violations.
- ◆ Employees can file suits, including class actions. Willful violations result in **2X** the amount of wages owed. Successful plaintiffs entitled to attorneys fees and costs.
- ◆ Statute of limitations period is 2 yrs, 3 yrs for willful violation.



QUESTIONS ??

THANK YOU.

Hawaii Employers Council

