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Restaurant Owners Beware: Congress Amends FLSA's Tip Pooling Provision

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Congress has amended the tip pooling requirements in the Fair Labor Standards Act ("FLSA") to clarify that is illegal for employers to keep tips received by their employees, regardless of whether the employer uses the tip credit or pays their employees the full minimum wage. Additionally, for those employers who opt to pay the full minimum wage (and not use the tip credit), the amendment eliminates the restriction that prohibited employers from distributing money from a tip pool to employees who are not usually tipped (at least until further guidance is developed on this issue).

As such, the FLSA now allows employers to distribute tips via a tip pool to both tipped and non-tipped employees (such as cooks and dishwashers). However, employers are prohibited from paying any portion of the tip pool to owners, managers, or supervisors. The Department of Labor has issued guidance which states that it will use the "duties test" to determine if an employee is a manger or supervisor. Under the duties test, an individual will be considered a manager/supervisor if: his or her "primary duty is management of the enterprise in which the employee is employed;" if she or he "customarily and regularly directs the work of two or more other employees;" and if she or he is someone who "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees."

Employers who violate the FLSA amendment and permit supervisors to participate in tip pools face being assessed civil penalties and liquidated damages.

TAKEAWAY: Restaurant employers should review their tip pooling policies to ensure they are compliant with the recent amendment.

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