

HR COMPLIANCE OVERVIEW

Tip Regulations Under the Fair Labor Standards Act (FLSA)

In 2020 and 2021, the U.S. Department of Labor (DOL) completed a series of rulemakings to update its tipped worker regulations. These rulemakings addressed 2018 legislative amendments to section 3(m) and other sections of the Fair Labor Standards Act (FLSA).

The current regulations were adopted through the following three rulemakings:

- ✓ The DOL's 2020 tip final rule on Dec. 30, 2020 ([85 FR 86756](#));
- ✓ The DOL's civil money penalty (CMP) final rule on Sept. 24, 2021 ([86 FR 52973](#)), which modified parts of the 2020 tip final rule related to the assessment of CMPs; and
- ✓ The DOL's dual jobs final rule on Oct. 29, 2021 ([86 FR 60114](#)), which modified the dual jobs portion of the 2020 tip final rule.

This Compliance Overview provides a summary of the DOL's recent amendments to give employers a complete picture of the current federal rules for gratuities and tipped wages. It's important to note that state laws may impose additional requirements or limitations on employers.

LINKS AND RESOURCES

- DOL [Summary](#) of Tip Regulations Amendments
- [Tip Regulations Under the FLSA](#)
- [Dual Jobs: Definitions and Examples](#)

Highlights

The regulations adopted between 2020 and 2021 address:

- Tip pooling;
- Tips for managers and supervisors; and
- Dual jobs.

The final rules also include:

- Examples of dual jobs; and
- The required analysis for dual job situations to ensure compliance with the FLSA.

Enforcement

The DOL stated that it uses CMPs to help “ensure fair competition for responsible employers.”

The final rule restores the DOL's ability to impose penalties of up to \$1,100 per violation against employers for taking tips earned by their employees.

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Tip Credit

The FLSA allows employers to claim a tip credit when compensating tipped employees for tipped work. This credit allows employers to pay their tipped employees cash wages in the amount of the difference between the minimum wage rate and the tip credit.

When an employee's tips are insufficient to offset the tip credit, employers are required to ensure the employee is paid at least the minimum wage rate.

FLSA requirements for tipped wages apply to tipped employees. Tipped employees are those engaged in occupations in which they customarily and regularly receive more than \$30 a month in tips.

Tip Pooling

Current regulations also prohibit employers, managers and supervisors from receiving tips from—but not contributing tips to—employee tip pools.

However, if employers do not claim a tip credit (meaning they pay their tipped employees the full minimum wage rate instead of the tipped employee minimum wage rate), they may impose a tip pooling arrangement that includes employees who are not employed in occupations in which they customarily and regularly receive tips (e.g., dishwashers and cooks).

Tips for Managers and Supervisors

Current tip regulations prohibit managers and supervisors from keeping any portion of an employee's tips, regardless of whether their employer takes a tip credit. New language in the FLSA regulations clarifies that managers and supervisors may only keep the tips they receive directly from customers based on the services they directly and solely provide.

Tip-producing Work

Employers can claim the tip credit only for employees who perform tip-producing work. The DOL defines tip-producing work as “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips, along with any activities that ‘directly support’ tip-producing work.” Directly supporting work refers to work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work.

However, employers cannot use the tip credit for activities that directly support tip-producing work when employees perform these activities for “a substantial amount of time.” Current regulations define “a substantial amount of time” as:

- At least 20% of the hours in the workweek for which the employer has taken a tip credit; or
- A continuous period of time of at least 30 minutes.

Dual Jobs

The DOL recognizes that some employees routinely engage in both tipped and nontipped occupations. These are known as “dual job” situations. However, the DOL also recognizes there is a difference between employees with dual jobs and employees who incidentally engage in nontipped occupations, such as maintenance work and preparatory or closing activities.

The following are examples published by the DOL to help employers understand the analyses they need to perform to ensure compliance with the FLSA in dual job situations.

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Example #1: Sofia

Sofia works as a nail technician and works 40 hours a week (eight hours a day, five days a week) at a salon.

- **Tip-producing work:** Sofia's tip-producing work includes giving manicures and pedicures, and assisting her patrons to select the type of service.
- **Directly supporting work:** Between customers, Sofia cleans pedicure baths, her tools, and the floor of the salon. Sofia performs these tasks for no more than 20 minutes at a time and for no more than five hours per week.
- **Question:** When can Sofia's employer take a partial credit for the tips that Sofia receives against the payment of the full minimum wage and when must the employer pay a direct cash wage at least equal to the full minimum wage?
- **Answer:** Sofia's employer can take a tip credit for all 40 hours of her 40-hour workweek, because she performs only tip-producing work and a non-substantial amount of directly supporting work. Sofia's directly supporting work is not considered substantial because it does not exceed 30 minutes of continuous work or 20% (20% of 40 hours = 8 hours) of that part of the workweek in which Sofia is engaged in a tipped occupation. If the employer takes a tip credit, it must pay Sofia not less than \$2.13 per hour in cash wages and with tips, Sofia must still make at least \$7.25 per hour.

Example #2: Issa

Issa works as a bellhop and works 35 hours a week (seven hours a day, five days a week) at a hotel.

- **Tip-producing work:** Issa's tip-producing work includes assisting guests with their luggage.
- **Directly supporting work:** Between assisting guests, Issa rearranges the luggage storage area and keeps the lobby and entrance area of the hotel clean. Issa performs these tasks for no more than 20 minutes at a time and for no more than five hours per week.
- **Work that is neither tip-producing nor directly supporting:** The employer directs Issa to retrieve food trays from outside guest rooms throughout the hotel at the end of each bellhop shift. Issa spends 2.5 hours per week performing this task.
- **Question:** When can Issa's employer take a partial credit for the tips that Issa receives against the payment of full minimum wage and when must the employer pay a direct cash wage at least equal to the full minimum wage?
- **Answer:** Issa is engaged in a tipped occupation when she is working as a bellhop. The employer can take a tip credit for 32.5 hours of Issa's 35-hour workweek, because she performs the tip-producing work of assisting guests with luggage and a non-substantial amount of work that directly supports her tip-producing work as a bellhop. Issa's directly supporting work is not considered substantial because it does not exceed 30 minutes of continuous work or 20% (20% of 32.5 hours = 6.5 hours) of that part of the workweek in which Issa is engaged in a tipped occupation. Issa was not engaged in the tipped occupation of a bellhop when performing the work of retrieving trays from guest rooms, so Issa's employer must pay a direct cash wage at least equal to the minimum wage for the 2.5 hours when she performs that work.

Example #3: Janet

Janet works as a bartender and works 40 hours a week (eight hours a day, five days a week) at a pub.

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- **Tip-producing work:** Janet’s tip-producing work includes making and serving drinks, talking and serving food to customers at the bar, keeping the bar organized as she prepares drinks, and wiping down the surface of the bar where customers are sitting.
- **Directly supporting work:** For 90 minutes after the pub closes each night, Janet slices and pits fruit for drinks for the next day’s service, wipes down the bar and tables in the bar area, cleans bar glasses, arranges bottles in the bar, retrieves liquor and supplies, cleans ice coolers and bar mats, makes drink mixes, and vacuums under the tables in the bar area.
- **Question:** When can Janet’s employer take a partial credit for the tips that Janet receives against the payment of the full minimum wage and when must the employer pay a direct cash wage at least equal to the full minimum wage?
- **Answer:** Once Janet performs more than 30 continuous minutes of non-tipped directly supporting work, she is no longer engaged in her tipped occupation. Her employer must pay her a direct cash wage equal to at least the minimum wage for the time over 30 minutes when she performs directly supporting work, therefore Janet gets paid the full minimum wage for one hour per day, five hours total per work week. Janet’s employer can take a tip credit for the remaining 35 hours of her 40-hour workweek, because she performs only tip-producing work and a non-substantial amount of directly supporting work during those hours. Janet’s directly supporting work is not considered substantial because it does not exceed 30 minutes of continuous work or 20% (20% of 35 hours = 7 hours) of that part of the workweek in which Janet is engaged in a tipped occupation.

Example #4: Miguel

Miguel works as a server and works 30 hours a week (five hours a day, six days a week) at a restaurant.

- **Tip-producing work:** Miguel’s tip-producing work includes taking orders, making menu recommendations, serving food and drink, attending to customer spills, processing credit card and cash payments, and removing items on the table during the meal service.
- **Directly supporting work:** Miguel also refills salt and pepper shakers and condiment bottles, rolls silverware, folds napkins, and vacuums under tables in the dining area. Miguel performs these tasks for 30 minutes before and after his server shift, and also for no more than 30 continuous minutes during lulls in the table service, totaling nine hours per week.
- **Question:** When can Miguel’s employer take a partial credit for the tips that Miguel receives against the payment of the full minimum wage and when must the employer pay a direct cash wage at least equal to the full minimum wage?
- **Answer:** Since Miguel performs directly supporting work for nine hours per week, which is more than 20% (20% of 30 hours = 6 hours) of that part of the workweek in which Miguel is engaged in a tipped occupation, his employer must pay him a direct cash wage equal to at least the minimum wage for three hours of directly supporting work. Miguel’s employer can take a tip credit for 27 hours of Miguel’s 30-hour workweek.