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## ***Now Accepting Tips: DOL Proposed Rule on “Tip Regulations Under the Fair Labor Standards Act”***

On October 8, 2019, the U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) entitled “Tip Regulations Under the Fair Labor Standards Act.” The NPRM seeks to implement and refine the changes on tip pooling made by the Consolidated Appropriations Act (CAA) OF 2018. Most notably, it eliminates the 80/20 rule used to determine if an employer may incorporate an employee’s tips as part of their wages when the employee engages in both tipped and non-tipped duties. If adopted, the NPRM would greatly impact the hospitality industry by expanding the variety of employees who are permitted to participate in a tip pool.

Currently, with employees in areas that follow the federal minimum wage, a non-exempt employee is entitled to the federal minimum wage [\$7.25 an hour] when more than 20% of their work in a shift comprises of non-tipped duties. The FLSA permits an employee who receives a substantial amount of their compensation through tips to earn \$2.13 an hour [allowing the employer to take a \$5.12 tip credit].

The NPRM, if approved, would permit an employer to take a tip credit for any time an employee performs related, non-tipped duties. For the employer to use the tip credit, the employee must have performed the non-tipped duties at the same time they performed [or within a reasonable time before or after] their tipped duties. In the proposed rule, the DOL explained which non-tipped duties are related to a tip production job.

The NPRM would also allow employers who do not take a tip credit an opportunity to establish a tip pool that includes employees who are traditionally not tipped, such as dishwashers and cooks. The DOL, through this proposed regulation, continues to prohibit managers and supervisors from keeping the tips received by employees.

Originally, the CAA prohibited employers, managers or supervisors from keeping any portion of an employee’s tips regardless of whether they take a tip credit. The CAA’s prohibition applies to managers and supervisors who obtain tips directly or indirectly. However, the terms “manager” and “supervisor” were never defined in the Act. Accordingly, the NPRM proposes a “duties” test that can be used to determine if an

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employee should be deemed a manager or supervisor for purposes of the executive employee exemption.

Under the “duties” test for the executive employee exemption, the employee must meet the following requirements: (1) the employee’s primary duty must consist of managing the enterprise, a department, or a subdivision of the enterprise; (2) the employee must customarily and regularly direct the work of at least two other full-time employees; and (3) the employee must have the authority to hire or fire other employees or provide recommendations as to the hiring, firing, or any other employment status of other employees. Such recommendations must be given particular weight. If any employee satisfies the executive duties test, then that employee would be ineligible to receive any portion of an employee’s tips under any circumstances. On the other hand, if any employee does not satisfy the duties test, then that employee should not be considered a manager or supervisor for purposes of the Act, and **may** be able to receive tips.

An employee can also be deemed a supervisor or manager for purposes of the Act and therefore precluded from keeping tips if the employee owns at least 20% equity interest in the business and actively engage in management.

Lastly, the NPRM would also impose a recordkeeping requirement for employers that do not take a tip credit but still collect employees’ tips to operate a mandatory tip pool. The NPRM is very similar to the requirements outlined in the FLSA.

Until the NPRM passes, employers should continue to comply with the current federal rules and consider state and local wage and hour laws on tipped employees. For further insight on the proposed regulation, employers may refer to the NPRM Tip Regulations Under the Fair Labor Standards Act. If you have any questions about this proposed rule or any other wage and hour developments, please contact a Stokes Wagner attorney.

**Questions?** Contact Stokes Wagner.