

# Getting It Right: Implementing Tip Credits and Tip Pools

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For many years the Fair Labor Standards Act (FLSA) has permitted restaurants and other establishments to use gratuities and pool tips, satisfying a significant portion of its minimum wage obligations to employees. When the "tip credit" is misapplied, the employer loses, forfeiting any tip credit it received and paying the employees' full minimum wage and allows the employees to keep his or her tips. Listed below are the guidelines for "getting it right" and implementing correctly tip credits and tip pools.

1. **Only tipped employees qualify for the tip credit.** A "tipped employee" is one who customarily and regularly receives more than \$30 per month in tips. This means he or she receives tips from customers, and not from other employees or the restaurant. An employee is not a "tipped employee" simply because they participate in a tip pool or receives a portion of the restaurants tips.
2. **Do not share any part of the tip pool with any employee who is not a "tipped employee."** This means kitchen help, cooks, dishwashers, assistant managers, managers or custodial help may not participate in the tip pool. Neither should the tip pool include non-service bartenders who do not have regular interaction with customers, but only prepare drinks for the wait staff to serve to customers. Persons who should be in the tip pool are servers, buspersons, bartenders and hostpersons. If anyone who is not a "tipped employee" gets any part of the tips, the tip credit fails and the employer has to pay everyone the minimum wage for those periods when the tips were given to an improper employee.
3. **No managers or assistant managers should participate in a tip pool even for the time they may perform "tipped work."** Under the FLSA, tips cannot be shared with employees who are performing non-tipped work and tips cannot be shared with the employer. Managers and assistant managers often qualify under the FLSA as employers. A manager who sometimes runs the service bar or delivers food should not participate in the tip pool when performing those tasks.
4. **When an employee who is in a tipped position spends more than 20 percent of his or her time doing work incidental to that tipped position, they must be paid the full minimum cash wage for that time.** For example, Mary spends 25 percent of her time setting tables, sweeping floors, refilling condiments and washing glasses and the other 75 percent waiting on tables. She must be paid her full minimum wage for the 25 percent she is not serving tables.
5. **Remember the no percent rule for non-tipped work.** Sometimes an employee will perform both tipped work and non-tipped work during the same work week. There is a difference between "related tipped" work and "non-tipped" work. Related tipped work, as shown in #4, is work closely related or incidental to the primary tipped work an employee performs. A service bartender who stocks the bar is performing related tipped work under the 20 percent rule. But some work is not related to tipped work at all. For example, three days a week Mary waits tables and on the other

two she does only cleaning and custodial chores. For these later chores she must be paid at least her minimum wage regardless of the percentage of time she spends on these tasks. She may not participate in the tip pool for time she spends performing these chores.

6. **An employer can not use the tip credit or tip pool even with tipped employees unless it first informs those employees adequately that it is using the tip credit or tip pool.** This is very important. Many employers have perfectly executed the tip credits and pools yet lost the wage benefit when they could not prove they had adequately informed all tipped employees as to how they were being paid. Do not rely on the required wage hour postings. Every employee who may work in a tipped position or participate in a tip pool should first read and sign a written notice explaining the tip credit and tip pool process. This signed document should be placed in the employees personnel file.
7. **Not all of the wages paid to tipped employees can be from tips. Employers must pay, at a minimum, \$2.13 per hour as a cash wage.** The balance of the minimum wage of \$5.85 can be from tips; that is, up to \$3.72 per hour can qualify for the tip credit. Also, the tip credit does not relieve employers from paying the minimum wage to every employee. If for some reason in a given pay period, the tipped employees' \$2.13 hourly wage and their tips do not cover the minimum wage, the employer must make up the shortfall. Tipped employees must receive at least the minimum wage for every hour worked. This combination of the cash wage and the tip credit should be explained in the notice the employee signs before starting work.
8. **Many establishments include a 15 percent service charge with large parties or special events.** If this service charge is in lieu of tips the patrons would otherwise leave, a court will likely count it as a "tip" that must go to the employees and not the employer. This is a tricky area and employers should be very careful about declaring 15 or 18 percent service charges as belonging to the employer.

It is the employer's burden of proof to show that it has properly notified employees and applied the tip credits correctly. Every employer must maintain accurate time records for all its employees, including "tipped" employees. Careful record keeping, proper notification and explanation to employees, and keeping all the tips with the tipped employees will serve as the best protection against costly legal challenges should they arise.