

Tips For Avoiding Litigation

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The Fair Labor Standards Act (FLSA) has become a popular tool for the plaintiff's bar. The FLSA is extremely technical and, consequently, it's very easy for even the most conscientious employers to violate it. The penalties for doing so can be severe, particularly because the FLSA permits employees to band together and sue their employers in what is referred to as a "collective action." The stakes in FLSA collective action litigation are usually quite high.



The distinction between tipped and nontipped work has recently become the subject of considerable litigation such as the Ervin case against Outback Steakhouse. A group of Outback's servers sued their employer, alleging that the employer failed to pay tipped workers the full minimum wage for nontip-producing work. Like a number of restaurants, Outback would use tip credit employees to perform nontipped work.

The FLSA sets the federal minimum wage at \$7.25 an hour, although where an employee is covered by both state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages. The FLSA contains a "tip credit" that allows an employer to subtract an employee's tips from the minimum wage calculation. An employer is only required to pay a fraction of the minimum wage (\$2.13 an hour) to a tipped employee, so long as the employee's wages and tips equal at least the minimum wage.

The FLSA defines a "tipped employee" as someone who "engages in an occupation in which he/she customarily and regularly receives more than \$30 a month in tips." Implicit within this definition are two requirements. First, the employee must work in an occupation that customarily and regularly receives tips. In determining whether an occupation fits this definition, courts often analyze the amount of contact an employee in that occupation has with tipping customers. Thus, it has been held that hosts and bus persons can be classified as tipped employees whereas kitchen workers, for example, cannot. The second requirement for a tipped employee is more straightforward: The employee must regularly receive more than \$30 dollars a month for tips.

Even if an employee's job clearly falls into a "tipped" category – take your average server, for example – an employer must nevertheless be mindful of the type of work the employee is assigned to perform. Under the FLSA, an employer may assign a tipped employee "nontipproducing work" that is incidental to the employee's position so long as that work does not occupy more than 20% of the employee's time.

Additionally, an employer must pay full minimum wage for nontip-producing work if it is not incidental to the employee's tip-producing duties.

Tips for avoiding FLSA liability.

- Identify and clearly distinguish between tipped and nontipped employees.
- Limit tipped employees to tip-producing work and tasks incidental to that tip-producing work. To the extent possible, eliminate from their job descriptions and responsibilities tasks that are not incidental to their tip-producing work. For example, it's fine to require a server to roll silverware, set tables or make coffee because it is incidental to his or her tip-producing work, but it's questionable – and inviting trouble – to ask the same server to clean bathrooms or prep in the kitchen.
- Do not overload tip-producing employees with nontip-producing work. The 20% threshold is murky. A modest amount of side work is fine, but saddling tipped employees with loads of nontip-producing work (even during slow times) is inviting trouble.