

CLIENT ALERT: USDOL Authorizes Lower Minimum Wage Rate for Tipped Employees - By Daniel S. Field and Shane R. Goodrich

Recently, the Department of Labor (DOL) published significant changes to its regulatory guidelines covering tipped employees. The new rules relax standards regarding tip credits and allow employers in Massachusetts and other states to take advantage of the full state law tip credit for tipped employees who work overtime. Employers may take advantage of the changes effective immediately.

As a result of the DOL's changes, Massachusetts employers may now pay tipped employees \$3.75 per hour during the first 40 hours of work, and pay tipped employees a minimum hourly overtime rate of \$9.25 per hour for hours worked over 40 hours in a given week. As a result of this adjustment, Massachusetts employers are relieved of the obligation to retroactively calculate the wages paid to tipped employees who work overtime hours.

To qualify as a tipped employee, the Fair Labor Standards Act ("FLSA") requires that an employee must customarily and regularly receive more than \$30.00 per month in tips. Under Federal law and in most states, employers may pay tipped employees a sub-minimum wage "service rate," which is less than the lowest applicable minimum wage. Employers may then credit gratuities received by the employee to make up the difference between the minimum wage and the service rate.

Under the FLSA, employers are permitted to take a "tip credit" of up to \$5.12 per hour, which is the difference between the federal service rate of \$2.13 and the federal minimum wage (\$7.25 per hour). Employers have also traditionally been limited to taking the maximum FLSA credit amount (\$5.12 per hour) for overtime hours worked by their employees. This meant that employers in states like Massachusetts had to pay more to their overtime employees to make up the difference between the federal minimum wage and the higher state minimum wage.

With the recent changes to the DOL's regulatory enforcement guidelines in its **Field Operations Handbook**, Massachusetts employers may now take an additional credit equal to the difference between the FLSA credit and the higher state credit; in Massachusetts this "credit is \$7.25 (the difference between the \$3.75 tipped rate and the Massachusetts Minimum Wage of \$11.00 per hour, effective January 1, 2017). During overtime hours, the new guideline permits Massachusetts tipped employees to receive \$9.25 per hour, which is based on the state minimum overtime wage of \$16.50 per hour, less the \$7.25 state tip credit. The changes provide employers significant relief from complex regulatory guidelines that had imposed three different minimum wage rates for employers of tipped workers, depending on whether an employee worked overtime during a given week.

There are several other state and federal prerequisites that must still be met before the tipped minimum wage can be used: a tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee; all tips received by the tipped employee must be retained by the employee except for a lawful tip pooling arrangement limited to employees who customarily and regularly receive tips; and the tip credit may only be applied to a tipped employee who has been informed of the tip credit rules. Also, as noted above, tipped employees must customarily and regularly receive more than \$30 per month in tips.

Employers should contact MBJ with questions about how these changes affect their business.

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