

# Tips, Tip Pooling, and Tip Credits: What is a Restaurant Legally Allowed to do with its Tips?



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Employees in a restaurant setting often receive tips, and employers often take a “tip credit” toward the minimum wage that they have to pay (allowing the employer in Arkansas to pay \$2.63/hour to the tipped employee if the tipped employee receives at least \$8.37 per hour in tips to make up the difference between \$2.63/hour and Arkansas’s \$11.00/hour minimum wage). “Tip pooling” is another common practice, where all of the tips are collected and then evenly distributed among the restaurant’s employees. However, if employers choose to implement a tip pool or tip credit, they must keep the following guidelines in mind to make sure that their tipping policy complies with the FLSA.

## **Can non-tipped employees receive payments from a tip pool?**

An employer who does **not** take a tip credit (i.e., who directly pays all employees at least \$11.00 per hour irrespective of the amount of tips received) may allow employees who are not tipped employees—such as cooks and dishwashers—to participate in a tip pool. This type of tip pool has one limitation: managers and supervisors are prohibited from taking part in the tip pool.

## **What if the employer takes a tip credit?**

If an employer chooses to take a tip credit, the guidelines get much more complicated. An employer who takes a tip credit may only allow employees who *customarily and regularly receive tips* to participate in the tip pool. This means that those employees who do not customarily receive tips—such as cooks—may not participate in the tip pool.

## **What if the tipped employee performs work that isn’t customarily tipped work?**

Even if an employer decides to take a tip credit and to limit the tip pool to those employees who customarily receive tips, the employer must be very cautious that it complies with the requirements for a tip credit. The general rule is that an employer may only take a tip credit for an employee in a tipped occupation. So, how is the tip credit calculated when a server (a traditional tipped occupation) performs other roles while at work? The Department of Labor’s Dual Jobs Rule provides guidance for this question.

A tipped occupation includes work that (1) produces tips and (2) directly supports the tip-producing work if the supporting work is not performed for a “substantial amount of time.” Directly-supporting work is defined as “work performed by a tipped employee in preparation of or to otherwise assist in tip-producing customer service work.” Directly-supporting work is performed a “substantial amount of time” if it (1) exceeds 20 percent of the hours in a week for which the employer has taken a tip credit or (2) the employee performs directly-supporting work for a continuous period that exceeds 30 minutes. If the

supporting work exceeds 30 minutes, it may not be taken as a part of the tip credit; however, this amount is excluded from the 20 percent calculation.

The rule provides the following examples of tip-producing work:

- A server's tip-producing work includes providing table service, such as taking orders, making recommendations, and serving food and drink.
- A bartender's tip-producing work includes making and serving drinks, talking to customers at the bar and, if the bar includes food service, serving food to customers.
- A busser's tip-producing work includes assisting servers with their tip-producing work for customers, such as table service, including filling water glasses, clearing dishes from tables, fetching and delivering items to and from tables, and bussing tables, including changing linens and setting tables.

The rule provides the following examples of directly-supporting work:

- A server's directly-supporting work includes dining room prep work, such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables.
- A busser's directly-supporting work includes pre- and post-table service prep work such as folding napkins and rolling silverware, stocking the busser station, and vacuuming the dining room, as well as wiping down soda machines, ice dispensers, food warmers, and other equipment in the service alley.
- A bartender's directly-supporting work includes work such as slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies, vacuuming under tables in the bar area, cleaning ice coolers and bar mats, making drink mixes, and filling up dispensers with drink mixes.

Work that is not part of the tipped occupation is any work that does not provide service to customers for which the employee receives tips and does not directly support the tip-producing activity. An employer may never take a tip credit for this time. The following examples illustrate work that is not part of the tipped occupation because the work does not provide service to customers for which tipped employees receive tips and does not directly support tip-producing work. This list is illustrative and is not exhaustive.

- Preparing food, including salads, and cleaning the kitchen or bathrooms, is not part of the tipped occupation of a server.
- Cleaning the dining room or bathroom is not part of the tipped occupation of a bartender.
- Cleaning the kitchen or bathrooms is not part of the tipped occupation of a busser.

Thus, if an employer chooses to take a tip credit, it must ensure that (1) it never takes a tip credit for time the employee spends doing work outside of the tipped occupation, (2) it never takes a tip credit for directly-supporting work that lasts more than 30 minutes, and (3) it closely monitors that tipped employers do not perform more than 20 percent of directly-supporting work during a work week.

If this sounds complicated, it is. Employers who choose to take a tip credit must remain vigilant to ensure that those who customarily and regularly perform a tipped occupation almost exclusively perform duties that fall under the roles of a tipped occupation. A failure to properly implement a tip credit or tip pool could leave an employer in jeopardy of incurring civil monetary penalties assessed by the Department of Labor and being subject to lawsuits for violations of the Fair Labor Standards Act.

Sources:

29 C.F.R. § 531.50

<https://www.dol.gov/agencies/whd/flsa/tips>

<https://www.federalregister.gov/documents/2021/10/29/2021-23446/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal>

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