



THE FLORIDA BAR

LABOR & EMPLOYMENT LAW SECTION

E - U P D A T E S

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Carlo D. Marichal  
Publications Sub-Committee Chair

### ***RECENT AMENDMENTS TO THE FLSA TIP POOL RULES***

On March 23, 2018, as part of the Consolidated Appropriations Act, Congress amended the Fair Labor Standards Act (FLSA) by addressing rules affecting tipped employees and tip ownership.<sup>1</sup> On April 6, 2018, the Department of Labor (DOL) issued Field Assistance Bulletin No. 2018-3 to provide guidance regarding the enforcement of these new rules.<sup>2</sup>

Under the new rules, employers, managers, and supervisors are prohibited from keeping employees' tips, regardless of whether the employer takes a tip credit. To determine whether someone qualifies as a manager or supervisor, the DOL's Wage and Hour Division looks to the duties test in the executive employee overtime exemption provisions. In sum, under that test the following criteria must be met:

- The employee's primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.
- The employee customarily and regularly directs the work of two or more other employees.
- The employee has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.<sup>3</sup>

The definition exceeds the generally accepted role of a "supervisor," suggesting that the DOL may approve of including dual function employees, such as lead waiters or lead bartenders, in tip pools.

On the other hand, employers who pay the full minimum wage are no longer prohibited from permitting employees who do not customarily receive tips, such as dishwashers and cooks, to participate in tip pools. Instead, non-supervisory employees who do not typically receive tips and are paid minimum wage are now permitted to participate in tip pools. Moreover, the DOL continues to permit an employer to administer an otherwise lawful tip pool.

Through amendments to FLSA sections 16(b) and 16(c), the Act also provides a remedy to recover unlawfully kept tips, providing for employers' liability to employees in an amount that includes the sum of any tip credit taken by the employer and the tips unlawfully kept by the employer, in addition to an equal amount for liquidated damages. An employer who repeatedly and willfully keeps employees' tips also has potential liability for civil penalties up to \$1100.

In the Bulletin, the DOL clarified that the recent Act does not affect the long-accepted permissible practice of allowing employers to deduct credit card processing fees associated with processing credit card tips. The Bulletin

further clarifies that the recent Act nullifies the 2011 regulations prohibiting tip sharing with non-tipped employees even when an employer did not take a tip credit.<sup>4</sup> However, the full scope of the Act's effect in withdrawing those regulations remains unclear, given the Act's language that only portions of the 2011 regulations not addressed by Section 3(m) of the FLSA have no further force or effect.

The DOL announced it will move forward with rulemaking to fully address the impact of the FLSA amendments.

~ *By Sherril Colombo and Stefanie Mederos / Littler Mendelson, P.C.*

#### Endnotes

- 1 Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, <https://www.gpo.gov/fdsys/pkg/BILLS-115hr1625enr/html/BILLS-115hr1625enr.htm>.
- 2 F.A.B 2018-3 (April 6, 2018).
- 3 See 29 C.F.R. § 541.100(a)(2)-(4).
- 4 See 29 C.F.R. §§ 531.52, 531.54 and 531.59.



## Section Bulletin Board

Friday, June 1, 2018

5:00 p.m. – 6:00 p.m.

**Labor & Employment Law Section**

**Executive Council Meeting – JW Marriott, Marco Island**

Friday & Saturday, June 1-2, 2018

**Advanced Labor Topics 2018 (2630R)**

**Lunch Included Both Days**

**Reception and Dinner Included on Friday Evening**

JW Marriott, Marco Island

Thursday, June 14, 2018

2:15 p.m. – 5:15 p.m.

**President's Showcase Seminar**

**Because Legal Practice Isn't Always a Day at the Movies: Health, Wellness,  
and a Welcoming Workplace for Lawyers and Their Clients (2858)**

The Annual Florida Bar Convention

Hilton Orlando Bonnet Creek

Thursday, June 14, 2018

5:00 p.m. – 6:00 p.m.

**Labor & Employment Law Section**

**Executive Council Meeting**

The Annual Florida Bar Convention

Hilton Orlando Bonnet Creek, Orlando

**Box Lunch Included on Friday  
and Buffet Lunch Included on Saturday**

***Register Now!***



***Friday & Saturday***  
**June 1-2, 2018**

**The Florida Bar Labor and Employment Law Section  
Presents**

**Advanced Labor Topics  
2018**

Course Number 2630

**JW Marriott Marco Island Beach Resort  
400 South Collier Boulevard  
Marco Island, FL**

Please contact Angie Froelich at (850) 561-5633 or [afroelich@floridabar.org](mailto:afroelich@floridabar.org) for any remaining hotel room availability in The Florida Bar – Labor Section room block.

The Section is pleased to include lunch on both days and dinner on Friday for registrants. The Friday dinner will be available at a cost of \$75 for guests or council members not registered.

**Register through the Member Portal, or at the link below**

<https://member.floridabar.org/s/lt-event?site=a0a36000003SDujAAG&id=a1R36000002ks2VEAQ>

**Trouble registering? Contact Angie Froelich at [AFroelich@floridabar.org](mailto:AFroelich@floridabar.org)  
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