



Client Alert

Tip-Credit Restrictions and the Minimum Wage:
Tenth Circuit Court of Appeals agrees Employers May Keep Tips as long as Employees
are Paid Minimum Wage

The Tenth Circuit, in *Marlow v. New Food Guys, Inc.*, 861 F.3d 1157 (10th Cir. 2017), recently determined that employers are not required to share customers' tips with employees who earn the minimum wage. The decision, which applies to employers in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, invalidates a Department of Labor ("DOL") regulation providing that "[t]ips are the property of the employee whether or not the employer has taken a tip credit under section 203(m) of the [Fair Labor Standards Act (the "FLSA or Act)]."

A. Background and the *Marlow* Decision

The Act protects against substandard wages – that is compensation which falls below the minimum standard of living necessary for health efficiency, and general well-being of workers. Early in the FLSA's history, the Supreme Court, in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), held that employers could use the tips paid to their employees to satisfy their minimum wage obligations. While the FLSA has been amended numerous times since the *Williams* decision, the 1974 amendment to § 203(m) of the Act added a "tip-credit" provision which enables employers of "tipped employee"¹ the option of paying a reduced hourly wage of \$2.13 so long as their workers receive enough tips to bring them to federal minimum wage of \$7.25. In 2011, the DOL issued a regulation which made clear that tips are the property of the employees, regardless of whether the employer takes a tip-credit under the FLSA. See 29 C.F.R. § 531.52 (2011).

In *Marlow*, the Tenth Circuit analyzed (1) whether the DOL had the authority to issue its 2011 regulation and (2) whether an employee who is paid more than the federal minimum wage is entitled to keep his or her tips. The *Marlow* plaintiff conceded that she earned \$12/hour, well in excess of the \$7.25 federal minimum, but relied on the DOL's 2011 regulation to support her claim that she was entitled to some portion of the tips her employer withheld. However, the Tenth Circuit found the regulation "was a step too far" since the tip-credit provision of § 203(m) "applies only when the employer uses tips received by the employee as a credit against the employee's minimum wage." Thus, to the extent an employer does not utilize the tip-credit to make sure their employee earns the federal minimum wage, but rather pays their employee a set wage "greater than the minimum wage," the regulation does not apply and the employer may keep the tips. Moreover, the Tenth Circuit reasoned that because the text of § 203(m)

¹ Defined as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. § 203(t).

limits the tip-credit restrictions to those employers who take the tip-credit, the DOL was “without authority to regulate to the contrary.”

B. Circuit Split will Result in Supreme Court Involvement

Although the Tenth Circuit determined that an employee whose wage exceeds the federal minimum is not entitled to keep her tips, other federal circuit courts disagree with this holding. Specifically, in *Or. Rest. & Lodging Ass’n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), the Ninth Circuit held the exact opposite – the FLSA is silent regarding the tip pooling practices of employers who do not take a tip-credit under § 203(m), meaning that the DOL not only had the authority to issue its 2011 regulation, but that that the regulation must be enforced. Because of the split in authority between the Ninth and Tenth Circuits, this issue will undoubtedly be resolved by the Supreme Court.

C. Important Takeaways from *Marlow*

- In the Tenth Circuit at least, an employer does not violate the FLSA when it decides not to distribute tips to employees so long as the tipped employee’s wages meet or exceed the federal minimum.
- However, an employer which uses the FLSA’s tip-credit provision in order to ensure its employees earn the federal minimum, must distribute tips so that the employee earns at least \$7.25/hour.
- The *Marlow* decision does not address any state law issues (i.e., breach of contract or Wage Act claims) or whether an employer who promises to distribute tips to employees who earn the federal minimum but later refuses to do so can do so without being held accountable for its promises.

Not only can BHGR advise you about any changes in the legal landscape which may result when the Supreme Court takes up these issues, but we can help advise you on the matters which *Marlow* did not address so that you can avoid the risk of liability for improperly withholding tips earned by your employees.