

Fair Employment Practices GUIDELINES

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Ask The Expert: Q&A

This month's installment of "Ask the Expert" has been contributed by Salvador Simao, a Shareholder in Littler Mendelson's Newark, N.J. office. Mr. Simao has significant experience in wage and hour matters and especially in conducting efficient wage and hour audits. Prior to becoming a shareholder at Littler Mendelson, Mr. Simao was a trial attorney at the U.S. Department of Labor, Office of the Solicitor. Mr. Simao can be reached at ssimao@littler.com.

Q. *How does a restaurant employer calculate the tip credit for an employee who performs a variety of tasks that are both tipped and non-tipped?*

A. A tip credit is a credit employers may count against wages paid in order to comply with the minimum wage requirements of the Fair Labor Standards Act. The law allows employers to pay as little as \$2.13 an hour as long as the employees' direct wages and tips equal the minimum wage, which is currently \$7.25.

In order to claim a tip credit, employers must:

- inform each tipped employee about the credit;
- pay each employee at least the minimum wage, which is equal to direct wages plus tip credit; and
- employees must be allowed to keep all tips, with the sole exception of authorized tip pooling arrangements.

Employees who customarily and regularly perform duties for which they receive tips or gratuities that exceed \$30 a month qualify for the credit. Most tips are generated through dealing directly with customers; however, this is not always the case. For example, bar backs who are tipped by bartenders may be considered tipped employees even though

they do not deal directly with customers. Note that the law recognizes a host of duties that are incidental to the performance of tipped work. As long as these duties do not exceed 20% of the employee's time, dual jobs may not be inferred.¹ If the employee performs work that exceeds 20%, or is not incidental to the work that generates the gratuities, then the employee may be considered to have dual jobs.²

Tipped employees are entitled to receive time and a half of their regular rate for all hours worked over 40. The regular rate includes: the direct wage, the tip credit, reasonable cost of any facilities furnished to the employee, commissions, bonuses and all other cash wages provided to the employee. Actual tips are not included in the regular rate. So, for example, if an employee works 50 hours a week, receives \$2.13 an hour, and \$500 in tips, overtime would be calculated as follows: \$7.25 (hourly rate plus tip credit, which should always equal the minimum wage) x .5 = \$3.625 (overtime premium) x 10 (overtime hours worked) = \$36.25. The employee would be owed \$36.25 as an overtime premium in addition to the \$106.50 owed (\$2.13 x 50) for straight time wages for a total of \$142.75.

Calculating overtime for an employee who holds dual jobs

First, you would determine the regular rate. In order to determine the regular rate you must divide the total remuneration paid in a work week by the total hours worked. This **must** include the tip credit.

For purposes of discussion, let's assume Sammy waits tables and then washes dishes at the end of his shift. Last week, he spent 10 hours washing dishes at a rate of \$10 per hour and worked 42 hours as waiter earning \$250 in tips.

The total remuneration would be \$404.50 dollars for the week or $[(\$7.25 \times 42) + (\$10 \times 10)]$. The

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\$7.25 represents the tip credit plus the direct wage that equals the minimum wage. The tips Sammy received are not included in the regular rate. The total remuneration (\$404.50) is then divided by the total hours worked (52), which results in a regular rate of \$7.78. This regular rate is divided in half, which equals the overtime premium due for each hour worked over 40, in this case \$3.89 per hour.

The final step is to determine the amount of overtime pay due. This is accomplished by multiplying the overtime premium by the number of overtime hours worked in the work week. In this example, \$3.89 x 12 = \$46.68.

The overtime formula is:

$$\frac{\{[(\text{hourly rate} + \text{tip credit}) \times \text{hours worked as a tipped employee}] + [\text{hourly rate} \times \text{hours worked as a non-tipped employee}] + [\text{all other remuneration, e.g. bonuses, housing etc.}]\}}{\text{Total hours worked}} = \text{RR}$$

$$\frac{\text{RR (regular rate)}}{2} = (\text{OR}) \text{ overtime rate}$$

$$\text{OR} \times \text{overtime hours worked} = \text{overtime amount due} \blacksquare$$

¹ The 20% threshold was eliminated under the Bush administration in DOL opinion letter FLSA2009-23. However, the Obama administration has withdrawn the opinion letter, inferring that the administration will uphold the 20% threshold.

² *Dual jobs* refers to an employee who works in both a tipped and non-tipped occupation for his/her employer. The employer is obligated to keep track of the hours worked in each occupation and only take tip credit for the hours worked associated with the tipped occupation.