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Tip Sharing Update – The DOL Provides Guidance On New FLSA Amendments

The Department of Labor (DOL) has issued a Field Assistance Bulletin addressing Congress' recent amendments to Section 3(m) of the Fair Labor Standards Act (FLSA) pertaining to employee tips. We discussed these amendments in Volume 17, Issue 7 of the *KZA Employer Reports*.

In the Consolidated Appropriations Act of 2018, Congress vacated the DOL's 2011 Regulation prohibiting mixed tip pools -- those that include employees who do not customarily and regularly receive tips (e.g., cooks, janitors, and dishwashers) even where the employer pays the full minimum wage to all employees, unless and until the DOL takes further rulemaking action. Congress also added a new prohibition on "managers and supervisors" keeping any portion of employees' tips. Congress did not, however, define who is an excluded manager or supervisor for purposes of tip sharing.

The DOL's Field Assistance Bulletin provides some helpful guidance on how it plans to enforce these amendments. First, the DOL confirmed its intention to proceed with rulemaking "in the near future" to fully address the impact of the amendments.

Second, the DOL announced it will use the existing "duties" test for exempt executive employees to determine whether an employee is a "manager" or "supervisor" subject to the new tip sharing prohibitions. Under this test, the DOL looks to see:

- whether 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;
- whether the employee customarily and regularly directs the work of two or more other employees; and
- whether the employee has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Based on the DOL's Field Assistance Bulletin, whether an employee is paid on a salary basis is not relevant to determining if he/she is a manager or supervisor prohibited from sharing employees' tips. Therefore, an employee who performs the duties of an exempt employee under the FLSA's executive exemption, but who is not paid on a salary basis, is prohibited from sharing in tips received by employees.

As you assess the structure of your employee tip pools in light of the new FLSA amendments and the DOL's Field Assistance Bulletin, please feel free to contact a KZA attorney for assistance. We will continue to keep you posted on the DOL's evolving rulemaking and enforcement activity related to employees' tips.