

**A FEW WAGE & HOUR TIPS  
ON PAYING TIPPED EMPLOYEES**  
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One of the best examples of how Oregon's wage and hour laws can differ from federal laws comes from a comparison of how they handle "tipped employees." Employers should be aware that where state and federal laws have similar, but different provisions, they will need to apply the standards that are most advantageous to their employees. Here are a few of the frequently asked questions fielded by BOLI's Technical Assistance for Employers Program.

**Q: What is a tip?**

A: A tip is a voluntary payment, a "thank you," if you will, from a customer, which is made in addition to the amount actually charged for a service. Since the amount of a tip is not dictated by the employer or subject to negotiation, compulsory charges for service, say, 15% of the bill, are not considered tips but rather part of the employer's gross receipts.

**Q: Can employers credit tips received by employees toward the obligation to pay minimum wage?**

A: Not in Oregon. Although federal law permits employers to count tips as wages for purposes of meeting their obligation to pay minimum wage to certain "tipped employees," Oregon does not. In fact, Oregon law specifically prohibits employers from including tips in the amount to be paid under the minimum wage law at ORS 653.035(3). This means that Oregon employers must pay the full amount of minimum wage without benefit of a tip credit.

**Q: Are tips included in overtime computations?**

A: Not under Oregon law. Tips are not included in the computation of the regular rate of pay and just as with minimum wage, tips cannot be credited against overtime wages due. ORS 653.035; OAR 839-020-0030(1).

**Q: May employers require employees to pool / share out tips?**

A: Yes. In businesses where tipping is customary, the tips will generally belong to the recipient, and it is not uncommon for recipients of tips to voluntarily share these amounts among other support staff. That said, an employer may also implement a formalized tipsharing pool so long as the specifics of the arrangement are not prohibited by law. Federal law limits tip pooling arrangements among employees to those who typically receive tips (e.g., wait-staff, bartenders, bellhops, but not managers or kitchen staff), however, the Ninth Circuit Court of Appeals has also held that the restrictions on who may participate in a tip-pooling arrangement only applied to employers who claimed tips as wages toward the minimum wage. Since that practice is prohibited under Oregon law,

Oregon employers remain free to impose a tip-pooling arrangement which includes staff who are not customarily tipped, such as kitchen staff. *Cumbie v. Woody Woo, Inc.*, 2010 WL 610603 (9th Cir. Feb. 23, 2010).

### **IMPORTANT UPDATE**

Following the *Cumbie* decision, the U.S. Department of Labor amended its regulations to state that employers are prohibited from using the tips of employees for *anything* other than (1) a valid tip pool (again, a pool that includes *only* employees who are customarily tipped - 29 C.F.R. § 531.54) or (2) a credit against the (federal) minimum wage. 29 C.F.R. § 531.52

Oregon employers may wish to seek the advice of an employment law attorney prior to implementing a tip pooling arrangement that would include employees who are not customarily tipped.

#### **Q: Can employers charge employees a fee for tips paid by credit card?**

A: Oregon law does not address this question, but the U.S. Department of Labor does allow employers who must pay a percentage of each credit card sale as a service charge to pay the employee the amount of the tip less the same percentage.

#### **Q: Are tips considered wages that must be reported?**

A: Wage and hour law does not encompass reporting requirements imposed by taxing authorities. Wage and hour law does require, however, that the payment of wages which are subject to withholding must be accompanied by an itemized statement of any deductions made. ORS 652.610. This is important because the tips paid to an employer (who then distributes them to the employee) may be subject to withholding requirements, and any deductions from tips for withholding will need to be itemized on the employee's pay stub.

#### **Q: Are the requirements for rest and meal periods different for tipped employees?**

A: Yes, there are different requirements for some, though not all, tipped employees. Tipped *food and beverage servers* may voluntarily waive their meal period if they:

- are employed to serve food or beverages, and receive and report tips to their employer.
- are at least 18 years of age.
- voluntarily request to waive their meal period. (For newly hired employees, the request to waive the meal period may not be made until the employee has worked for the employer at least seven days.)

The request to waive the meal period must be in writing on a form prescribed by BOLI (available online at: [www.oregon.gov/BOLI/WHD/Meal\\_Waivers.shtml](http://www.oregon.gov/BOLI/WHD/Meal_Waivers.shtml)) Keep in mind

that employers must retain a copy of the meal waiver for six months after the employee separates from employment. A tipped food and beverage server who has waived his or her meal period must still be given an opportunity to consume food during shifts of six hours or longer. When the employee works longer than eight hours, the employee must be given a meal period in which he or she is relieved of all duty. As with all their employees, employers must also keep records clearly showing whether or not the employee has received the meal period and ensuring that the employee is paid for any meal period in which the employee is not relieved of all duty. Finally, the employer must conspicuously post a notice (provided by BOLI) regarding rest and meal periods. The notice is available online at: [www.oregon.gov/BOLI/WHD/Meal\\_Waivers.shtml](http://www.oregon.gov/BOLI/WHD/Meal_Waivers.shtml).

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**For more information on this and other topics of interest to Oregon employers, please visit the Technical Assistance for Employers (TA) website at [www.oregon.gov/boli/ta](http://www.oregon.gov/boli/ta) or consider attending one of TA's upcoming seminars. You can also reach TA by phone at 971-673-0824.**

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