



April 6, 2018

FIELD ASSISTANCE BULLETIN NO. 2018-3

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Bryan L. Jarrett
Acting Administrator

SUBJECT: Amendment to FLSA Section 3(m) Included in Consolidated Appropriations Act,
2018

This Field Assistance Bulletin (FAB) provides guidance concerning the Wage and Hour Division's (WHD) enforcement of tip credit rules under the Fair Labor Standards Act (FLSA) after Congress amended the FLSA in the Consolidated Appropriations Act, 2018 (Act), Pub. L. No. 115-141, Div. S., Tit. XII, § 1201. The Act prohibits employers from keeping tips received by their employees, regardless whether the employer takes a tip credit under 29 U.S.C. § 203(m). The Act also provides that portions of WHD's regulations codified at 29 C.F.R. §§ 531.52, 531.54, and 531.59 that barred tip pooling when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit shall have no further force or effect (until any future action by the WHD Administrator).¹ WHD expects to proceed with rulemaking in the near future to fully address the impact of the 2018 amendments.²

In the meantime, given these developments, employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools. The Act prohibits managers and supervisors from participating in tip pools, however, as the Act equates such participation with the employer's keeping the tips.³ As an enforcement policy, WHD will use the duties test at 29 C.F.R. § 541.100(a)(2)-(4) to determine whether an employee is a manager or supervisor for purposes of section 3(m).

The Act also provides enforcement authority in FLSA sections 16(b) and 16(c) to, among other things, recover all tips unlawfully kept by the employer, in addition to an equal amount in liquidated damages.

¹ The Act provides that the portions of the 2011 final rule that amended 29 C.F.R. §§ 531.52, 531.54, and 531.59, to the extent that they are "not addressed by section 3(m)" of the FLSA, "shall have no further force or effect until any future action" taken by the Administrator. Act, Div. S, Tit. XII, Sec. 1201(c).

² The Act does not impact WHD's enforcement when an employer claims a tip credit under section 3(m).

³ Administering a permissible tip pool does not constitute either unlawful retention of tips or unlawful tip pool participation under the Act by employers, managers, or supervisors. Additionally, the provisions in WHD Field Operations Handbook 30d05 concerning tips charged on credit cards still apply.

The Act further provides WHD with discretion to impose civil money penalties (CMPs) not to exceed \$1,100 when employers unlawfully keep employee tips. In assessing CMPs, WHD will follow its normal procedures, including by determining whether the violation is repeated or willful.

Finally, given the above developments, WHD's July 20, 2017 non-enforcement policy concerning retention of tips by tipped employees paid the full FLSA minimum wage will not apply to new investigations beginning on or after March 23, 2018. When an investigation covers periods before and after March 23, 2018, and the employee was paid at least the full FLSA minimum wage, violations of section 3(m) may only be cited if they occurred after March 23, 2018.