



March 30, 2018

Submitted via email at dol.lss.regulations@alaska.gov

Becky Weimer
Department of Labor and Workforce Development
Labor Standards and Safety
P.O. Box 111149
Juneau, AK 99811-1149

Re: Notice of Proposed Changes Relating to Tip Pooling Arrangements in the Regulations of the Department of Labor and Workforce Development: Regulation #: 2018200075

Dear Ms. Weimer:

The Restaurant Law Center submits these comments in response to the Department of Labor and Workforce Development's proposal to amend regulations in Title 8 of the Alaska Administrative Code dealing with tip pooling arrangements.

INTEREST OF THE RESTAURANT LAW CENTER.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association ("Association"). In Alaska, members of the Alaska Cabaret, Hotel, Restaurant and Retailers Association ("Alaska CHARR") automatically become members of the Association. Restaurants and other food service providers are the nation's second largest private-sector employers. Small businesses dominate the industry; larger chains are often collections of smaller franchised businesses. The Law Center seeks to provide the industry's perspective on regulatory issues significantly affecting the industry. Specifically, the Law Center highlights the potential consequences of pending regulations, such as this one, through regulatory comments on behalf of the industry. The Law Center has also been representing Alaska CHARR as co-counsel in litigation to preserve the ability of restaurants in Alaska to continue sharing tips with kitchen staff, such as cooks and dishwashers.

NEWLY ENACTED FEDERAL LAW CHANGES ALREADY PROVIDE THE PROTECTIONS ALASKA'S DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT IS SEEKING.

Currently, Alaska regulations limits tip pooling by referencing federal law. There were some concerns with a U.S. Department of Labor proposal from December 2017 that may have allowed

employers to share on tip pools. This is not a practice that the Law Center, the Association, or Alaska CHARR support. In joint comments before the U.S. Department of Labor, we collectively spoke against such a practice and encouraged a bipartisan legislative solution “to amend the FLSA to expressly restrict employer retention of customer tips, which we do not anticipate would be a controversial change.”¹

On March 23, 2018, such a protection was signed into federal law. The new law expressly makes it illegal for an employer to “keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.”² However, while the target of the Alaska proposal was to protect tips from the possibility of employers keeping them—something that has now been addressed by federal law—the proposal, as written, would hurt some of the workers with the most economic needs in Alaska and, often, with the lowest marketable set of skills.

In fact, because the Alaska proposal would have a detrimental effect on these workers, it is counter to sound notions of public policy. The Alaska proposal, as written, would prohibit those restaurant workers in the back of the house, such as dishwashers and cooks, from receiving a portion of the tips they help generate. United States Senator Patty Murray (D-WA) from a state with laws that, like Alaska, prevent employers from taking a tip credit, led the effort that culminated with an “omnibus appropriations bill [that] includes a bipartisan statutory provision to ensure that workers in the back of the house (i.e., cooks, bussers, dishwashers) can participate in tip pools in appropriate circumstances. Importantly, this same provision makes clear that employers themselves cannot keep tips.”³

It would be wrong for Alaska’s Department of Labor and Workforce Development to now take away this negotiated benefit from cooks and dishwashers in its state. In addition, the concerns raised by the Economic Policy Institute, and others that submitted comments prior to March 23, 2018, arguing that without the proposed changes tips “would be transferred from tipped workers to their employers” are now moot, as the federal statute expressly prohibits such action.⁴

¹ Regulatory Comments from the Restaurant Law Center, the National Restaurant Association, Alaska CHARR, and others, pg. 7, fn. 17 (February 5, 2018) to U.S. Dep’t of Labor, Notice of Proposed Rulemaking, “Tip Regulations Under the Fair Labor Standards Act” (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017).

² Consolidated Appropriations Act of 2018, Title XII: Tipped Employees, Sect. 1201, pg. 2026 (March 23, 2018).

³ USDOL News Release: *Omnibus Appropriations Bill Supports Important Priorities for the American Workforce* found at <https://www.dol.gov/newsroom/releases/osec/osec20180323> (March 23, 2018). See also, Senator Murray News Release: *Murray and Worker Advocates Applaud Tip Rule Agreement, Murray: Deal “Comes As a Sigh of Relief” For Workers*, found at <https://www.help.senate.gov/ranking/newsroom/press/murray-and-worker-advocates-applaud-tip-rule-agreement-murray-deal-comes-as-a-sigh-of-relief-for-workers> (March 21, 2018).

⁴ Prohibition found in the “Consolidated Appropriations Act of 2018,” Title XII: Tipped Employees, Sect. 1201, pg. 2026 (March 23, 2018); EPI public comments on Alaska’s tipped pooling arrangements are found at <https://www.epi.org/publication/epi-public-comments-on-alaskas-tipped-pooling-arrangements/> (February 28, 2018).

ALASKA'S EXISTING REGULATIONS ON TIP POOLING BETTER SERVE PUBLIC POLICY THAN DO ALASKA'S PROPOSED REGULATIONS.

Employees working in the dining room greeting guests, taking orders, delivering food, clearing dirty dishes, and ensuring orders are correct, complete, and delivered on time, work as a team. Each is dependent on the other for their success, the success of the restaurant, and providing a successful guest experience. But this team of workers is only one piece of the puzzle. Employees who work in the kitchen (the cooks and dishwashers) are just as critical to the success of the restaurant, the guest experience, and the success of tipped workers' themselves.

If the food is cold, prepared incorrectly, or untimely, or if the dishes, silverware, and glasses are not clean, the guest experience suffers, the restaurant's sales suffer, and compensation for dining room employees suffers—unsatisfied guests will, in general, leave a smaller tip or no tip at all than a guest who has an excellent customer experience.

All employees rely on each other. And allowing all employees who are engaged in providing excellent guest experience to share in the tips promotes teamwork. A cook who understands that the food he or she prepares not only affects the tip the server who delivers the food receives, but will also impact his or her compensation directly, will have added incentive to work as a team and perform at the highest levels. In other words, permitting tips to be pooled among these employees promotes teamwork.

By imposing limits on tip pooling where employees already receive the full minimum wage, as is the case in Alaska, the proposed regulations in effect create a uniquely favored class of workers entitled to more than any other worker in the restaurant: full minimum wage plus all customer tips. Nothing in the public policy embodied in the Federal Labor Standards Act supports such a result. It serves no purpose consistent at least with federal law for the Alaska Department of Labor and Workforce Development to confer special rights upon certain groups of workers that go well beyond any rights conferred to other hourly employees in a restaurant.

This is a fairness issue. If employees working the dining room are not receiving a lower hourly wage (because no tip credit is allowed in Alaska) and are receiving an hourly wage at or above the minimum wage, there is no good reason to exclude kitchen staff from receiving some portion of tips left by guests. There is no good reason, for example, why a busser who clears dirty dishes from a table should be eligible to share in tips left by a customer, as Alaska's proposed regulations allow, but the dishwasher who cleans the dirty dishes should not.

Similarly, there is no good reason why a bartender who prepares a drink for a customer should be eligible to share in tips, as Alaska's proposed regulations also allow, but a cook who prepares the guest's food should not. After all, it is because of the work performed by all employees in the restaurant that a server is in a position to even collect a tip. Thus, the end result of the proposed regulations, if finalized, are that tipped employees in Alaska end up with a windfall and kitchen workers in Alaska experience the unfairness of being walled off from tips even though their work contributes directly to the customers' dining experience and thus to the tips.

Other states that do not allow for a tip credit have reached the same conclusion—allowing mandatory tip pools with back of the house workers, such as cooks and dishwashers, is a matter of “common sense and fairness.”⁵ In California, for example, its courts have held that “a mandatory tip pool makes certain that these employees receive their fair share when the patrons are pleased with their service, but have no way to tip them directly.”⁶

Furthermore, in one case, the Court of Appeals of California stated that “if the plates on which the food is served are not clean, the food received is not hot, or is not as ordered, the patron may be inclined to leave a smaller tip even when the services of the servers and bussers were satisfactory. Likewise, when the meal is delicious, the presentation on the plates beautiful, and special food requests have been satisfied, the patron may be inclined to leave a generous tip, even when the servers and bussers might not have delivered exceptional service. In short, a patron tips on all of the service received, not simply the service received by employees the patron can see.”⁷ As pointed out, Alaska’s proposed changes would go against what its sister states in the West Coast, which also do not allow employers to take a tip credit, have been doing to guarantee that employees receive their fair share from tips when patrons are pleased with their service, but unable to tip them directly. Federal law just codified the practice, but Alaska’s proposed regulation would allow some to benefit from the work of the entire team of hourly employees at the expense of others, such as cooks and dishwashers.

ALASKA’S PROPOSED REGULATIONS WOULD LIKELY HAVE A DISPROPORTIONAL NEGATIVE IMPACT ON MINORITIES.

There are some demographic reasons weighing against the proposed regulations. According to the United States Census Bureau about forty percent of Alaska is not “white only.” At the same time, the demographic profile by the United States Census Bureau also shows that Alaska has had a noticeable increase in its minority population during the past two decades, particularly among residents of Mexican descent.

In the restaurant industry, according to Bureau of Labor Statistics figures, the composition of the dining room staff tends to differ greatly from the kitchen staff. As the table in the next page shows, nearly half of all chefs and head cooks (49.3%), and almost three in five cooks and dishwashers (respectively 57.1% and 57.6%) come from one of the three identified minority groups. In the dining room, however, the percentage of employees who are African-Americans is about half what it is in the kitchen.

⁵ See, *Etheridge v. Reins International California, Inc.*, 172 Cal.App.4th 908, 920, 923 (2009); see also, *Leighton v. Old Heidelberg, Ltd.*, 219 Cal.App.3d 1062 (1990).

⁶ See, *Etheridge*, 172 Cal.App.4th at 923. See also, *Grodensky v. Artichoke Joe’s Casino*, 171 Cal.App.4th 1399, 1443-1447 (2009).

⁷ *Etheridge*, 172 Cal.App.4th at 922.

The representation of Hispanics in dining room roles is likewise substantially below what it is in the kitchen occupations (16.3% to 20.9% in the dining room, versus 23.0% to 35.4% in the kitchen). While this data is not collected or published at the state level, because of anecdotal evidence we have collected together with the demographic data outlined above, we are confident in stating that similar demographic disparities between dining room staff, which is typically considered “tipped” staff, and kitchen staff, which is typically considered “non-tipped” staff, exist in Alaska as well.

Occupation ⁸	Total Employed (thousands)	Black or African-American	Asian	Hispanic or Latino
Total U.S. workforce, age 16+	151,436	11.9%	6.1%	16.7%
Kitchen roles				
Chefs and head cooks	460	14.7%	11.6%	23.0%
Cooks	2,179	17.3%	4.8%	35.0%
Dishwashers	319	16.3%	5.9%	35.4%
Dining room roles				
Waiters and waitresses	2,085	9.4%	6.6%	20.9%
Bartenders	454	7.4%	2.5%	17.0%
Hosts and hostesses	319	8.8%	3.8%	16.3%

These statistics combined with the existing anecdotal evidence demonstrate that the net effect of Alaska’s proposed regulations is to place a disproportionate burden on minority employees, relative to non-minority employees, with respect to achieving higher earnings. State agencies should not pursue policies that further hinder the progress of the historically disadvantaged.

IF ALASKA FEELS THAT IT MUST ACT, THERE IS A THIRD OPTION THAT AVOIDS THE NEGATIVE EFFECT OF THE PROPOSED REGULATIONS AS WRITTEN.

If despite the prohibition on employers and others from participating in tip pools found in federal law Alaska still feels clarification is needed, we urge you to do it in a way that does not harm employees, such as cooks and dishwashers. These employees also work towards the restaurant customers’ overall experience leading to the tips. Thus, we would urge you to scrap the proposed changes to 8 AAC 15.907 and, instead, just amend 8 AAC 15.907(e) as follows:

- (1) “tip pooling arrangement” means an agreement under which a portion of an employee’s tips is collected for distribution among certain employees; **tip**

⁸ See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, last modified Feb. 8, 2017, available at <https://www.bls.gov/cps/cpsaat11.htm> (last visited Jan. 16, 2018). Industry practice and Department of Labor enforcement guidance determine the designation of occupations as being kitchen or dining room roles; those are not BLS classifications.

pooling arrangements may include non-tipped employees, such as cooks and dishwashers at a restaurant, who are in the chain of service to the customers who provide the tips and contribute to those customers' overall experience.

We do not have an objection to the proposed new notice requirement—although, notice of tip pooling arrangements are also already required by federal law.

CONCLUSION.

We urge Alaska's Department of Labor and Workforce Development to support the federal bipartisan agreement that makes clear that employers themselves cannot keep tips, while ensuring that workers in the back of the house, such as cooks and dishwashers, can continue to participate in tip pools. This is easily accomplished by refraining to make the proposed changes and just continue to reference federal law. In the alternative, the Department could scrap its proposed changes to 8 AAC 15.907 and only amend 8 AAC 15.907(e) with our proposed language, as indicated in the preceding section, to allow kitchen staff, such as cooks and dishwashers, to share in the tips when patrons are pleased with their service, but have no way to tip them directly.

Thank you for considering our recommendations. Please do not hesitate to contact me at (202) 331-5913, if you need additional information or would like to discuss the changes to the underlying federal statute or anything else in these comments.

Sincerely,



Angelo I. Amador
Executive Director
Restaurant Law Center