



## Mr. Pink<sup>1</sup> Never Leaves a Tip: How Current Tip Credit and Tip Pool Guidelines Leave Employees at the Mercy of Employers

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1. Reference to a character in the film *RESERVOIR DOGS* (Live Entertainment 1992).

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## I. INTRODUCTION

At every restaurant there is the familiar sound of after-meal chatter, everyone at the table giving their closing thoughts as to what the cooks did correctly or the criticisms from the dining companion who has watched too many episodes of Bravo's "Top Chef." The bill arrives, and then glances are made to see if the waiter is within earshot. The critical question is spoken: "How much should we tip?"

Each year, diners give roughly \$42 billion in tips at full-service restaurants which employ about 2.6 million waiters and waitresses who rely on tips for the bulk of their income.<sup>2</sup> A general conception of tips is that they provide employees with immediate compensation for their hard efforts.<sup>3</sup> Although eighty percent of Americans reason that they prefer paying a tip as opposed to a service fee because they believe it provides an incentive to the waiter or waitress,<sup>4</sup> Cornell professor of consumer behavior and marketing Michael Lynn stated that the correlation between the satisfaction with service and the size of the tip is less than two percent.<sup>5</sup> Instead, the amount of the bill is the most determinative factor of the size of the tip.<sup>6</sup> Professor Lynn discovered that diners generally tip the same percentage regardless of the service in large part because it is expected of them and because of fears of social disapproval in leaving behind a small tip.<sup>7</sup> Ben Franklin recognized this social phenomenon when he said, "[t]o overtip is to appear an ass: to undertip is to appear an even greater ass."<sup>8</sup> The size of the tip may also be related to some other social experience. Actor John Goodman said in a recent interview, "I always overtip. Because at the end of the night, your feet hurt and you get to count it up and there's a nice feeling when you've gotten tipped well. I know what it's like. My mom lived on tips."<sup>9</sup> Thus, the size of the tip may not be any reflection on customer satisfaction. This Comment will discuss how the customer compulsion to tip is reflective of the underpinning problems associated with the tip credit and tip pooling.

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2. See Paul Wachter, *Why Tip?*, N.Y. TIMES, Oct. 12, 2008, at MM56 (according to economist Oscar Azar).

3. *Id.*

4. *Id.* (referring to the results of a Zagat survey).

5. *Id.*

6. See *id.* (referring to the findings of Cornell professor Michael Lynn).

7. *Id.*

8. *Id.*

9. Interview by Cal Fussman with John Goodman, actor, *John Goodman: What I've Learned*, ESQUIRE, October 8, 2008, at 64.

The origins of the tipping custom have been attributed to Tudor England where overnight guests would provide sums of money to private homeowners.<sup>10</sup> The custom trickled over to coffeehouses, restaurants, and other commercial establishments.<sup>11</sup> Some speculate that “tip” is an acronym for the phrase “To Insure Promptitude,” which was inscribed on a bowl at a coffeehouse frequented by the 18<sup>th</sup> century English author Samuel Johnson.<sup>12</sup> After the Civil War, wealthy Americans began traveling to Europe, bringing back with them the tipping custom to flaunt their worldliness.<sup>13</sup> At first, Americans opposed the custom and viewed it as contradictory to democratic ideals.<sup>14</sup> Some states even passed anti-tipping laws.<sup>15</sup>

In 1938, Congress passed the Fair Labor Standards Act (FLSA) with the intention of regulating “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . .”<sup>16</sup> The FLSA set minimum wages,<sup>17</sup> limited the maximum number of hours employees were to work,<sup>18</sup> provided for overtime wages in certain industries,<sup>19</sup> and prohibited “oppressive child labor.”<sup>20</sup> It was not until 1966 that Congress added restaurant workers to the list of protected workers under the FLSA.<sup>21</sup> That same year, Congress adopted the concept of a tip credit which allowed employers to credit an employee’s tips to satisfy the federal minimum wage requirement.<sup>22</sup> Along with the tip credit, Congress adopted the practice of tip pooling among customarily and regularly tipped employees which allowed employees to pool their tips together.<sup>23</sup> Tip pooling was a method of ensuring fairer distribution of tips and promoting harmony among employees.<sup>24</sup>

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10. KERRY SEGRAVE, *TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES* 1 (1998).

11. *Id.* at 4.

12. *See id.* (adding that this time period was as early as 1756).

13. *See id.* at 6.

14. *Id.* at 2-3.

15. Wachter, *supra* note 2, at MM56.

16. 29 U.S.C. § 202(a) (2009).

17. 29 U.S.C. § 206 (2009).

18. 29 U.S.C. § 207 (2009).

19. *Id.*

20. 29 U.S.C. § 212(a) (2009).

21. *See* S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3006, 1966 WL 4378.

22. 29 U.S.C. § 203(m) (2009); *see also* S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3014, 1966 WL 4378.

23. 29 U.S.C. § 203(m).

24. *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1067 (Cal. Ct. App. 1990).

This Comment will discuss the legal uncertainties associated with the current tip credit and tip pool guidelines and demonstrate the potential for employees within the restaurant industry to be denied the right to their tips. Section II of this Comment supplies background information on the Congressional goal of providing a minimum wage to hourly employees. Also, Section II explains the general guidelines for implementing a tip credit and tip pool and how both are intended to provide employees the statutorily mandated minimum hourly wage. Section III of this Comment then analyzes the areas of imprecision within the tip credit and tip pool guidelines and examines cases where employees were unlawfully denied their tip wages. Lastly, the Comment presents arguments supported by Labor Unions which demand more stringent policies of the tip credit or for an abolition of the tip credit altogether. The Comment then concludes by re-evaluating the general custom of tipping.

## II. BACKGROUND

Before discussing the complications with respect to the tip credit and tip pools, it is important to first understand the development of the minimum hourly wage. After discussing the establishment of the federal minimum wage, Section II(b) examines the concept of a tip. This Section subsequently explains the tip credit and tip pool models. Lastly, Section II(e) provides a brief snapshot of the devastating consequences to an employer in implementing an unlawful tip pool.

### A. *The Federal Hourly Minimum Wage*

The Fair Labor Standards Act requires employers to pay employees a legally prescribed minimum hourly wage.<sup>25</sup> Employers are required to pay the federal minimum wage “finally and unconditionally or ‘free and clear’” in order to comply with the Congressional intent of providing a minimum standard of living.<sup>26</sup> This requirement has generally been interpreted to mean that employees must not be required to return their

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25. 29 U.S.C. § 206(a)(1) (2009).

26. 29 C.F.R. § 531.35 (2009).

minimum wages to employers.<sup>27</sup> As of July 24, 2009, the current U.S. federal minimum wage is \$7.25 per hour.<sup>28</sup>

*B. Tips and Tipped Employees*

A tip is defined under federal regulation as a “sum of money presented by a customer as a gift or gratuity in recognition of some service performed for him.”<sup>29</sup> An employee must be engaged in an occupation that customarily and regularly receives at least \$30 per month in tips in order to be considered a tipped employee.<sup>30</sup> The term “customarily and regularly” is defined as “a frequency which must be greater than occasional, but which may be less than constant.”<sup>31</sup>

*C. The Tip Credit Provision*

The FLSA permits employers to implement a tip credit in which an employee’s tips are credited toward the employer’s minimum wage obligation.<sup>32</sup> Under the tip credit provision, an employer is only required to pay \$2.13 per hour in direct wages so long as that amount, combined with the employee’s tips, equals the hourly minimum wage.<sup>33</sup> The employer must pay any differences to ensure the employee receives at

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27. See generally *Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972) (holding that it was a violation of the minimum wage requirements in requiring employees to make repayments of cash register shortages, and that shifting the employer’s business expense to employees reduced the employee’s minimum wage below the statutory minimum, thus violating the “free and clear” requirement under 29 C.F.R. § 531.35), *cert. denied*, 409 U.S. 1108 (1973).

28. U.S. Department of Labor Homepage, <http://www.dol.gov> (last visited Aug. 29, 2009).

29. 29 C.F.R. § 531.52 (2009); see also Dep’t. Labor Wage and hour Div. Op. Ltr. 1975 DOLWH LEXIS 60, WH-321 (Apr.30, 1975) (stating the Congressional purpose was the ensure that an employer could not use the tips of a tipped employee to satisfy more than 50 percent of the minimum wage obligation and to ensure that employees retain all tips except for when there is a tip pooling arrangement among customarily and regularly tipped employees). But see 29 C.F.R. § 531.55 (2009) (excluding explicitly a service charge, such as 10 percent of the amount of the bill, from the definition of tip).

30. 29 C.F.R. § 531.56 (2009).

31. 29 C.F.R. § 531.57 (2009).

32. 29 U.S.C. § 203(m) (2009); see also 29 C.F.R. § 531.51 (2009) (explaining that the use of the 29 U.S.C. § 203(m) tip credit requires the payments that the employee receives to be classified as tips, the employee to earn more than \$20 a month in tips from that occupation, and that occupation to be one in which tips are regularly and customarily made).

33. See 29 U.S.C. § 203(m); see also Department of Labor Fact Sheet # 15, <http://www.dol.gov/esa/whd/regs/compliance/whdfs15.pdf> (last visited Aug. 29, 2009) (applying the tip credit to the current federal minimum wage).

least the federal minimum wage for every hour worked.<sup>34</sup> For example, in a tip-credit state where the minimum wage is \$7.25, the current federal minimum wage, an employer would be permitted to pay tipped employees \$2.13 an hour, provided the employee makes at least \$5.12 per hour in tips.<sup>35</sup>

#### D. Tip Pooling

The FLSA allows employees to pool their tips together.<sup>36</sup> Although the Sixth Circuit has found that an employer may require employees to pool their tips,<sup>37</sup> the general practice for a valid tip pool is to have employees initiate the pool, participate voluntarily, and limit the employer's involvement to only managerial functions, such as distributing tips charged on credit cards based on a formula developed by the employees.<sup>38</sup> It is common to limit participation in the tip pool to customarily and regularly tipped employees and to ensure that managerial employees do not take from the pool.<sup>39</sup> Tipped employees cannot be required to contribute a greater percentage of their tips than is "customary and reasonable" to the tip pool.<sup>40</sup> The Wage and Hour Division will not question contributions to a pool that do not exceed 15% of an employee's tips.<sup>41</sup> If a dispute arises concerning the validity of a tip pool arrangement, the employer bears the burden of proving its validity.<sup>42</sup>

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34. 29 U.S.C. § 203(m); *see also* 29 C.F.R. § 531.7 (2009) (noting that employees may request a review by the Secretary of Labor if they believe the tip credit that is taken exceeds actual tips).

35. *See* U.S. Department Labor, Minimum Wages for Tipped Employees, <http://www.dol.gov/esa/whd/state/tipped.htm> (last visited Aug. 29, 2009), for a state-by-state breakdown of the state minimum wage, which may be higher than the federal minimum wage, and maximum allowable tip credit.

36. 29 U.S.C. § 203(m); *see also* 29 C.F.R. § 531.54.

37. *See, e.g.,* Kilgore v. Outback Steakhouse of Fla., Inc., 160 F.3d 294, 303-04 (6th Cir. 1998) (holding that Outback was permitted to require its waiters to pool tips with hosts).

38. Carolyn Richmond, *Tip Sharing, Tip Pool & Spread of Hours: Staying Out of Hot Water*, RESTAURANT INSIDER MAGAZINE, July 2007, available at <http://www.newyorkrestaurantinsider.com/july2007-tipsharing.asp>.

39. 29 U.S.C. § 203(m).

40. U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(a) (1988), available at <http://www.dol.gov/esa/whd/foh/index.htm> (follow "Chapter 30" hyperlink).

41. *Id.*; *see also* Dep't. Labor Wage and Hour Div., Op. Ltr. 1978 DOLWH LEXIS 28, WH-468 (Sept. 5, 1978) (noting that both percentage of sales and percentage of tips models will not be questioned by the Wage and Hour Division, provided that the amount contributed by employees does not exceed 15% of the tips they received).

42. *See* Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 467 (5th Cir. 1979) (holding that TGI Friday's restaurant had the burden to prove a valid tip pool).

*E. Impact of Unlawful Tip Pools on the Employer*

Under the FLSA, employees are permitted to file an action for unlawful tip pools on behalf of themselves and other similarly situated employees.<sup>43</sup> Employees generally have to show that they were similarly affected by a common policy, plan, pattern or practice in order to proceed collectively.<sup>44</sup> A testifying witness' testimony is justified in a collective action if his or her experiences are sufficiently similar to the rest of the non-testifying plaintiffs.<sup>45</sup> Only a small number of testifying employees may be needed in order to fulfill this requirement so as to proceed with a collective lawsuit.<sup>46</sup> However, the court may allow employees to prepare an alternative trial plan if the court initially determines that the employee testimony does not appear to be reflective of company policy.<sup>47</sup>

The ramifications of invalid tip pool arrangements can be devastating to an establishment. When invalid tip pooling cases are initiated, the court may allow a yearly span of employees to opt into the lawsuit if they faced similar invalid tip pooling arrangements. Over 100,000 employees in California joined in an action against Starbucks in 2008 because of invalid tip pooling.<sup>48</sup> As a result, Starbucks had to pay over \$105 million in tip money that it had unlawfully taken.<sup>49</sup> In *Rousell v. Brinker International, Inc.*,<sup>50</sup> there were over 3,500 employees who

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arrangement upon the questioning of the waiters who believed they were being denied the statutory minimum wage).

43. 29 U.S.C. § 216(b) (2009).

44. See, e.g., *Rousell v. Brinker Int'l, Inc.*, No. H-05-3733, 2008 U.S. Dist. LEXIS 52568, at \*63 (S.D. Tex. July 9, 2008) (requiring Chili's employees to demonstrate that they were all similarly affected by an invalid tip pooling scheme in order to bring forth a collective action); see also *Aguirre v. SBC Communications, Inc.*, No Civ. A. H-05-3198, 2006 U.S. Dist. LEXIS 22211, at \*5 (S.D. Tex. 2006) (requiring plaintiffs to show that they were all similarly affected by a common plan as opposed to purely personal circumstances in order for them to proceed collectively).

45. *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*91 (S.D. Tex. July 9, 2008).

46. See *id.* (noting that there is no bright line test for how many employees are needed to testify in order to show all employees were similarly affected). In *Rousell*, the court did not strike on its face the possibility that the testimony from fifty-six opt-in plaintiff-employees could be representative of employees from the other 718 unrepresented Chili's restaurants to show that employees at those restaurants faced similar invalid tip pooling policies. *Id.* at \*91.

47. See, e.g., *id.* at \*93 (allowing Chili's employees who were unable to assure the court that employees from the other 718 unrepresented Chili's restaurants faced similar conditions to draft an alternative trial plan to alleviate the court's concern).

48. Vikas Bajaj, *California Awards Starbucks Baristas \$105 Million in Tip Dispute*, N.Y. TIMES, March 21, 2008, at C5; see discussion *infra* Section III(e).

49. *Id.*

50. 2008 U.S. Dist. LEXIS 52568 (S.D. Tex. July 9, 2008).

were employed by Chili's restaurants between August 2003 and August 2006 who joined in the invalid tip pool action.<sup>51</sup> Also in 2008, the Fireman Hospitality Group, which owned several New York restaurants, paid a \$3.9 million settlement to employees for various labor and wage violations; unlawful managerial participation in tip pools was among the claims.<sup>52</sup>

### III. ANALYSIS

At first glance, uses of the tip credit and tip pool do not appear to have many intricacies. The purpose of this section is to demonstrate questionable facets of the tip credit and tip pool. Section III(A) will demonstrate the inconsistencies among court decisions and also legislative history as to whether employers may mandate tip pools. Next, Section III(B) looks into the adequacy of information employers must give employees if the employer intends to credit the employees' tips toward their wages. Section III(C) and III(C)(1) will then examine the discrepancy among courts as to which employees may participate in a tip pool. Then, Section III(D) will explain the application of the tip credit to employees who perform both tip producing and non-tip producing functions. Following that, Section III(E) will explore the ineligibility of managerial participation in a tip pool arrangement. Lastly, Section III(F) will explain the different approaches to tip pooling in the seven states that do not allow employers to use the tip credit.

#### A. *Uncertainty as to Whether a Tip Pool May be Mandatory*

Conflicts have arisen as to whether a tip pool may be mandatory or whether it must be voluntary. While the Fair Labor Standards Act permits a tip-pooling arrangement among employees who customarily and regularly receive tips, it does not expressly prohibit mandatory or coerced tip-pooling arrangements.<sup>53</sup> However, the Senate Committee on Labor and Public Welfare states that an employer "will lose the benefit of [the tip credit] exception if tipped employees are *required* to share their tips with employees who do not customarily and regularly receive tips."<sup>54</sup> The Department of Labor Handbook similarly expresses that an employer cannot require employees to share tips with employees who

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51. *Id.* at \*2.

52. Steven Greenhouse, *Judge Approves Deal to Settle Suit Over Wage Violations*, N.Y. TIMES, June 19, 2008, at B3.

53. *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*30.

54. S. REP. NO. 93-690, at 43 (1974), *microformed on* CIS No. 74-S543-3 (Cong. Info. Serv.) (emphasis added).



traditionally are not tipped.<sup>55</sup> The voluntariness of a tip pooling arrangement is also questionable when the employer recommends that certain percentages on the dollar amounts be shared among employees.<sup>56</sup>

A tip pool arrangement may be considered mandatory, and thus invalid in some jurisdictions, if managers have oversight over the tip pool and make efforts to enhance the tip-pooling arrangement.<sup>57</sup> Management cannot lawfully urge an employee to share tips with non-tipped employees nor can management speak personally with employees who do not comply.<sup>58</sup> Employees may share their tips with other employees who are not customarily and regularly tipped provided they are not coerced to do so and it is not a condition of employment.<sup>59</sup>

Although the Senate Committee and Department of Labor Field Operations Handbook voiced concerns against required tip pools, the Sixth Circuit in *Kilgore v. Outback Steakhouse of Florida, Inc.*<sup>60</sup> decided otherwise. In *Kilgore*, the Sixth Circuit reasoned that the tip credit provision which permits the pooling of tips does not expressly prohibit employers from requiring tip pooling.<sup>61</sup> Additionally, the Sixth Circuit noted that 29 C.F.R. § 531.54 distinguished the practice of tip splitting, “where waiters give a portion of their tips to busboys,” from voluntary tip pooling, “whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among

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55. See U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(c) (1988), available at <http://www.dol.gov/esa/whd/foh/index.htm> (follow “Chapter 30” hyperlink); see also Dep’t. Labor Wage and Hour Div., Op. Ltr. 1997 DOLWH LEXIS 55, at \*4 (Nov. 4, 1997), for a Department of Labor opinion letter suggesting that a tip pool is invalid when a tipped employee is required, as a condition of his or her employment, to share tips with non-tipped employees.

56. Dep’t. Labor Wage and Hour Div., Op. Ltr. 1997 DOLWH LEXIS 55, at \*4 (Nov. 4, 1997).

57. See, e.g., *Zhao v. Benihana, Inc.*, No. 01 Civ. 1297, 2001 U.S. Dist. LEXIS 10678 (S.D.N.Y. May 7, 2001). In *Zhao*, the manager disciplined the plaintiff-employee at the request of a chef for violating the tip agreement between the servers and the chefs. *Id.* at \*12. Such managerial involvement in policing the tip pool indicated that management “instituted or adopted the tip sharing agreement as a matter of restaurant policy and that the tip pool was therefore not voluntary.” *Id.*

58. See, e.g., *Bonham v. Copper Cellar Corp.*, 476 F. Supp. 98, 101-02 (E.D. Tenn. 1979) (finding a tip pool arrangement was mandatory and, therefore, invalid because the managers urged waitresses to share 15 percent of their wages with bartenders, busboys, and kitchen personnel and spoke personally with waitresses when they did not comply).

59. See *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*75 (explaining that employer coercion should be determined from an objective standpoint).

60. See *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 303-04 (6th Cir. 1998) (holding that Outback was allowed to require its waiters and waitresses to pool their tips with hosts).

61. *Id.* at 303.

themselves. . . .”<sup>62</sup> The Court of Appeals in California, a non-tip credit state,<sup>63</sup> allowed mandatory tip pooling among employees who directly serviced patrons.<sup>64</sup> In its reasoning, the court recognized the custom and usage of tip pooling within the restaurant industry and found that fairer distribution of tips promoted harmony among employees.<sup>65</sup>

Thus, the dissention among jurisdictions as to whether or not a tip pool may be voluntary gives employers room to argue either way. Even in jurisdictions where tip pools must be voluntary, one could argue that tip pools are never purely voluntary. It is not hard to imagine the pressure or encouragement from a manager to participate in a tip pool, especially with employees who rely on their wages to survive.<sup>66</sup>

*B. Disputes as to the Sufficiency of Tip Credit Notice*

Another area of confusion is the sufficiency of notice employers must give to employees that they will be using the tip credit. Employers must notify employees of the provisions of subsection 203(m) in order for a tip credit to be lawful.<sup>67</sup> An employer does not have to “explain” the tip credit to employees, but rather it is enough to “inform” employees that tips will be treated as satisfying part of the employer’s minimum wage obligation. Under this requirement, to “inform” an employee requires less effort than it would to “explain” the tip credit to the employees.<sup>68</sup> Although the Department of Labor regulation explicitly requires employers to post a notice concerning the tip credit provision,<sup>69</sup> it is not certain that employers must “display” the notice.<sup>70</sup> Courts have found that notice of the tip credit may be conveyed to employees through

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62. *Id.*; see also *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799, 800-01 (E.D. Ark. 1990) (upholding a mandatory tip pool); *Bonham v. Copper Cellar Corp.*, 476 F. Supp. 98, 101-02 (E.D. Tenn. 1979) (noting that mandatory tip pooling with busboys is not necessarily prohibited by 29 U.S.C. § 203(m) and also citing 29 C.F.R. § 531.54).

63. See *infra* text and accompanying notes 117-123.

64. See *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1067 (Cal. Ct. App. 1990) (holding that waitresses could be required to share tips with busboys).

65. *Id.*

66. John Marshall, *Tip Pooling Pros and Cons*, [http://www.tipcompliance.com/pollLearningCenter.cfm?doc\\_Id=89](http://www.tipcompliance.com/pollLearningCenter.cfm?doc_Id=89) (last visited Aug. 29, 2009).

67. 29 U.S.C. § 203(m) (2009) (stating “unless such employee has been informed”); see *Kilgore*, 160 F.3d at 298.

68. See *Kilgore*, 160 F.3d at 298.

69. 29 C.F.R. § 516.4 (2009) (“Every employer employing any employees subject to the Act’s minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy.”).

70. *Lentz v. Spanky’s Rest. II, Inc.*, 491 F. Supp. 2d 663, 671 (N.D. Tex. 2007).

a file folder containing the relevant information,<sup>71</sup> a co-worker, written materials,<sup>72</sup> or a prominently-displayed poster.<sup>73</sup> Most evidently, an employee would have also been on notice if the employer informs him or her of the amount the employer intends to treat as a tip to satisfy the minimum wage obligation.<sup>74</sup>

Unions have stressed for an elaboration of the notice requirement.<sup>75</sup> Perhaps some of the problems associated with tip pools could be avoided if the employee was made aware of its implications.<sup>76</sup> Going against the court's decision in *Kilgore*, unions have argued that legislative history indicates that "informing" employees of the tip credit does in fact mean "explaining" it to them.<sup>77</sup> Some unions have pushed for the requirement that employers provide written notice to employees explaining how their minimum wage will be calculated and that employees have a legal right to keep all of their tips if they do not agree to participate in a valid tip pool arrangement.<sup>78</sup> The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has taken the position that a poster, which has been found to be sufficient notice in court decisions, inadequately informs tipped employees of their rights.<sup>79</sup> Expanding the notice requirement seems appropriate in that it would help to educate employees and also employers who would have to explain the implications of the tip credit, thus allowing for more educated and lawful decisions from both employees and employers.

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71. See, e.g., *Kilgore*, 160 F.3d at 299 (6th Cir. 1998) (holding that a file folder given to Outback employees describing the restaurant's tip policy was adequate notice).

72. *Davis v. B & S, Inc.*, 38 F. Supp. 2d 707, 719 (N.D. Ind. 1998).

73. See, e.g., *Pellon v. Business Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1310 (Fla. 2007) (holding that a prominently displayed poster using language approved by the Department of Labor to explain 29 U.S.C. § 203(m) was sufficient notice).

74. *Davis*, 38 F. Supp. 2d at 719 (N.D. Ind. 1998).

75. Kevin P. McGowan, *Labor Department Should Drop Proposal To Revise FLSA Regulations, Unions Contend*, LABOR RELATIONS WEEK, Oct. 23, 2008, [http://news.bna.com/lrn/LRLNWB/split\\_display.adp?fedfid=10956241&vname=lrwnotalissues&fcn=22&wsn=499954000&fn=10956242&split=0](http://news.bna.com/lrn/LRLNWB/split_display.adp?fedfid=10956241&vname=lrwnotalissues&fcn=22&wsn=499954000&fn=10956242&split=0).

76. See *id.* (arguing that the "inform" requirement leaves many low-wage workers ignorant about their pay).

77. *Id.*

78. See *id.* (noting that the AFL-CIO has also suggested that employers inform employees that a minimum wage is required by law, the amount of the minimum wage, how the tip credit works, and explain the formula for tip distribution if there is a valid tip pool arrangement).

79. *Id.*

### C. Customarily Tipped Employees Within a Tip Pool

Additionally, it is legally ambiguous as to who may legally participate in a tip pool arrangement. If an employer claims a tip credit, employees must be permitted to retain their tips unless they participate in a valid tip pool among other employees who “customarily and regularly receive tips.”<sup>80</sup> The Department of Labor Wage and Hour Division has stipulated that “‘customarily and regularly’ signifies a frequency which must be greater than occasional, but which may be less than constant.”<sup>81</sup> Employees who only occasionally receive more than \$20 a month in tips would not fall within this categorization.<sup>82</sup> Additionally, employees who customarily and regularly receive tips will not lose this distinction if they fail to receive more than \$20 a month in tips because of a temporary condition, such as sickness or seasonal fluctuations.<sup>83</sup>

#### 1. Front-of-the-House vs. Back-of-the-House Employees

In an attempt to categorize the types of employees who may be included in a tip pool, the Senate Committee on Labor and Public Welfare specifically names “waiters, bellhops, waitresses, countermen, busboys, and service bartenders” as employees who are customarily and regularly tipped and mentions that tip pooling among these employees should not be discouraged.<sup>84</sup> Conversely, employees such as janitors, dishwashers, chefs, and laundry room attendants are categorized as those who do not customarily and regularly receive tips and, thus, should not participate in a tip pool.<sup>85</sup>

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80. 29 U.S.C. § 203(m) (2009); *see also* H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2822, 1974 WL 1148 (“With respect to tipped employees, the tip credit provision of the act is not to apply unless the employer has informed each of his tipped employees of the tip credit provision and all tips received by a tipped employee have been retained by the tipped employee [either individually or through a pooling arrangement]”).

81. 29 C.F.R. § 531.57 (2009).

82. *Id.*

83. *Id.*

84. S. REP. NO. 93-690, at 43 (1974), *microformed on* CIS No. 74-S543-3 (Cong. Info. Serv.); *see also* U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(a) (1988), *available at* <http://www.dol.gov/esa/whd/foh/index.htm> (follow “Chapter 30” hyperlink), for a list of employees who customarily and regularly receive tips which is virtually identical to the list provided by the Senate Committee on Labor and Public Welfare; *see also* Department of Labor Fact Sheet # 15, <http://www.dol.gov/esa/whd/regs/compliance/whdfs15.pdf> (last visited Aug. 29, 2009), for a similar listing.

85. S. REP. NO. 93-690, at 43 (1974), *microformed on* CIS No. 74-S543-3 (Cong. Info. Serv.); *see also* U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(a) (1988), *available at* <http://www.dol.gov/esa/whd/>

A flaw with these listings is that neither the Senate Report nor the Department of Labor Handbook explains the employee characteristics which qualify or disqualify particular types of employees from being able to participate in the tip pool.<sup>86</sup> In considering who may participate in a tip pool, courts have placed great significance on whether the occupation entails regular interaction with customers.<sup>87</sup> The test reflects the lists created by the Senate Committee on Labor and Welfare and the Department of Labor because those employees who are visible and have contact with patrons are the employees who are more likely to have an impact on customer service.<sup>88</sup> This test was exemplified in *Kilgore v. Outback Steakhouse of Florida, Inc.*, where the Sixth Circuit considered how hosts at Outback Steakhouse restaurants had sufficient interaction with customers, such as greeting them, supplying them with menus, seating them at tables, and occasionally “enhancing the wait.”<sup>89</sup> Similar to bussers, who are explicitly listed in 29 C.F.R. § 531.54 as customarily tipped employees who may participate in a tip pool, Outback hosts did not necessarily have direct contact with the customers but still had more than a “de minimis interaction with customers.”<sup>90</sup> Further, a host’s interaction with customers was dissimilar from that of back-of-the-house employees such as dishwashers, cooks, or overnight maintenance who may not have any interaction with customers.<sup>91</sup> Accordingly, hosts were permitted to participate in a tip pool and the employer could lawfully use a tip credit for hosts.<sup>92</sup> Occupations such as a maitre d’,<sup>93</sup> sommelier,

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foh/index.htm (follow “Chapter 30” hyperlink), (containing list of employees who do not customarily and regularly receive tips which is virtually identical to the list provided by the Senate Committee on Labor and Public Welfare); *see also* Department of Labor Fact Sheet # 15, <http://www.dol.gov/esa/whd/regs/compliance/whdfs15.pdf> (last visited Aug. 29, 2009), for a similar listing.

86. *See, e.g.*, *Rousell v. Brinker Int’l, Inc.*, No. H-05-3733, 2008 U.S. Dist. LEXIS 52568, at \*31 (S.D. Tex. July 9, 2008) (recognizing the absence of an explanation of the commonalities between the categorization for back-of-the-house and front-of-the-house employees in trying to determine within which group a quality assurance employee would fit).

87. *See, e.g.*, *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 301 (6th Cir. 1998).

88. *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*42.

89. *Kilgore*, 160 F.3d at 301.

90. *Id.*

91. *Id.*

92. *Id.* at 301-02.

93. *See Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799, 800-01 (E.D. Ark. 1990) (holding that a maitre d’ who did not receive direct tips from customers but set the dining room, greeted and seated customers, served the first drink to customers, and assisted servers was permitted to participate in a mandatory tip pool).

busser, and bartender have also been validly included in mandatory tip pools.<sup>94</sup>

Adhering to this test of employee interaction with customers, courts have also held that occupations which do not entail direct interaction with customers cannot lawfully participate in a tip pool.<sup>95</sup> Salad preparers at Copper Cellar restaurants did not have any direct contact with patrons—they were not even in the view of patrons—or perform any duties that were traditionally recognized with tips.<sup>96</sup> A salad preparer's duties conformed more to that of a food preparer, an occupation which traditionally did not receive tips.<sup>97</sup> Thus, they were not tip credit or tip pool eligible.<sup>98</sup>

However, courts have also noted that an employee does not need to have direct contact with customers in order to have an effect on customer service, such as an employee whose duties include checking the adequacy of food temperature and monitoring timely service.<sup>99</sup> Thus, in employing these parameters, it would seem appropriate for the court to consider the employee's overall duties in addition to the extent of direct customer interaction, which may have to be only minimal.<sup>100</sup>

Even in determining the extent of interaction with customers, courts sometimes fail to address whether employees who perform some customer service functions but have limited or no interaction with customers would be eligible to participate in a mandatory tip pool.<sup>101</sup>

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94. *Fraser v. Pears Co, Inc.*, 16 Mass. L. Rep. 255, 2003 Mass. Super. LEXIS 152, at \*10-11 (Mass. Supp. 2003).

95. *See, e.g., Myers v. Copper Cellar Corp.*, 192 F.3d 546, 550 (6th Cir. 1999) (finding that salad preparers could not participate in a tip pool because they did not have any direct contact with diners, could not be seen by patrons, and had duties akin to those classified as food preparation or kitchen support work); *Elkins v. Showcase, Inc.*, 704 P.2d 977, 989 (Kan. 1985) (holding that bartenders who were located behind a wall had no interaction with customers were not regularly tipped employees who could participate in a tip pool arrangement and, therefore, the employer could not utilize the tip credit for those employees).

96. *Myers*, 192 F.3d at 550.

97. *Id.*

98. *Id.*

99. *See Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*42 (finding that quality assurance employees provided important customer service duties, such as ensuring timely delivery of food, akin to that of servers).

100. *See id.* at \*42-43 (explaining that employees who have minimal customer interaction may still participate in a mandatory tip pool provided their primary duties entail important customer service functions).

101. *Compare Kilgore*, 160 F.3d at 301 (holding that it was clear that Outback hosts were permitted to participate in a tip pool because of their interaction with customers) and *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*42 (finding that quality assurance employees ensured timely delivery of food but may not have had direct interaction with customers) with *Myers*, 192 F.3d at 550 (6th Cir. 1999) (finding that salad preparers, who

Industry practice may be valuable in determining whether an employee's duties reflect those of an employee who is customarily tipped.<sup>102</sup>

Not all courts have adopted the approach of considering the extent of customer interaction as being dispositive of whether an employee can participate in a mandatory tip pool.<sup>103</sup> Moving away from the customer interaction approach, one district court noted that bussers may not have any direct contact with customers and may not receive tips directly, usually because their duties are not performed until after the patron has left, but bussers are nonetheless considered to be customarily tipped employees.<sup>104</sup> Courts have also recognized the difficulty and inequity that could result if only those who physically serve patrons would be permitted to participate in a tip pool.<sup>105</sup>

Even courts that have utilized the customer interaction distinction have recognized that those employees who take from the tip pool do not themselves need to contribute to the pool, and their tip income may derive solely from the tip pool.<sup>106</sup> These particular employees may not

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had no contact with customers and only prepared food, could not participate in a tip pool and were ineligible for use of the tip credit).

102. *Rousell*, 2008 U.S. Dist. LEXIS 52568, at \*49-50.

103. *See, e.g., Lentz v. Spanky's Rest. II, Inc.*, 491 F.Supp.2d 663, 670-71 (N.D. Tex. 2007) (noting that nothing in the tip credit provision requires employees who participate in a tip pool to have direct interaction with customers). In *Lentz*, the employee worked for Double Nickel Steakhouse as a waiter for \$2.13 an hour plus tips and he and other waiters were required to share their tips with "expeditors," employees who helped prepare plates in the kitchen but did not interact with customers. *Id.* at 667. While conceding that he still received the hourly minimum wage, the plaintiff argued that the tip pool was illegal because expeditors were not customarily tipped employees. *Id.* The court denied the argument that expeditors, because of their lack of customer interaction, were not permitted to lawfully participate in a tip pool. *Id.* at 670-71.

104. *Id.* at 670-71; *see also* 29 U.S.C. § 203(m) (2009) (there is no explicit requirement in the tip credit provision that employees who participate in a tip pool interact directly with customers); *see also* U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(a) (1988), *available at* <http://www.dol.gov/esa/whd/foh/index.htm> (follow "Chapter 30" hyperlink), and S. REP. NO. 93-690, at 43 (1974), *microformed on* CIS No. 74-S543-3 (Cong. Info. Serv.), both of which include busboys in the list of regularly and customarily tipped employees.

105. *See Louie v. McCormick & Schmick Rest. Corp.*, 460 F. Supp. 2d 1153, 1163 (C.D. Cal. 2006) (holding that restaurants may require servers to share tips with bartenders, regardless of whether bartenders provide direct or indirect services to a particular server's customers).

106. *See, e.g., Kilgore*, 160 F.3d at 301 (allowing hosts, who did not receive any tips directly, to share in the tip pool); *see also* 29 C.F.R. § 531.54 (2009) ("Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them. . . ."); U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d04(a) (1988), *available at* <http://www.dol.gov/esa/whd/foh/index.htm> (follow "Chapter 30" hyperlink) ("It is not required that all employees who share in tips must themselves receive tips from

be allowed to take tips from customers and, therefore, would have no tip income to contribute to the pool.<sup>107</sup>

A fundamental question to ask is why regularly tipped employees are distinguished from those who are not. There does not seem to be much justification in paying cooks, who make the food but do not have contact with customers, at a fixed hourly wage while allowing waiters and waitresses to make a tip profit from that food simply for bringing it to the patrons' tables.<sup>108</sup> When one considers the data which shows diners will generally tip the same percentage regardless of the quality of service, this widely accepted practice appears even more puzzling.<sup>109</sup> Once an employer is able to muddle through case history to determine who is considered a customarily and regularly tipped employee, the labeling of an employee is nonetheless confusing due to the non-existent reasoning behind this distinction. Again, employees are left at the mercy of the employer's decision as to who may participate in the pool. Without more certainty as to who may participate in the pool, employees could be unknowingly and unlawfully deprived of their tips until they ask the court to decide whether they or their fellow employees are considered customarily and regularly tipped employees.

*D. Applying the Tip Credit to Employees Engaged in Dual Jobs*

An employer is permitted to take a tip credit for an employee who works dual jobs, but only for the time that the employee spends working in a tipped employee capacity.<sup>110</sup> For example, a waiter/waitress "who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" may still be engaged in a tipped occupation even though these regular, incidental duties are not by themselves directed toward producing tips.<sup>111</sup>

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customers."); Dep't. Labor Wage and hour Div. Op. Ltr. 1997 DOLWH LEXIS 55, at \*1 (Nov. 4, 1997) ("It is customary for waiters/waitresses to receive gratuities and share them with the busboys/busgirls who assist in serving the patrons."); *Dole v. Continental Cuisine, Inc.*, 751 F. Supp. 799, 801-03 (E.D. Ark 1990) (allowing a maitre d' who did not receive tips himself or contribute to the pool to benefit from a mandatory tip pool).

107. *Kilgore*, 160 F.3d at 301 (6th Cir. 1998).

108. Marshall, *supra* note 66.

109. See *supra* text and accompanying notes 4-7.

110. 29 C.F.R. § 531.56(e) (2009); see also Dep't. Labor Wage and Hour Div., Op. Ltr. 1980 DOLWH LEXIS 1, WH-502 (March 28, 1980) (stating that a tip credit could not be taken for non-tipped duties where there was a "clear dividing line between the types of duties performed by a tipped employee.").

111. 29 C.F.R. § 531.56(e); see also Dep't. Labor Wage and Hour Div., Op. Ltr. 1980 DOLWH LEXIS 1, WH-502 (March 28, 1980). In response to a question, the Department of Labor answered that after-hour clean-up duties performed by tipped employees such as cleaning the salad bar, placing the condiment crocks in the cooler,



On the other hand, not all duties in an occupation that is tipped need to be directed toward producing tips to qualify for a tip credit.<sup>112</sup> An employer may take a tip credit for all of the employee's time even if the employee performs duties which are incidental to the main job but not considered to be tipped work, provided the employee does not spend more than 20 percent of his or her time performing those incidental tasks.<sup>113</sup> For example, a person who is dually employed as a waiter and a maintenance person, or another occupation in which the employee spends a substantial amount of time (in excess of 20 percent) in a non-tipped capacity, that employee is a "tipped employee" only with respect to the employment as a waiter and the tip credit is not applicable to his or her hours of employment in the occupation as a member of the maintenance staff.<sup>114</sup>

The guidelines for the dual job distinction place in the hands of the employer the improbable duty of checking a stopwatch to ensure tip pool employees do not exceed the 20 percent threshold for incidental tasks. Aside from the impracticality of employers performing this duty, another problem with the dual job guidelines is the indistinctness pertaining to the duties which are aimed at producing tips and those which are not aimed at producing tips. Even the U.S. Chamber of Commerce, which has shown its support of the current tip credit, expressed its disapproval

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cleaning and stocking the waitress station, cleaning and resetting the tables, and vacuuming the dining room carpet were duties under the umbrella of tipped employment and a tip credit could be taken for the time spent performing these duties. *Id.* at \*1-2. However, the opinion letter posed a hesitation to designate the duties as tipped employment if there were specific employees who were routinely assigned to that type of maintenance work. *Id.* at \*2.

112. 29 C.F.R. § 531.56(e); *see also* *Townsend v. BG-Meridian, Inc.*, No. CIV-04-1162-F, 2005 U.S. Dist. LEXIS 45200, at \*6-7 (W.D. Okla. 2005) (holding that the employer could apply the tip credit towards the time the plaintiff-waitress spent while performing cashier and phone receptionist duties, in addition to the time she spent serving tables, because such duties were "merely related duties incident to her waitress position"). *But see* *Dole v. Fred Bishop & Carol Bishop*, 740 F. Supp. 1221, 1228 (S.D. Miss. 1990) (finding that the time waitresses spent cleaning and preparing food before the restaurant opened was easily separable from the time spent performing waitressing duties and, therefore, the waitresses were entitled to the full statutory minimum wage during these periods of time).

113. U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d00(e) (1988), *available at* <http://www.dol.gov/esa/whd/foh/index.htm> (follow "Chapter 30" hyperlink); Dep't. Labor Wage and Hour Div., Op. Ltr. 1980 DOLWH LEXIS 1, WH-502 (March 28, 1980).

114. 29 C.F.R. § 531.56(e); U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK, § 30d00(e) (1988), *available at* <http://www.dol.gov/esa/whd/foh/index.htm> (follow "Chapter 30" hyperlink).

of the vague treatment for employees engaged in dual jobs and has requested some clarification.<sup>115</sup>

*E. Managerial Employees Unlawfully Taking from Tip Pools*

A chief concern with tip-pooling arrangements is the unlawful participation of employers and agents of the employer in the pool. Even where managers assist in serving food by providing such services as plating food, they still may not share in a tip pool where their primary duty is to supervise and not to serve food.<sup>116</sup>

In March 2008, the Superior Court in San Diego awarded Starbucks baristas roughly \$105 million after finding that supervisors were unlawfully taking from the tip pool.<sup>117</sup> Although supervisors at the well-known establishment made and served coffee, they also directed other employees, set schedules and performed other managerial work.<sup>118</sup> The award represented unlawfully-taken tips that belonged to roughly 100,000 former and current Starbucks baristas who had worked in stores in California since October 2000.<sup>119</sup> In April 2008, a similar action was brought against Starbucks in New York.<sup>120</sup> The lawyer representing the baristas stated that he intended to make the same argument that was made in California, arguing that the supervisors could not lawfully participate in the tip pool.<sup>121</sup> He was quoted as saying, "The fact that shift supervisors are underpaid doesn't mean that baristas should bear the brunt of that."<sup>122</sup> These cases have the potential to open the gates for litigation in other states, housing altogether more than 7,000 Starbucks shops with tip jars on every counter.<sup>123</sup>

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115. See McGowan, *supra* note 75 (referring especially to the Department of Labor Handbook which explains tip credit treatment for an employee engaged in dual jobs).

116. *Fernandez v. Four Seasons Hotels, Ltd.*, No. 02-4689-F, 2007 Mass. Super. LEXIS 367, at \*8 (Mass. Supp. 2007). In *Fernandez*, several employees who served at banquet events within the Four Seasons Hotel filed an action when the employer included an 18-19% service charge on the food and beverage bill and distributed only 15% to the employees while the remaining 3-4% was either given to managers or to the entity of Four Seasons. *Id.* at \*1. The court held that employees were entitled to entire service charge. *Id.* at \*7-8.

117. Bajaj, *supra* note 48 at C5, available at 2008 WLNR 5485688.

118. *Id.*

119. *Id.*

120. *Greenhouse, supra* 52 at C10.

121. *Id.*

122. *Id.*

123. *Id.*

*F. Tip Pool Guidelines in Non-Tip Credit States*

Some states prohibit an employer from crediting employee tips to satisfy the minimum wage obligation.<sup>124</sup> Those states include Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington.<sup>125</sup> Accordingly, every employer in these states must pay each employee the full state minimum wage regardless of the amount of tips employees receive.<sup>126</sup> Courts in these jurisdictions may impose fewer restrictions on tip pools as opposed to states which permit employers to use the tip credit because the employers in non-tip credit states still must pay the entire hourly minimum wage.<sup>127</sup> The District Court of Oregon suggested that tip-pooling restrictions under subsection 203(m) apply only where an employer takes a tip credit, and, for states that do not allow tip credits, there are no laws restricting tip pooling.<sup>128</sup> Therefore, an employer could require employees to share tips with each other, whether or not they are customarily tipped employees, provided the employer does not take, keep or use tips to satisfy the minimum wage obligation.<sup>129</sup> It is important to note, however, that not all non-tip credit states follow this unrestricted approach.<sup>130</sup>

The Oregon approach runs contrary to a Department of Labor Wage and Hour Division Opinion Letter which states that even where the employer does not seek a tip credit, tip pooling would be illegal if “(1) such pooling deprives a tipped employee of any amount of the tips such employee actually received and (2) the employer does not pay a sufficiently high cash wage to reimburse such employee for such loss,

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124. U.S. Department Labor, Minimum Wages for Tipped Employees, <http://www.dol.gov/esa/whd/state/tipped.htm> (last visited Aug. 29, 2009).

125. *Id.*

126. *See* 29 C.F.R. § 531.52 (2009) (“In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer.”).

127. *See, e.g.,* *Cumbie v. Woody Woo II, Inc.*, No. CV. 08-504-PK, 2008 U.S. Dist. LEXIS 56608, at \*8-9 (D. Or. 2008) (holding that there are no restrictions on tip pools in non-tip credit states).

128. *Id.* at \*8-9. In *Cumbie*, a tip pool was deemed not to be invalid where the employer paid servers above the Oregon minimum wage and servers were required to share 55 to 70% of their tips with kitchen staff. *Id.* at \*3. The court rejected the position of the Oregon Restaurant Association’s Government Affairs website which stated that an employer-mandated tip pooling policy is always illegal. *Id.* at \*8-9. The court found this statement to have no authority. *Id.* at \*9.

129. *Id.* at \*17.

130. *See supra* notes 117-123 and accompanying text. The Starbucks action was filed within California, a non-tip credit state, and yet the Superior Court of San Diego held that supervisors could not participate in the tip pool.

plus at least minimum wage. . . .”<sup>131</sup> Additionally, the Opinion Letter explains that the employee would then be “contribut[ing] part of his or her property to the employer or to other persons for the benefit of the employer, with the result that the employee would not have received the full minimum wage ‘free and clear’ as required by section 531.35 of Regulations 29 CFR Part 531.”<sup>132</sup>

The District Court of Oregon devalued this Opinion Letter, reasoning that every tip-pooling arrangement would be unlawful under this standard because a tip pool would inevitably deprive some employees of their tips.<sup>133</sup> The court added that even tip pool arrangements explicitly approved of in § 203(m) would be invalidated under this standard because the whole purpose of the tip pool is to redistribute tips evenly.<sup>134</sup>

Thus, it is unclear whether there are any guidelines in states which do not allow employers to use a tip credit. Although the District Court of Oregon decided that rules should not apply to tip pools in a state that does not recognize a tip credit, other non-tip credit states have decided otherwise, such as the Superior Court in San Diego in the Starbucks case which held that a manager could not participate in a tip pool. The inconsistencies in these decisions leave employers and employees in the dark as to the guidelines for tip pools in states that do not honor the tip credit.

#### IV. CONCLUSION

In the opening scene of the film *Reservoir Dogs*, Steve Buscemi’s character, Mr. Pink, is dining with his partners.<sup>135</sup> After the boss orders all of them to leave a tip, Mr. Pink uncomfortably scratches his chin and looks out the window next to him. Buscemi’s character verbosely reveals that he is defiantly opposed to the entire tipping norm.<sup>136</sup> He protests, “I don’t tip because society says I have to. . . . As far as I’m concerned, they’re just doing their job”.<sup>137</sup> He then questions the norm of tipping some jobs and not others: “I used to work minimum wage,

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131. Dep’t. Labor Wage and Hour Div., Op. Ltr. 1989 DOLWH LEXIS 1, WH-536, at \*4 (Oct. 26, 1989).

132. *Id.*

133. *Cumbe*, 2008 U.S. Dist. LEXIS 56608, at \*11.

134. *Id.* at \*11-12; *see also* Christensen v. Harris County, 529 U.S. 576 (2000) (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only to the extent that those interpretations have the ‘power to persuade.’”).

135. *RESERVOIR DOGS* (Live Entertainment 1992).

136. *Id.*

137. *Id.*

and when I did I wasn't lucky enough to have a job that society deemed tip-worthy."<sup>138</sup> When a partner raises the point that waitressing is working hard, Buscemi's character bounces back with pointing out that "so is working at McDonald's, but you don't feel the need to tip them, do you? . . . They're serving you food."<sup>139</sup> Empathetically he states his disgust that the government taxes tips, but reacts by saying that he is not personally to blame for that.<sup>140</sup> He concludes with telling his partners, ". . . if you show me a piece of paper that says the government shouldn't do it I'll sign it, put it to a vote I'll vote for it, but what I won't do is play ball."<sup>141</sup>

The cases in this Comment exemplify the uncertainty with the current structure of the tip credit and tip pooling arrangements. What is certain is that the Congressional intent in passing the tip credit provision was not to shortchange employees of their wages. Arguably the tip credit is mostly benefitting employers "seeking to dilute their federal minimum wage . . . obligations."<sup>142</sup> Employees at Starbucks, for example, who rely on their minimum wage and tips should not have to be penalized because of the fact that shift supervisors are underpaid.<sup>143</sup> Courts have attempted to clear the ambiguity within the provision, such as whether or not a tip pool may be mandatory, how much pressure is needed to show coercion, the sufficiency of notice to employees of the tip pool arrangement, who may legally participate in the tip pool, or which duties can be tip-credited. However, the law still lacks clearly-defined guidelines for valid tip pools, thus giving employers room to abuse the shortcomings of the current law until an employee questions its use.

Obvious solutions to the current abuse of the tip credit would be to either clarify the guidelines or to even void the provision altogether. The Service Employees International Union (SEIU) has argued for the Department of Labor to either withdraw or substantially revise the tip credit provision, referring to it as "an intent to diminish hourly compensation through any means possible."<sup>144</sup> SEIU has described the current structure of the tip credit as an illustration of the Department of Labor's failure to proceed with its core mission of protecting American

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138. *Id.*

139. *Id.*

140. *RESERVOIR DOGS* (Live Entertainment 1992).

141. *Id.*

142. McGowan, *supra* note 75.

143. Marshall, *supra* note 66.

144. McGowan, *supra* note 75.

workers and ensuring that they receive the full minimum wage guaranteed by the Fair Labor Standards Act.<sup>145</sup>

Maybe it is not too drastic to look beyond the tip credit and, like Steve Buscemi's character, reconsider the tipping custom altogether. It is an interesting American social norm to tip some service employees, such as waiters and waitresses, and not others, such as cashiers, bus drivers, teachers, doctors, or lawyers. An alternative approach may also be the European model which adds a flat service charge to a diner's check.<sup>146</sup> One benefit to this model is that would help resolve the problem of unreported tips, which the I.R.S. has estimated to be over 40 percent of all tips.<sup>147</sup> Some resort areas in the United States have begun using this approach, but some customers still give an additional tip for extraordinary service, thus re-establishing the question of how to treat the tip.<sup>148</sup>

Ultimately, tips are a labor cost advantage unique to the industries that enjoy them. While some may argue that it is unfair to tip some employees and not others, the fact remains that Congress had promulgated guidelines for those industries which recognize tips. In 2009, over forty years after the passage of the tip credit provision and establishment of tip pooling, hundreds of thousands of employees are still being deprived of millions of dollars in tips on which some of them survive. As shown throughout this Comment, it is not hard to imagine the potential abuses of the tip credit throughout the country. These unclear guidelines demand revision so that employees are not unlawfully denied their tips. Ambiguity within the guidelines or employer ignorance of the guidelines are not valid reasons for employers to abuse the system, thus relying on employees to be legally vigilant, nor are they reasons to force patrons to "play ball."

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145. *Id.*

146. Robin Lee Allen et al., *A tip on tip sharing: enforcing the division of gratuities may be a disservice to employees*, NATION'S RESTAURANT NEWS, June 14, 2004, [http://http://findarticles.com/p/articles/mi\\_m3190/is\\_24\\_38/ai\\_n6074638](http://http://findarticles.com/p/articles/mi_m3190/is_24_38/ai_n6074638).

147. Wachter, *supra* note 2, at MM56.

148. Allen, *supra* note 146.