

NOTE TO MEDIA: Setareh Ebrahimiyan and other members of LeClairRyan's Labor and Employment Team are available as resources for bylined articles or interviews on various labor and employment issues.

For: LeClairRyan, Alexandria, Va.
From: Parness & Associates, Aberdeen, N.J.

FOR IMMEDIATE RELEASE

New Federal Tip Pooling Law Changes Game for Restaurants, LeClairRyan Attorney Says
-- New rules could ensnare unwary employers, Setareh Ebrahimiyan advises.

ALEXANDRIA, Va. (5/31/18)— The recently enacted Tip Income Protection Act of 2018 may have been buried in the 2,323 pages of the federal omnibus spending bill, but restaurants across the country need to be aware of this new law and understand its implications, warns Setareh Ebrahimiyan, an associate in LeClairRyan's Alexandria, Va. office and member of the national law firm's Labor and Employment Team.

If an employer pays a full minimum wage and does not take a "tip credit" — which allows them to take a credit toward their minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least \$2.13) and the federal minimum wage — "the Act allows for employees who do not customarily receive tips to participate in tip pools," she explains in a blog, [The Tip Income Protection Act — Changes to Tip Pooling](#). Under a pooling arrangement, an employer requires tipped employees to combine their tips and develops a formula for redistributing them among the pooled employees.

Previously, the Fair Labor Standards Act generally restricted tip pools to employees who "customarily and regularly" receive tips. But now, a tip pool can include "the back-of-the-house employees like busboys, chefs, line cooks, and janitors," Ebrahimiyan writes. "The Act makes it very clear that tips belong to the employees, and not employers. This strict prohibition against managers, supervisors and employers collecting or retaining tips made by employees is critical in light of the increased penalties under the Act."

Penalties for tip pool violations were increased to include the amount of tip credit taken, amount of wages withheld, and liquidated damages in the same amount, Ebrahimiyan notes. "Additionally, the Secretary of Labor may impose civil penalties of \$1,100 per violation."

But the Act does not address the issue of managers and supervisors who participate in a tip pool, leading her to ask, "Will courts draw a distinction between upper level management and lower-level supervisors?"

As an example, Ebrahimiyan points to a bartender who does not have the ability to hire or fire employees, but otherwise functions as a manager when the owner is not around while continuing to serve customers. Does he or she get to share in the tip pool arrangement?

Of course, each situation may have unique facts and circumstances, she notes. "Restaurants commonly use tip-credit and tip pooling arrangements, and must be careful not to violate the FLSA," she writes. "Also, state law can provide stricter restrictions on these arrangements than the FLSA. We encourage employers considering these arrangements to contact legal counsel."

Ebrahimiyan's post appears in [LR Workplace Defender](#) blog, which focuses on employment litigation issues.

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Press Contacts: At Parness & Associates Public Relations, Bill Parness, (732) 290-0121, bparness@parnesspr.com or Lisa Kreda, lkreda@parnesspr.com

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