



Ohio Legislative Service Commission

Bill Analysis

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H.B. 534

130th General Assembly
(As Introduced)

Reps. Antonio, Milkovich, Foley, R. Hagan, Wachtmann, Cera, Williams, Rogers, Driehaus, Fedor

BILL SUMMARY

- Prohibits an employer from requiring the employer's employees to participate in a tip pool.
 - Specifies penalties for violating the prohibition against compulsory tip pooling.
 - Specifies that employees may voluntarily enter into an agreement to divide tips among themselves.
 - Specifies that an employer may provide custodial services for the safekeeping of funds to be divided pursuant to a voluntarily entered tip pooling agreement between the employer's employees.
 - Requires an employer providing those custodial services to keep a record of the funds that is open to examination by the employees for whom the funds are held.
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CONTENT AND OPERATION

Prohibition on required tip pooling

The bill prohibits an employer who is subject to Ohio's Minimum Wage Law from requiring the employer's employees to participate in a tip pool.¹ The bill defines a "tip pool" as a system by which an employee is required to pay any gratuity received by

¹ R.C. 4111.18.

the employee into a common fund for distribution among multiple employees of the employer.²

Under the bill, an employer who violates the bill's prohibition against requiring tip pooling is liable to the affected employee for the full amount that the employee would have received in tips absent the tip pool, less any amount actually paid to the employee from the tip pool, and costs and reasonable attorney's fees as may be awarded by the court. If an employer *knowingly* violates the bill's prohibition against tip pooling, the employer is liable to the affected employee for double the difference between the full amount that the employee would have received in tips absent the tip pool and the amount actually paid to the employee from the tip pool, plus costs and reasonable attorney's fees as may be awarded by the court.³

Voluntary tip pooling

The bill allows employees to voluntarily enter into an agreement to divide tips among themselves. The bill also allows an employer to provide custodial services for the safekeeping of funds to be divided pursuant to a voluntary tip pooling agreement between the employer's employees. However, the bill requires an employer providing these custodial services to keep a properly identified record of the funds, separate from other business records, that is open to examination by the employees for whom the funds are held.⁴

Background – minimum wage generally and tipped employees

The federal Fair Labor Standards Act⁵ (FLSA) and Section 34a of Article II of the Ohio Constitution (Section 34a), along with Ohio's Minimum Fair Wage Standards Law⁶ (MFWS), specify the minimum wages that an employer must pay the employer's employees. An employer may be subject to one or both laws.

Relationship of federal law to state law

A possibility exists that an employer is subject to both the FLSA and Ohio minimum wage laws. The FLSA specifies that if an employer is subject to both laws, the employer is governed by the law that establishes the higher minimum wage, or, for

² R.C. 4111.18(A).

³ R.C. 4111.19.

⁴ R.C. 4111.18(C) and (D).

⁵ 29 United States Code (U.S.C.) 201 *et seq.*

⁶ R.C. Chapter 4111.

purposes of determining overtime, the lower maximum workweek.⁷ Currently, Ohio has the same maximum workweek as specified in the FLSA (40 hours per week) but has a higher basic minimum wage (\$7.95 per hour) as compared to the basic minimum wage under the FLSA (\$7.25 per hour).⁸ Thus, employers subject to both laws currently pay the state rate.

Tipped employees

Under the FLSA

Under the FLSA, a "tipped employee" is an employee engaged in an occupation in which the employee customarily and regularly receives more than \$30 a month in tips. The FLSA permits an employer to take a "tip credit" toward the minimum wage paid by the employer to tipped employees. The credit equals the difference between the "cash wage" of \$2.13 per hour (the amount the employer actually pays the employee) and the federal minimum wage of \$7.25. Thus, the current maximum tip credit an employer may take under the FLSA is \$5.12 per hour.⁹

To take the tip credit, an employer must provide a tipped employee with specified information regarding the tip credit, including that the employee may be subject to a tip pooling arrangement. If a tipped employee does not receive enough in tips to actually receive the minimum wage, the employer must pay the tipped employee the difference.¹⁰

Under Ohio law

Under Section 34a, an employer may pay an employee less than, but not less than half, the minimum wage rate required by Section 34a if the employer is able to demonstrate that the employee receives tips that combined with the wages paid by the employer are equal to or greater than the minimum wage rate for all hours worked. The current minimum wage for tipped employees is \$3.98 per hour. The MFWS allows the

⁷ 29 U.S.C. 218.

⁸ Ohio Const., Art. II, Sec. 34a; Ohio Department of Commerce, Ohio Minimum Wage Laws, <http://www.com.ohio.gov/dico/MinimumWageLaws.aspx> (accessed June 2, 2014); and 29 U.S.C. 206(a).

⁹ 29 U.S.C. 203(m) and (t) and U.S. Department of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/dol/topic/wages/wagestips.htm> (accessed June 2, 2014).

¹⁰ 29 Code of Federal Regulations (C.F.R.) 531.59 and U.S. Department of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/dol/topic/wages/wagestips.htm> (accessed June 2, 2014).



Director of Commerce to adopt rules to address the inclusion of ascertainable gratuities in wages paid. However, it does not appear that the Director has adopted those rules.¹¹

Tip pooling

Generally, tips belong to the tipped employee. However, as mentioned above, the FLSA expressly allows an employer to require tip pooling. To be a valid tip pooling arrangement, an employer can only require redistribution of tips among employees who customarily and regularly receive tips. Additionally, employees must be notified about the arrangement. The employer can only take the tip credit for the amount each employee ultimately receives and cannot retain the employees' tips for any other purpose.¹²

Ohio law is silent with respect to tip pooling. Thus, it appears that Ohio employers can require the practice, although an Ohio employer subject to the FLSA would have to comply with the FLSA's requirements for tip pooling.

HISTORY

ACTION	DATE
Introduced	05-13-14

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¹¹ Section 34a, R.C. 4111.05, and Ohio Department of Commerce, Ohio Minimum Wage Laws, <http://www.com.ohio.gov/dico/MinimumWageLaws.aspx> (accessed June 2, 2014).

¹² 29 C.F.R. 531.54.

