

# **Ninth Circuit Holds that DOL may Expand Regulation of Employers' Tip Pooling Practices**

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The restaurant and gaming industry lost a battle in the Ninth Circuit over whether employers that pay their workers at least the minimum wage are subject to Department of Labor regulations restricting tip pooling arrangements.

In a split decision, the Ninth Circuit concluded in [Oregon Restaurant and Lodging Association v. Perez](#), that the Department of Labor acted within its authority to issue a 2011 regulation prohibiting employers from establishing a tip pool shared by regularly tipped workers, such as waitresses, and non-tipped workers, such as kitchen staff. The prohibition now applies to employers who pay minimum wage to non-tipped workers and thus do not take a “tip credit,” i.e., use workers’ tips as a credit to fulfill minimum wage requirements. Previously, under [Cumbie v. Woody Woo, Inc.](#), the DOL could only regulate tip pooling arrangements of employers that took a tip credit.

Under this new decision, all employers — regardless of whether they take a tip credit — are prohibited from establishing tip pools comprising of non-tipped and regularly tipped workers. In other words, employers can only use a tip pool comprised exclusively of employees who “customarily and regularly receive tips.”

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## Topics

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