



## Interpretive Notice & Formal Opinion (“INFO”) # 3:

### Tips (Gratuities) and Tipped Employees Under Colorado Wage Law

#### Overview

This INFO covers how Colorado law protects “tips” that employees receive, as well as how and when employers can pay “tipped employees” less than full minimum wage. Key definitions:

- “Tipped employee”: An employee regularly receiving over \$30 per month in tips.
- “Tip” (or gratuity): A payment in any form (cash, credit card, electronic, etc.) for goods or services by a customer (or by someone paying for the customer) that is voluntary, i.e., above the required payment, and discretionary with the customer as to what, if anything, to pay as a tip.

#### Employers Paying “Direct Wages” under Minimum Wage Based on a “Tip Credit”

Wages employers pay tipped employees are called their “direct” or “cash” wages. Direct wages can be less than the full minimum wage by up to \$3.02, an amount that’s called the employer’s “tip credit”<sup>1</sup>:

Minimum Wages with & without Tip Credits	Colorado (except Denver):		Denver:	
	2022	2023	2022	2023
<b>Full minimum wage</b>	\$12.56	\$13.65	\$15.87	\$17.29
<b>With tip credit:</b> up to \$3.02 lower; but in Denver, for <i>only</i> food & beverage workers	\$9.54	\$10.63	\$12.85	\$14.27

There are several limits on when employers can use tip credits to pay direct wages below full minimum wage:<sup>2</sup>

- (1) Employers **can’t pay more than \$3.02 below full minimum wage, no matter how high tips are**. In 2023, that requires at least \$10.63 (\$14.27 in Denver) in direct wages, even if tips are (for example) \$20 per hour.
- (2) Employers **must pay enough in direct wages for *total* pay, with tips, to reach full minimum wage in each workweek**. If an employer pays direct wages below full minimum wage, but tips end up too low to raise total pay to full minimum wage, then the employer must make up the difference in direct wages.

**Example 1:** In 2023, a non-Denver employer paid direct hourly wages of \$10.63, and tips raised total pay above full minimum wage (\$13.65). Then one week, tips drop to \$2.00 per hour, making total pay \$12.63, which is \$1.02 below full minimum wage. To raise pay to full minimum wage, the employer must make up the difference by adding \$1.02 per hour in direct wages, in the pay period for the week with lower tips.

**Example 2:** If the job in Example 1 is in Denver, direct hourly wages must be at least \$14.27 (\$3.02 below *Denver’s* minimum), or higher if tips are under \$3.02. If tips drop to \$2.00 per hour, the employer must raise direct wages to \$15.29 (\$2.00 below full minimum) to make up the difference.

- (3) Employers **can’t claim tip credits from mandatory charges**. The tip credit allows direct wages below full minimum wage only if “tips” make up the difference. Mandatory charges, like a 20% “service charge,” aren’t “tips,” because customers can’t choose whether and how much to pay. They’re just part of a service or good costs; a \$10 sandwich plus a 20% service charge is a \$12 sandwich. Employers can use service charges to fund employee wages, but not for a “tip” credit allowing direct wages below full minimum wage.<sup>3</sup>

<sup>1</sup> For Colorado minimum wages, see: [COMPS Order](#), 7 CCR 1103-1, Rule 6.2.3; [Publication And Yearly Calculation of Adjusted Labor Compensation Order](#) (“PAY CALC Order”), R. 1.2; and Colorado Constitution Art. XVIII, § 15. For Denver minimum wages, see: Colorado Department of Labor & Employment, “[Local Minimum Wage Report 2021](#).”

<sup>2</sup> Some limits are from law about tips; others are from law that exceptions to wage rights are interpreted narrowly, including permission to pay under minimum wage. [C.R.S. §§ 8-6-102, 103\(6\)](#); COMPS Order, 7 CCR 1103-1, Rule 8.7(A).

<sup>3</sup> Cf. 29 C.F.R. §§ 531.52, 531.55(a) (“A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer ... , is not a tip and, even if distributed by the employer to its employees, cannot be counted as a

(4) Employers **can't claim tip credits if they take away or divert tips**. That means employers:

- (a) **can't make tipped employees share tips with non-tipped employees** — often called “tip pooling,” or “tipping out” other staff — like managers or “back of house” staff (cook, dishwasher, etc.);<sup>4</sup> and
- (b) **can't keep any tip funds as revenue for the employer**, such as:
  - using them **to pay employees' direct wages**, rather than paying tips to those tipped employees;
  - using them **to pay for credit card processing fees** or similar costs; **or**
  - letting an employer, manager, or supervisor share those tips — all of which is unlawful even if the employer claims no tip credit.<sup>5</sup>

Tip sharing where an employer does *not* claim a tip credit is discussed further in the section below, “Requirements For Tip Sharing (“Tip Pooling”) Among Employees, Including Notification to Customers.”

### **Tip Credits for Employees Working in Both Tipped and Non-Tipped Roles**

Tip credits can apply to *all* hours of those doing a mix of tipped and non-tipped work only under two conditions:

- (1) **The non-tipped work must “directly support” the tipped work.**<sup>6</sup> For example, for restaurant servers, non-tipped work “directly supporting” tipped work:
  - (a) includes refilling condiments, making coffee, table setup or cleaning, or idle time awaiting tipped work;
  - (b) does not include bathroom or kitchen cleaning, maintenance, or window-washing; and
  - (c) does not include food preparation, *except* for workers who, after preparing food, directly serve it to customers, such as at a sushi bar, a bar, or an ice cream counter.<sup>7</sup>
- (2) **The non-tipped work must not take a “substantial” amount of time**, which means it must be:
  - (a) **not more than 20% of the tipped employee's weekly hours** — the traditional “80/20 rule”; and
  - (b) **not more than a half-hour continuously** — because doing non-tipped work that long is a departure

tip received in applying [tip credits] .... Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.”)

<sup>4</sup> [COMPS Order](#), 7 CCR 1103-1, Rule 1.10. An “employer loses its entitlement to the tip credit where it requires tipped employees to share tips with (1) employees who do not provide direct customer service or (2) managers.” *Shahriar v. Smith & Wollensky*, 659 F.3d 234, 240 (2d Cir. 2011) (citing *Myers v. Copper Cellar*, 192 F.3d 546, 550-51 (6th Cir. 1999) (“Because the salad preparers abstained from any direct intercourse with diners, worked entirely outside the view of restaurant patrons, and solely performed duties traditionally classified as food preparation or kitchen support work, they could not be validly categorized as ‘tipped employees’ .... [For] shifts in which salad mixers were included within the tip pool, the pooling scheme was illegal; thus each employee who was compelled to contribute to such a tip pool was statutorily entitled to payment of the full ... minimum wage for all work ... during those shifts.”)). Those not directly tipped can qualify as tipped employees if their direct customer interactions impact what tips are left: bussers may help servers by clearing tables; hosts may “sufficiently interact with customers in ... [work] where undesignated tips are common” if they “greet customers, supply them with menus, seat them at tables, and ... ‘enhance the wait.’” *Id.* at 550; U.S. DOL [Field Operations Handbook](#), Chapter 30, 30d04.

<sup>5</sup> [C.R.S. § 8-4-103\(6\)](#) (“It is unlawful for an employer ... to assert a claim to, or right of ownership in, or control over gratuities.”); C.R.S. § 8-4-105; COMPS Order, 7 CCR 1103-1, Rule 1.10; 29 U.S.C. § 203(m)(2)(B) (“An employer may not 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.”); 29 U.S.C. § 213(a)(1); [29 C.F.R. § 541](#).

The managers or supervisors who can't share tips are those with duties matching the federal “executive” exemption, even if they are performing tipped duties when the tips are shared (e.g., a manager who fills in for a server who is out sick). An exception: Managers or supervisors *may* keep tips directly given to them by customers for services they provide. Supervisors or managers (but not owners who qualifies as “employers” under C.R.S. § 8-4-101(6)) performing *separate jobs*, one tipped and one non-tipped, may participate in a tip pool only when performing the tipped job for the entire period during which tips are shared — for example, for a daily tip pool, the entire day; for a single-event tip pool, the entire event.

<sup>6</sup> [29 C.F.R. § 531.56\(f\)](#). The Division and the federal Wage and Hour Division (“WHD”) previously used the term “related duties.” The Division agrees with WHD’s recent replacement of that term with “directly supports,” a term that is consistent with the term “related duties” but more precise, and that avoids the problem that “related” could be misinterpreted to include work only “remotely related to the tipped occupation.” Fed. Register, Vol. 86, No. 207, at 60129 (Oct. 29, 2021).

<sup>7</sup> [29 C.F.R. § 531.56\(f\)\(3\)\(ii\), \(5\)\(ii\)](#).

from the tipped job into a non-tipped job.<sup>8</sup>

**Example 3:** Several restaurant servers spend 10% or 30% of their time on various non-tipped duties. The table below shows when a tip credit can and can't apply to their work:

(1) Does the non-tipped work "directly support" tipped work?		(2) Is the non-tipped work time "substantial"?		
		(a) 10% of time & not over 30 min. at once	(b) 10% of time, as several 1-hour periods	(c) 30% of time
AI refills table items (ketchup, salt, etc.)	✓ Directly supports tipped work <input type="checkbox"/> Tip credit can cover non-"substantial" non-tipped time	✓ Tip credit for <b>all</b> hours <i>(just 10%, and not 30 continuous minutes, isn't "substantial")</i>	✓ Tip credit for the 70-90% of time serving customers	✗ No tip credit for the 10%-30% non-tipped work (over 20% or 30 continuous minutes is "substantial")
		✗ Doesn't directly support tipped work <input type="checkbox"/> No tip credit for any non-tipped time	✓ Tip credit for the 70-90% of time serving customers	✗ No tip credit for any time on non-tipped work

**Requirements For Tip Sharing ("Tip Pooling") Among Employees, Including Notification to Customers**

An employer may require tipped employees to share, or "pool," tips with other employees, *if*:

- (a) **employees are told in advance** that their tips *will* be shared, and *how* they will be shared (what calculations, and which employees), including any required employee contribution to a tip pool;<sup>9</sup>
- (b) **customers are notified in writing** that tips they leave will be pooled, in any way (a notice on a menu, a table tent, a receipt, etc.) that gives customers notice before they decide on any tip;<sup>10</sup> and
- (c) **employees receive at least full minimum wage in total pay** — direct wages from the employer, plus tips the employee actually receives from a tip pool if a tip credit is allowed (see "Tip Credits," above).

Employers *may* require tip sharing with *untipped* employees (such as cooks or dishwashers) — but cannot then claim a tip credit, and must pay all employees at least full minimum wage in direct wages.

Employers *may not* require tip sharing, with the employer, managers, or supervisors. If they do, they can't apply a tip credit or tip sharing, and must pay full minimum wage as well as return any shared tips.

**Overtime Pay When Employers Claim Tip Credits**

For work beyond 40 hours per week, or 12 per day or shift, all employees must be paid "time and a half" overtime (one and one-half times their regular pay rate) under the [COMPS Order](#), unless they are exempt from overtime.<sup>11</sup> The regular rate that's raised to time-and-a-half for overtime is at least *full* minimum wage, before a tip credit. That means that when an employer uses a tip credit to pay direct wages below full minimum wage, the overtime rate is time-and-a-half of the *full* minimum wage, and the tip credit lowers *that* rate by up to \$3.02:

<sup>8</sup> 29 C.F.R. § 531.56(f). The Division previously applied WHD's general 80/20 rule, and agrees with WHD's recent elaboration that "substantial" time on non-tipped work also includes (even if not 20% of work time) "continuous" time on non-tipped work (specifically, over a half-hour), because that amounts to performing separate, dual jobs — one tipped, one not. Fed. Register, Vol. 86, No. 207, at 60138 (Oct. 29, 2021). That interpretation is consistent with existing case law, e.g., *Fast v. Applebee's Int'l*, 638 F.3d 872, 880 (8th Cir. 2011) (no tip credit for "nontipped duties performed during distinct periods of time, such as before opening or after closing"); *Myers*, 192 F.3d at 549 ("an employee who discharges distinct duties on diverse work shifts may qualify as a tipped employee during one shift, such as one ... serv[ing] tables, but might not qualify as a tipped employee on another shift, for example, one during which he or she performs maintenance tasks.").

<sup>9</sup> [C.R.S. § 8-4-103\(6\)](#) (employer can require tip pool only "on a preestablished basis among the employees"); *McFeeley v. Jackson Street Entertainment*, 825 F.3d 235, 246 (4th Cir. 2016) (employer violating duties "to pay ... the minimum wage set for those receiving tip income and to notify employees of the 'tip credit' ... cannot therefore claim the 'tip credit'").

<sup>10</sup> C.R.S. § 8-4-103(6) ("gratuities are the sole property of the employee unless the employer notifies each patron in writing, including by a notice on a menu, table tent, or receipt, that gratuities are shared by employees").

<sup>11</sup> For example, a manager who spends most of their time supervising two or more others, is salaried, and is paid at least the minimum amount for exemption, is commonly exempt as a "supervisor." Some employer types also have exemptions or variances from standard overtime rules. See the [COMPS Order](#) for full details of all exemptions and variances.

The minimum overtime wage that employers can pay, based on the minimum wage with a tip credit	Colorado (except Denver):	Denver:
<b>Time-and-a-half of full minimum wage (2023):</b>	<b>\$20.48</b>	<b>\$25.94</b>
<b>With tip credit (up to \$3.02 lower):</b>	<b>\$17.46</b>	<b>\$22.92</b>

### **Required Recordkeeping**

Employers must keep records of hours, pay, and tips — which includes recording any differences between tips *left for* an employee and tips *paid to* that employee, such as from tip-sharing (pooling, tipping out, etc.). [COMPS Order](#) Rule 7.1 requires employers to keep an “accurate record for each employee” that includes “(C) daily record of all hours worked; (D) record of credits claimed and of tips; and (E) regular rates of pay, gross wages earned, withholdings made, and net amounts paid each pay period.”<sup>12</sup> For tipped employees:

- A record of all “tips,” without any limitation, requires recording *all tips left for* the employee, whether or not any portion was shared in tip pooling, tipping out, etc. — for example, all tips that restaurant customers left after being served by a server. Employers are advised to keep such records on a daily or workweek basis. If a tip is deemed to be left equally for multiple individuals (for example, if an employer uses a collaborative restaurant service model, where multiple servers serve a single table), it need only record the tip amount and the individuals for whom the tip was left.
- A record of “gross wages earned” and “credits claimed” requires records of tips *paid to* a tipped employee — which may differ from tips left for the employee in the case of tip-sharing. These records must be kept on a *daily* or *weekly basis*, such as a weekly tip log or a nightly “tip out” sheet. A *multi-week* total of tips left and paid (a biweekly or monthly pay period, etc.) is not sufficient, as it lacks the daily or weekly tip amounts required to calculate a tip credit.

An employer must keep the required records for cash tips — which will generally not be documented on a receipt — as well as tips that are otherwise documented (e.g., on credit card slips).<sup>13</sup> If an employer fails to keep such records, it may not be able to show that a tip pool excludes untipped employees (such as cooks) who can’t be included in a tip pool without nullifying the tip credit; or it may not be able to show that tips aren’t retained by the employer or by FLSA-exempt managers or supervisors.

### **Complaint Rights**

Employees can [file complaints with the Division for unpaid “wages or compensation”](#) (for more on the Division complaint process, see [INFO #2](#)) if they were:

- denied any tips they were owed;
- paid the reduced minimum wage, based on a tip credit, in a situation where the employer was not allowed to claim that tip credit (e.g., if a tip credit is claimed from service charges rather than tips); or
- paid nothing, or any amount less than \$3.02 under the full minimum wage, due to an employer asserting that their tips were enough to make up the difference.

**For More Information:** Visit the Division [website](#), call 303-318-8441, or email [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us).

<sup>12</sup> [COMPS Order](#), 7 CCR 1103-1, Rule 7.1(C)-(E). The rest of Rule 7.1 requires other information not related to hours and pay: “(A) name, address, occupation, and date of hire”; and “(B) date of birth, if the employee is under 18 years of age.”

<sup>13</sup> Tax law already requires employees to report, and employers to keep records of, cash tips. IRS [Publication 1244](#) at 2 (for employees: “If you receive tips that total \$20 or more for any month while working for one employer, you must report the tips to your employer. Tips include cash left by customers[.]”); and IRS [2021 General Instructions for Forms W-2 and W-3](#) at 16 (employers must report “[t]otal tips reported by the employee to the employer” on W-2 form).