

D.C. Ballot Referendum Eliminates Minimum Wage Tip Credit

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Summary: D.C. voters approve ballot Initiative 77, which eliminates the tip credit and increases the minimum wage for tipped workers to \$15/hour by 2025.

In the June 19, 2018 primary election, District of Columbia voters approved ballot Initiative 77, which effects a major change in the city's minimum wage treatment for tipped employees. Assuming that the initiative is not nullified by Congress or undone by the D.C. Council, the ability of employers to rely upon a tip credit for the payment of a portion of the minimum wage owed to certain employees will be phased out, and the minimum wage that employers must pay tipped employees will increase on an accelerated schedule to \$15.00 per hour by July 1, 2025.

Under the federal Fair Labor Standards Act (FLSA) and pre-Initiative 77 District of Columbia law, tipped employees were entitled to the same minimum wage as non-tipped employees, but the employer was entitled to apply some of the tips that the employee received towards the employer's minimum wage obligation. For example, in the District of Columbia, the minimum wage is \$12.50 per hour, and prior to Initiative 77 an employer of a tipped employee could pay the employee \$3.33 per hour and rely on tips received by the employee to make up the difference of \$9.17 per hour. If the employee did not receive enough tips to reach \$12.50 per hour, then the employer was required to pay the employee additional compensation to reach the minimum wage.

Initiative 77 phases out the ability of District of Columbia employers to rely on a tip credit. The initiative accelerates the increase of the tipped minimum wage on the following schedule:

July 1, 2018: \$4.50 per hour
July 1, 2019: \$6.00 per hour
July 1, 2020: \$7.50 per hour
July 1, 2021: \$9.00 per hour
July 1, 2022: \$10.50 per hour
July 1, 2023: \$12.00 per hour
July 1, 2024: \$13.50 per hour
July 1, 2025: \$15.00 per hour

Prior to Initiative 77, the District of Columbia tipped minimum wage had been scheduled to increase at a slower rate to \$5.00 per hour by July 1, 2020.

Under the new law, District of Columbia employers of tipped employees will still be able to rely on a tip credit to make up the difference between the tipped minimum wage and the full minimum wage until July 1, 2026. On July 1, 2026, the tip credit will be fully eliminated and all employees will be subject to the same minimum wage of \$15.00 per hour (plus annual cost of living increases from July 1, 2021 onwards).

Many observers expect employers to adjust to these higher wages by a combination of imposing service charges, increasing prices, and reducing employee headcount. One open question is whether District of Columbia employers, once they are paying a full hourly minimum wage without counting tips, will be permitted to retain employee tips for themselves to offset the increased costs. Current Department of Labor (DOL) regulations under the FLSA provide that tips are the property of the employee receiving them (subject to permissible tip pooling arrangements), even if the employer is not relying on a tip credit. The two federal appellate courts to address the regulations have divided on whether DOL has authority to regulate the conduct of employers who do not rely on the tip credit, with the Ninth Circuit upholding the regulations and the Tenth Circuit invalidating them. On December 5, 2017, the DOL issued a notice of proposed rulemaking indicating that it sought to rescind the portions of its regulations applicable to employers who do not rely on the tip credit. If the DOL follows through on the change in regulation and it remains in effect, then it is possible that District of Columbia employers may be able to retain tips received from customers once the tipped minimum wage is fully phased out in 2026.

Having been approved by a majority of voters, Initiative 77 is now subject to a 30 day congressional

review period, during which it is possible that Congress could take action to nullify or change the initiative. In addition, the D.C. Council at any time could take action to nullify the initiative by voting to reinstate the pre-Initiative 77 minimum wage framework.

A final note is that Initiative 77 is applicable in the District of Columbia only. Virginia employers will remain subject to the FLSA, and its tip credit regulations, as Virginia has no state minimum wage, and Maryland employers will remain subject to the applicable state (and in some cases, county) minimum wage which also allows employers to take a tip credit in certain situations.

Paley Rothman's Employment Law group has extensive experience in advising employers about their wage payment obligations and working with employers to develop compliant payroll structures. If you have questions about the implementation of Initiative 77 or any other wage payment issue, we are glad to help you.