



## Court Denies Conditional Certification Of Tip Credit Notice Collective Action

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The U.S. District Court for the District of Connecticut recently denied first-stage conditional certification of a proposed collective action under Section 216(b) of the Fair Labor Standards Act (FLSA). In a decision that likely sounds the death knell for the plaintiff employee's allegations, the court determined that the defendant employer, a steakhouse and tavern, provided sufficient tip credit notice under the FLSA.

Under Department of Labor regulations, the required tip credit notice must inform a tipped employee all of the following:

1. The amount of the cash wage that is to be paid to the tipped employee by the employer
2. The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer
3. Which amount may not exceed the value of the tips actually received by the employee
4. That all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips
5. That the tip credit shall not apply to any employee who has not been informed of these requirements in this section

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In *McDougle v. Dakota of Rocky Hill, LLC*, the plaintiff employee alleged that the employer, Dakota, failed to provide the tip credit notice required by FLSA Section 203(m) and therefore was not entitled to take the tip credit. The employee, McDougle, specifically alleged that the employer's orientation materials, policies distributed to employees, and posters displayed in the restaurant did not satisfy the DOL regulations. McDougle moved for conditional certification of a collective action under FLSA Section 216(b) on behalf of all Dakota servers, but the district court denied the motion.

Interestingly, rather than conducting a "similarly situated" inquiry, as is typical in FLSA collective action cases, the court proceeded to determine whether the employer had satisfied the tip credit notice requirements. The court painstakingly examined each of the five tip credit provisions at issue, and determined that "[e]ven when adopting a strict reading of the notice requirement as provided in 29 C.F.R. § 531.59(b), Dakota's orientation process, internal policies, and wage posters collectively notified its servers of the five tip credit provisions of the DOL regulation."

Based on that determination, the court explained that "[b]ecause Dakota has satisfied the tip notice requirement, the Plaintiffs' claims fail on the merits. Therefore, the question whether Dakota servers are similarly situated for purposes of class certification is moot." Thus, the court never examined whether the requirements for first-stage conditional certification were met.

There are at least two takeaways from the *McDougle* decision. First, while a plaintiff's burden under Section 216(b) is lenient, employers from any industry defending FLSA collective actions may want to consider whether any merits-based defenses are available to defeat first-stage conditional certification. Second, employers of tipped employees would do well to revisit their tip credit notice to be sure that policies and practices comply with the relevant technical requirements.