

# Wage & Hour

LAW UPDATE

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## Wage and Hour Law Update

Posted at 10:57 AM on August 29, 2013 by Noel Tripp

### Following Woody Woo, Federal Court In Utah Rejects Employee Gratuity Claim Since No Tip Credit Taken

Joining several other recent federal court decisions, including a decision [invalidating recently promulgated Department of Labor regulations purporting to address the issue](#), Judge Ted Stewart of the District of Utah has ruled that an employee has no claim for allegedly misappropriated gratuities under the FLSA unless the employer elected to take the tip credit set forth in 29 U.S.C. § 203(m). *Czarnik v. All Resort Coach, Inc.*, 2013 U.S. Dist. LEXIS 121766 (D. Utah Aug. 26, 2013).

*Czarnik* concerned the common practice in the personal transportation industry of charging a sum as a service fee on top of the base charge for the transportation, which in this case was bus passenger transportation and tour services in Utah and surrounding Western states. The employer in *Czarnik* distributed a portion of this fee to the drivers and retained a portion. While reserving its right to also argue that the amount in question was a service charge it was free to retain (and not a tip) in whole or in part, the Defendant moved to dismiss on the basis that, because the driver Plaintiffs were not paid pursuant to the tip credit, they could not bring a claim for allegedly misappropriated gratuities under the FLSA. Judge Stewart agreed, ruling that the tip credit “provision . . . ties the requirement that the tips be retained by the employee to the taking of a tip credit by an employer. It does not create a freestanding requirement pertaining to all tipped employees.” The Court separately ruled that the plaintiff drivers were exempt from overtime pay under the FLSA’s [motor carrier exemption](#).

It is unclear what direction DOL rulemaking will take with respect to FLSA protection of gratuities, though the Department has appealed the decision invalidating its new regulations. *Oregon Restaurant and Lodging Association et al v. United States Department of Labor*, D. Oregon Case No. 12-cv-1261, DKT 48. Of course, numerous [state laws regulate gratuities](#) and employers must take them into consideration in analyzing this question.

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