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DOL Solicits Tips on Revised Tipped Employee Regulations

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On June 23, the U.S. Department of Labor Wage and Hour Division published a notice of proposed rulemaking titled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Dual Jobs." The proposed rulemaking reinstates the department's longstanding 80/20 rule applicable to wages paid to tipped employees.

The Tip of the Iceberg: The Tip Credit and the 80/20 Rule

Under the FLSA, employers of tipped employees are permitted to pay a reduced cash wage of $2.13 per hour ($2.83 in Pennsylvania) and take a "tip credit" by applying the employee's tips to satisfy the difference between the reduced wage and statutory minimum wage of $7.25. In 1967, the year after Congress first created the tip credit provision to the FLSA, the DOL promulgated its initial tip regulations. Those regulations recognized that, in some cases, an employee may be employed in both a tipped occupation and a nontipped occupation. The regulations characterized this as a "dual job" situation, and provided that an employer could only take a tip credit against minimum wage obligations for the time the employee spent in the tipped obligation. Time spent in the nontipped occupation must be paid at the federal minimum wage.

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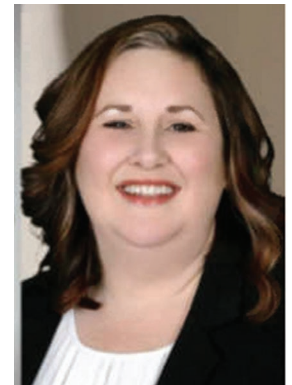
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The original tip regulations also recognized that employees in a tipped occupation sometimes perform duties that, while not tip producing, are related to the tipped occupation. In the restaurant industry, for example, servers often perform "side work" as part of their normal job duties, which can include a variety of tasks such as setting tables, rolling silverware, and refilling condiments. The DOL considered these related tasks to be "part of" the tipped occupation, and employers were permitted to take a tip credit for time spent performing these tasks.

Since 1988, the DOL has evaluated dual job issues by applying the 80/20 rule. Under the 80/20 rule, employers were permitted to take a tip credit for time spent performing related, nontipped work, so long as the nontipped work did not exceed 20% of the employee's workweek. Over the years, some employers have taken issue with the 80/20 rule because it did not provide guidance on which nontipped duties were considered "related" to the tip-producing occupation.

In 2018, the DOL reissued a 2009 opinion letter that rescinded the

80/20 rule and, instead, provided that employers could take a tip credit for the time a tipped employee performed related, nontipped duties, so long as those duties are performed "contemporaneously with, or for a reasonable time immediately before or after," tipped duties. Under the opinion letter, the amount of time spent performing nontipped duties was not a factor in determining whether a tip credit could be taken by the employer.

In December 2020, the DOL promulgated a final rule amending its tip regulations (the 2020 tip rule), and formally adopting the dual jobs test outlined in the reissued opinion letter. Although other portions of the 2020 tip rule became effective, the dual jobs standard was delayed. On Jan. 19, several states filed a complaint challenging the elimination of the 80/20 rule in the 2020 tip rule. The following day, the White House issued a memorandum directing that all proposed and pending regulations be withdrawn or delayed pending review by an appointee of President Joe Biden. The DOL then delayed the implementation of the dual jobs standard and gave notice of its intent to withdraw it.

Tipping One's Hand: The Dual Jobs Proposed Rule

In response to the federal lawsuit, on June 23, the DOL published a notice of proposed rulemaking titled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Dual Jobs" (the Dual Jobs NPRM). In an effort to clarify when an employer may claim a tip credit for time spent performing nontipped work, the Dual Jobs NPRM essentially reinstates the 80/20 rule with some modifications.

Under the Dual Jobs NPRM, the duties and work tasks performed by tipped employees are placed into two broad categories: work that is part of the tipped occupation; and work that is not part of the tipped occupation.

1. Work That Is Part of a Tipped Occupation

- Work is considered "part" of a tipped occupation if it: produces tips; or directly supports tip-producing work.
- Work that "directly supports" tip-producing work is work that assists a tipped employee to perform the work for which the employee receives tips. For example, a server preparing items for tables, a bartender cutting fruit for drinks, or a nail technician cleaning pedicure baths between customers.
- An employer may take a tip credit for the time spent on tasks that directly support tip-producing work, but only if such tasks do not take a substantial amount of time. Time is considered "substantial" if: for any workweek, nontipped tasks exceed 20% of the workweek; or for any continuous period of time, nontipped tasks exceed 30 minutes. Employers cannot take a tip credit for nontipped time that exceeds these thresholds.

2. Work That Is Not Part of the Tipped Occupation

- Work is not "part" of the tipped occupation if it does not generate tips or directly support tip-producing work. For example, cleaning restrooms is not part of a server's occupation, cleaning the dining room is not part of a bartender's occupation, and ordering supplies is not part of a nail tech's occupation.
- Employers may not take a tip credit for work that is not part of the tipped occupation. Employees must be paid minimum wage for time spent on these tasks.

Here's a Tip: Analysis and Opportunity for Comment

Although the Dual Jobs NPRM marks a return to an old familiar standard, it also brings new complications for employers of tipped employees. The proposed regulation provides only three examples of tip-producing work:

- A server waiting tables;
- A bartender serving drinks and talking to customers; and
- A nail technician performing manicures/pedicures.

At first glance, these examples appear straightforward and easily understood. When viewed against the backdrop of FLSA enforcement and litigation, these examples leave room for significant interpretation. Waiting tables, for instance, includes multiple tasks beyond taking customer orders and delivering food and drinks. Servers may be required to prepare their own soups and side salads, which could be characterized as non-tip-producing tasks associated with kitchen staff. Absent clear guidance from the DOL, the definition of "tip-producing work" will develop in piecemeal fashion through agency guidance, enforcement and litigation, making it difficult for employers to proactively implement compliant policies and practices.

The reintroduction of the 80/20 rule and the new 30-minute rule also creates practical timekeeping problems for employers. Under the Dual Jobs NPRM, an employer is not completely barred from taking a tip credit when a tipped employee's support tasks exceed 20% of the work week, instead, the tip credit is eliminated for time spent beyond 20%.

For example, if an employee spends 35% of the workweek performing support tasks, the employer may take a tip credit for the first 20% of the time but must pay minimum wage for the excess 15%. Likewise, if an employee spends 50 continuous minutes of an eight-hour shift performing support tasks, the employer can take a tip credit for the first 30 minutes but must pay minimum wage for the remaining 20 minutes. Employers cannot practically track every minute of a tipped employee's workday or workweek to determine whether the employee is within the thresholds provided by the Dual Jobs NPRM.

Before the dual jobs rule becomes final, employers of tipped employees should take the opportunity to critically evaluate the tasks and duties performed by tipped employees and the amount of time spent performing them. If time spent on non-tipped tasks exceed the 80/20 rule or 30-minute threshold, employers have time to consider alternatives such as redistributing non-tipped duties to other staff like hostesses, bussers or kitchen staff. Employers also could consider having two separate pay rates for tip-producing/supporting work, and nontipped work. If tipped staff perform time-intensive opening or closing duties, they could clock in and out separately for these tasks.

Finally, if tipped employees are performing significant nontipped work, employers should use this time to evaluate the economic impact of potentially shifting to a minimum wage pay scale and foregoing the tip credit altogether for those employees.

Public comment on the Dual Jobs NPRM is open until Aug. 23. Hospitality employers and industry groups, along with the attorneys who represent them, are encouraged to provide feedback concerning the proposed rule.

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