# New Labor Department Proposal Would Resurrect Troublesome 80/20 Rule for Tipped Workers

Insights
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The U.S. Department of Labor just issued a Notice of Proposed Rulemaking that will affect most businesses with tipped employees if the business utilizes the tip-credit method of payment. The thrust of this proposal is the re-introduction of the notorious 80/20 Rule – sometimes called the "20% Rule." The DOL's new version of the 80/20 rule is even more burdensome for employers as it places additional limitations on the amount of time that tipped employees can spend performing work that is not directly tip-producing itself, but which supports that tip-producing work. The DOL's proposal also removes clarity about which job duties fall into the category of "supporting tip-producing work." Needless to say, this development is not good for employers. What do employers need to know about this June 21 release?

**How Did We Get Here?**

For decades, the Fair Labor Standards Act (FLSA) regulations have recognized that an employee remains a tipped employee even if part of the working time is spent performing side work that is related to the primary tip-producing work, but which does not produce tips itself (i.e. making coffee, cleaning tables, occasionally washing dishes and the like). See 29 CFR 531.56.

In 1988, the DOL introduced the 80/20 Rule to address a tipped employee's side work in its internal Field Operations Handbook (FOH), a resource meant to assist USDOL personnel during investigations. The 80/20 Rule stated that an employee was no longer a "tipped employee" when they spent more than 20% of their time in a workweek performing this side-work. Notably, the DOL never submitted the 80/20 Rule to the formal rulemaking process. Yet this sub-regulatory position has made an enormous impact on employers with tipped employees who utilize a tip credit (meaning employers who pay tipped employees a wage below the minimum wage in reliance on tips received meeting or exceeding minimum wage obligations)

So where did this 20%-time limitation originate? Not from the FLSA itself. Nothing in the statute supports a conclusion that a tipped employee is determined by the amount of time that they spend performing "related duties." And yet in the ensuing decades, this rule put employers in the difficult position of only being able to utilize the tip credit by conducting a detailed, burdensome analysis of the work being performed by a tipped employee to ensure that "related duties" are limited to the

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20% threshold. Predictably, substantial litigation over this issue has occurred in the intervening years.

Recognizing the administrative burden this imposed on employers, the DOL began the process of dismantling the 80/20 Rule in 2018, first by issuing opinion letters and then by amending the FOH. Then, in December 2020, the DOL issued a Final Rule which would have done away with the 80/20 Rule for good. However, following the change in administration, the DOL withdrew this Final Rule prior to its effective date.

**The Latest Proposal**

The new proposal would result in three key changes:

- First, reinstatement of the 80/20 Rule. An employer loses the tip credit if a tipped employee spends more than 20% of their weekly hours performing work that "directly supports" tip-producing work (but is not tip producing itself).
- Second, a new, additional time limitation on this type of work would be implemented. An employer loses the tip credit for a tipped employee who performs "directly-supporting work" for a *continuous* period that exceeds 30 minutes. This is true even if the continuous time spent on this work amounts to less than 20% of the employee's total work for the week.
- Third, DOL would eliminate the Occupational Information Network (O*NET) as a resource that employers could use to determine if a certain task constituted directly-supporting work in the first place. Instead, DOL's proposal would add just four examples of duties that constitute directly-supporting work. By contrast, O*NET provided a much larger list of duties typically performed by a tip-producing occupation.

**What's Next for Employers?**

Employers wishing to submit comments on the proposed rule have 60 days (or until August 23, 2021) to do so. Assuming the proposed rule goes into effect in its current form, employers who utilize a tip credit will have to take steps to ensure tipped employees do not exceed these time limitations when performing "directly supporting" work. At a minimum, you will need to ensure that tipped employees do not continuously perform this type of work for more than 30 minutes when no tip-producing work is occurring. Limiting this type of work when tipped employees are performing it contemporaneously with tip-producing work is a much harder proposition. The DOL did not address this particular problem in its notice.

Not all employers take a tip credit and some states' laws prohibit the use of a tip credit. However, for those employers who do utilize a tip credit, you should consider implementing a reporting mechanism whereby employees notify management if they have performed directly-supporting work in excess of either time limitation so that management can take steps to adjust their compensation appropriately. Additionally, with the pending elimination of O*NET as a resource for

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determining which duties constitute "directly-supporting duties" in the first place, you will need to use additional discretion when assigning this work.

Fisher Phillips will continue to monitor this situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in Wage and Hour Practice Group, or any member of our Hospitality Industry Team.

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