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HOSPITALITY EMPLOYERS IN FOR A FRIGHT THIS HALLOWEEN: LABOR DEPARTMENT REINSTITUTES NOTORIOUS 80/20 RULE FOR TIPPED EMPLOYEES

Insights
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Just in time to frighten hospitality employers, the U.S. Department of Labor just issued its final rule regarding tipped wages, reinstating a worker-friendly rule that will cause challenges for most businesses utilizing the tip-credit method of wage payments. Like a zombie rising from the crypt, the main part of the final rule released yesterday is the resurrection of the notorious "80/20" Rule (referring to the percentage of time "dual job" employees spent on their job duties). The DOL's final rule will be difficult for many hospitality employers to administer where it places limitations on the amount of time that tipped employees can spend performing work that is directly supporting tip-producing itself. The new rule will go into effect December 28, 2021 – what do you need to know in advance of this frightening implementation date?

Like a True Horror Movie Franchise, Let's Revisit 80/20 I, 80/20 II, 80/20 VIII Before We Move on to the Latest Installment of This Series

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.

A 1980 U.S. DOL opinion letter addressed a situation in which tipped restaurant servers performed various non-tipped duties including cleaning and resetting tables,

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cleaning and stocking the server station, and vacuuming the dining room carpet after the restaurant was closed. The DOL found that when the non-tipped duties were “assigned generally to the waitress/waiter staff,” they would be found to be related to the employees’ tipped occupation. The letter suggested, however, that the employer would not be permitted to take the tip credit if “specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.”

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 its 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)

Courts were deferential to the DOL’s position as guidance during the ensuing decades, putting employers in the difficult position. They could only feel comfortable utilizing the tip credit if they conducted a detailed, burdensome analysis of the work being performed by a tipped employee to ensure that “related duties” were limited to the 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. After years of deferring to the DOL’s sub-regulatory position from the 1988 opinion letter favoring the 80/20 rule, some courts then refused to apply the DOL’s “reasonable time” standard, concluding that it did not warrant deference under legal regulatory doctrine. As a response to these court opinions, the DOL issued a Final Rule in December 2020 which would have done away with the 80/20 Rule. The Rule would have focused on “dual job” tipped employees being permitted to spend a “reasonable time” on non-tip related job duties and still be paid with a tip credit. However, following the change in administration, the DOL withdrew this Final Rule prior to its effective date.

The Final Chapter? DOL Current “Final” Rule

The new “final” rule results in three key changes to the final rule announced in December 2020:

- First, the tip credit may only be taken for time spent by the employee when they are “engaged in” a tipped occupation. Time spent outside of the tipped occupation must be paid at the federal minimum wage without a tip credit applied to those hours.
- Second, the DOL reinstated 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 is not tip-producing work or work that directly supports tip-producing work. The final rule defines tip-producing work as “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.” Work that directly supports tip-producing work is defined as “work that assists a tipped employee to perform the work for which the employee receives tips.”
- Third, a new, additional time limitation on this type of work will 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 (think side work). 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.

Of course, like any horror movie, the devil lurks in the details. The DOL exhaustively discusses various concepts to help hospitality employers understand the different components of the final rule.

The Ominous Definition of “Tip-Producing Work”

The Department modified the definition of tip-producing work to be “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.” The final rule makes clear that the Department intended tip-producing work to encompass all aspects of the service to customers for which the tipped employee receives tips.

Therefore, “waiting tables” includes any task logically included within the scope of that tip-producing work. In a

non-exhaustive list, the DOL stated this “would include a server serving food and drink, as well as filling water glasses for their table, verifying whether a customer has food allergies, or cleaning a spill on their customer’s table.” The DOL’s examples also includes generally activities that are within the scope of that table service, such as:

- walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers;
- filling and refilling drink glasses;
- attending to customer spills or items dropped on the floor adjacent to customer tables;
- processing credit card and cash payments; and
- removing plates, glasses, silverware, or other items on the table during the meal service.

Duties *Not* Part of the Tipped Occupation

The DOL’s examples of Tip-Producing Work raises the natural question of what duties are *not* considered as part of the Tipped Occupation. The DOL made clear that general food preparation, including salad assembly, is not part of the tipped occupation of a server.

Confusingly, the DOL did state that a server’s tip-producing table service may include some work performed in the kitchen, such as those that are “akin to garnishing plates before they are taken out of the kitchen and served.” This includes “toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made soup, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets.”

Bussers Are Not Left Out in the Dark

Commenters offering their opinions on the proposed rule specifically asked the DOL to explain how its definitional tests would apply to employees such as bussers, whose tip-producing work is performed in assistance of other tipped employees’ work. Thankfully, the DOL listened to the comments. It found that a busser’s tip-producing work includes assisting servers with their customer service work that produces tips – such as providing table service – just as a barback’s tip-producing work includes assisting

bartenders with their customer work that produces tips, such as making and serving drinks.

As revised, the definition of *tip-producing work* clarifies that this category applies to work (such as bussing tables) performed by tipped employees like bussers who do not directly receive tips from customers. This is because this work provides service to customers for which the tipped employee (i.e., the busser) receives tips, even though they usually receive the tips from other tipped employees (i.e., servers).

The DOL provided several non-exhaustive examples of a busser's tip-producing work. They include resetting tables during table service in between customers, because this work is not done in preparation of the tip-producing work but *is* the busser's tip-producing work. Compare this to the busser's work of setting tables, folding napkins, and rolling silverware before the restaurant is open to customers. Thankfully, the DOL also found that the definition of *tip-producing work* applies to service bartenders, "who are tipped by servers because they prepare drinks for servers to bring to tables and therefore perform customer service work even if."

The Dark Corners of the Definition of "Directly Supporting Tip-Producing Work"

In response to comments, the DOL's final rule modifies the proposed rule's definition of *directly supporting work* to clarify the scope of work that fits within this category. The final rule provides that directly supporting work is work that is part of the tipped occupation so long as it is not performed for a substantial amount of time (20% in the aggregate during a workweek or longer than 30 continuous minutes during any shift).

Directly supporting work is defined as "work which is performed by a tipped employee in preparation of, or to otherwise assist tip-producing customer service work." The DOL's illustrations of this type work includes, "work performed by a tipped employee such as a server or busser in a restaurant before or after table service, such as rolling silverware, setting tables, and stocking the busser station, which is done in preparation of the tip-producing customer service work."

Will the Measurement of the 20% Be a Trick or a Treat?

There was a question whether the DOL was going to measure the 20% on a daily or workweek basis. Thankfully, after considering comments, the DOL found that the 20% will be measured by the workweek.

The DOL also provided some guidance on how to determine the workweek for the purposes of calculating the 20 percent tolerance. To illustrate this concept, the DOL provided the following examples:

Example 1. A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 18 minutes of non-tipped directly supporting work twice a day, for a total of three hours a week. The employer may take a tip credit for all of the time the employee spends performing directly supporting work, because this time does not exceed 20 percent of the workweek. Because this employee has been paid the full minimum wage for a total of five hours a week, the employee could perform up to seven hours of directly supporting work ($35 \text{ hours} \times 20 \text{ percent} = 7 \text{ hours}$) without exceeding the 20 percent tolerance.

Example 2. A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 10 hours a week of nontipped directly supporting work, in increments of time that do not exceed 30 minutes. The 5 hours of work paid at the minimum wage is excluded from the workweek for purposes of the 20 percent calculation. Therefore, the employer may take a tip credit for 7 hours of the directly supporting work ($35 \text{ hours} \times 20 \text{ percent} = 7 \text{ hours}$), but must pay the server a direct cash wage equal to the minimum wage for the remaining three hours.

Daylight Shines on This Horror Show: What's Next for Employers?

Hospitality employers now have until December 28 to adjust their operations in preparation for the DOL's final rule. 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 want 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. You will need to analyze your front-of-the-house schedules and duties to plan for the resurrection of the 80/20 rule.

For those employers who utilize a tip credit, you should consider developing a process where employees can 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. You may want to consider whether or not to implement a shift attestation question affirming whether or not the employee performed any directly-supporting work, and if so, for how long that work lasted.

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 author of this Insight, any attorney in [Wage and Hour Practice Group](#), or any member of our [Hospitality Industry Team](#).