

# FOOD DELIVERY APPS CAN BE BOTH A BLESSING AND A CURSE FOR RESTAURANTS: 5 TIPS TO AVOID A TIP CREDIT LANDMINE

Insights

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Restaurants' reliance on food delivery apps soared during the pandemic because they provide a convenient way for customers to order from local restaurants and an easy solution for processing restaurant payments and sourcing third-party drivers to pick up meals and deliver them to customers. According to [MarketWatch](#), the four major food delivery app companies had roughly \$5.5 billion in combined revenue from April through September 2020, which was more than twice as much as their combined \$2.5 billion in revenue during the same period in 2019. In partnering with these food delivery apps, restaurants were able to reach their customers during both the shutdown and the subsequent reopening. However, restaurants are charged around 30% per order, which means using these apps can cut significantly into a restaurant's already paper-thin profit margins. With these watered-down profits, restaurants may be tempted to assign myriad tasks to tipped and nontipped workers alike, including preparing orders for food app customers. If you assign such tasks to tipped employees, however, you'll want to read on to learn more about your obligations under the "new" 80/20 Rule, whether putting together orders for food app customers could be considered tip-producing work, and gather five tips to avoid legal troubles.

## The "New" 80/20 Rule

The Department of Labor's (DOL's) Wage and Hour Division reinstated the infamous "[80/20 Rule](#)" in December 2021, amending the Fair Labor Standards Act's (FLSA's) tip

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provisions regarding when restaurants with tipped employees may take a tip credit and modifying the definition of work that is considered part of a tipped occupation.

The FLSA permits employers to take a so-called “tip credit” and pay employees who traditionally receive tips – such as servers and bartenders – less than the federal minimum wage, so long as employees make up the difference in tips and the employer follows certain other requirements. Under the 80/20 rule, employers lose the tip credit for the workweek if an employee spent more than 20% of their time performing non-tipped side work, such as rolling silverware into napkins, cleaning and setting tables, and making coffee.

If you are not familiar with the original 80/20 Rule, the Trump administration’s attempt to eliminate it, and the new administration’s Final Rule, you can read more in our detailed Insight [here](#).

### **Is Preparing To-Go Orders Specifically for Food Delivery App Customers Tip Producing Work?**

With restaurants’ increasing reliance on business from food delivery apps to generate income, should restaurants be cautious regarding their use of tipped employees to serve food delivery app customers? Under the 80/20 Rule, an employer loses the tip credit when a tipped employee spends more than 20% of their weekly hours performing work that directly supports tip-producing work while on the tip credit. Similarly, the tip credit is lost when a tipped employee performs “directly supporting” work for a continuous period of time exceeding 30 minutes. Tip-producing work is defined as “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.” The tip credit can be taken for all time spent performing tip-producing work. 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.”

This is work the employee performs which directly supports tip-producing activities but does not itself generate tips. The 20% limitation applies to those hours for which the tip credit is taken. Hours paid at minimum wage (or higher) are excluded when making the 20% determination.

The Final Rule specifically addresses servers taking to-go orders, but only against the backdrop of the COVID-19



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## **Service Focus**

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pandemic. It provides that “if *during the COVID-19 pandemic*, a server receives tips from serving customers by taking their phone orders and providing them with carry-out meals, employers can properly categorize those tasks as tip-producing.” However, the Final Rule does not address whether these activities are properly categorized as tip-producing work outside the context of the pandemic or whether non-tipped to-go orders – including orders made through delivery apps – are properly categorized as directly supporting tip-producing work.

However, it seems likely that the current DOL will take the position that if tipped employees do not receive any tips for putting together orders for the food delivery app customers, the time spent performing this activity will not be viewed as tip-producing work and may not even be viewed as directly supporting tip-producing work.

Surprisingly, the Department of Labor’s Opinion Letters and Field Assistance Bulletins are silent on whether to-go order assistance in general is considered tip-producing. There are only a few cases that have dealt with this specific issue.

- An Ohio court [allowed a server’s wage claim to proceed](#) in 2019 based on allegations that she “spent a significant amount of time preparing delivery orders for Uber Eats, Grub Hub and Door Dash” and was compensated a tip-credit rate for time spent on these duties. The court’s reasoning was based on the fact that preparing delivery service orders is not included on the O\*Net task list, which is no longer used under the new Final Rule.
- A federal appeals court allowed [a Florida case](#) to proceed against a national restaurant chain in 2021 based on allegations that a worker managed and fulfilled orders from food delivery apps unrelated to her tipped occupation as a server in violation of the 80/20 Rule.
- Another Ohio federal court ruled in 2020 that [a server’s case should proceed](#) for similar reasons, finding that a reasonable factfinder could conclude that *at least some* of the tasks cited by the server were unrelated to their tipped occupation.

However, the courts in these cases did not reach the merits of their individual claims. Instead, the courts declined to review the Trump administration’s guidance and only

addressed the previous 80/20 Rule that the Biden administration has since reinstated.

Despite the dearth of authority, logic suggests that time spent preparing to-go orders would be considered tip-producing work if employees *actually receive tips* on those to-go orders and would not count toward the 20% limitation. Conversely, it is possible that time spent by an employee preparing to-go orders for food delivery apps might not be considered tip-producing since the employee *does not receive any tips* from the delivery apps' customers. As a result, the time spent performing these activities could be found to count toward the 20% limitation or could be found to be work outside the tipped occupation.

## 5 Options to Limit Potential Tip Credit Errors

1. **Consider paying the full minimum wage.** If most of your revenue is derived from to-go and carry-out orders, you may want to consider paying your tipped employees the full minimum wage for all time spent preparing to-go orders and supplementing their pay with any tips received from the to-go orders, especially considering customers are less likely to tip on to-go orders than dine-in meals. However, this can be difficult if employees' time spent waiting on customers in the restaurant is intermingled with time spent preparing to go and delivery app orders, as is often the case.
2. **Designate a non-tipped employee to handle orders.** You may want to designate your greeters or hosts as the food delivery app preparers, since they are paid at least the minimum wage. Ideally, you should stop receiving orders from the food delivery apps when this designated employee clocks out to avoid having your tipped employees handle the orders.
3. **Assign the task to a specific hourly employee each shift.** You should consider designating a specific hourly paid employee (who is paid at least the minimum wage) to handle preparation of all to-go and food delivery app orders. This relieves the burden of keeping track of precise time tipped employees spend preparing to-go and food deliver app orders versus performing tip-producing duties or directly supporting work.
4. **Conduct a job assessment.** If you are unsure how to proceed or which of the above approaches would work

best for your restaurant, an assessment regarding how your employees spend their time could be informative. Consider how much time each employee spends performing tip-producing and directly supporting work and how much time is spent preparing to-go and delivery app orders each shift on average. If the latter accounts for a substantial amount of your tipped employees' time or is often intermingled with tip-producing and directly supporting work, it may be best to designate either a host or another employee who is paid hourly to handle all to-go and food delivery app orders for the shift.

**5. Consider adding service charges as an alternative.**

Consider paying your employees at a regular rate of more than one and one-half times the federal minimum wage (\$10.89), adding mandatory service charges to all orders, and distributing the proceeds of the service charges to your employees. If the service charges received by employees account for more than half of their total compensation for a set representative period (not less than one month), you may be able to take advantage of the FLSA's Section 7(i) overtime exemption, as discussed in our previous [Insight](#).

## **Conclusion**

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](#).