Tip-Credit Turmoil Continues: USDOL Releases Guidance That Continues Trend of Trimming Employer Practices

Insights
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More than a year after the US Department of Labor announced the return of the time-keeping nightmare that is the 80/20 rule with new tweaks that encourage even more litigation, the agency just released new guidance that simply adds to the morass facing employers whose industries rely heavily on this method of payment. Specifically, USDOL released two new fact sheets on March 3 providing guidance on paying tipped employees and those with dual jobs while updating the Field Operations Handbook to incorporate guidance on the regulations issued in late 2021. What do you need to know – and what are the five steps you should consider taking?

Tip Credit Overview

If you are reading this insight, you probably either have tipped employees or are familiar with the tip-credit. This system allows employers to pay employees a direct cash wage of less than the federal (or applicable state) minimum wage and rely upon tips provided by customers to make up the required minimum payment. For nearly a decade, use of the tip-credit has been narrowed by the US Department of Labor, following public statements that many in places of political power disfavor the practice and would like to eliminate it entirely.

The last few years have seen much activity in this area. USDOL issued a rule that took effect in November 2021 that expanded the agency's authority to assess penalties against employers who violate the tip provisions of the Fair Labor Standards Act (FLSA). It also clarified when managers and supervisors may receive and retain tips. Then it issued a second rule, effective December 2021, that reinstated – and worsened – the notorious "80/20" Rule, amended the FLSA's tip provisions regarding when restaurants with tipped employees may take a tip credit, and modified the definition of work that is considered part of a tipped occupation.

What Happened Last Week?

Fast forward to last week when USDOL issued its two new fact sheets on the tipping practices. At first blush, the guidance contained in these releases does not break ground on any new interpretations. Instead, it reiterates USDOL's position that a tipped employee must be engaged in tip-producing work at least 80% of the time (and they cannot spend more than 30 minutes consecutively performing supporting work that does not produce tips).

The Field Operations Handbook updates have some interesting examples, however, that attempt to explain how an employer is supposed to determine whether a tipped employee is spending a "substantial amount" of their time performing non-tipped, supporting work. These examples include an analysis of the 20% rule and the 30-minute rule. All of the examples lead to one clear conclusion: USDOL's belief that employers can meaningfully keep track of the time their tipped employees spend performing each and every tip-supporting, tip-producing, or unrelated task is not only unreasonable, but perhaps, impossible.

Tips For Compliance

Here are five steps you should consider taking to stay ahead of the curve when it comes to the increasingly challenging task of complying with tipping laws:

- **Pay Minimum Wage:** Although there are no perfect solutions, and the law does not require this, we continue to recommend paying servers and tipped employees at least minimum wage during all non-tip producing periods of work. For example, one potential solution for servers who are paid via the tip-credit is to pay them minimum wage any time the point-of-sale system reflects that they are not actively serving a table.
- **Evaluate Your Business:** For those employers who rely heavily on the tip-credit, management of the process is key to avoiding compliance issues. Evaluate your business and consider the best practices and potential problem areas and put a process in to automatically manage the potential issue.
- **Stagger Staff:** Consider staggering in times for staff to avoid unnecessary idle time.
- **Education:** Educate your staff and management as to what is considered directly supporting work and how many hours staff can perform this work and stay in compliance.
- **Use Technology:** Use various scheduling software programs to schedule directly supporting work and ensure that all work is coded and reported in your payroll systems as side work.

Conclusion

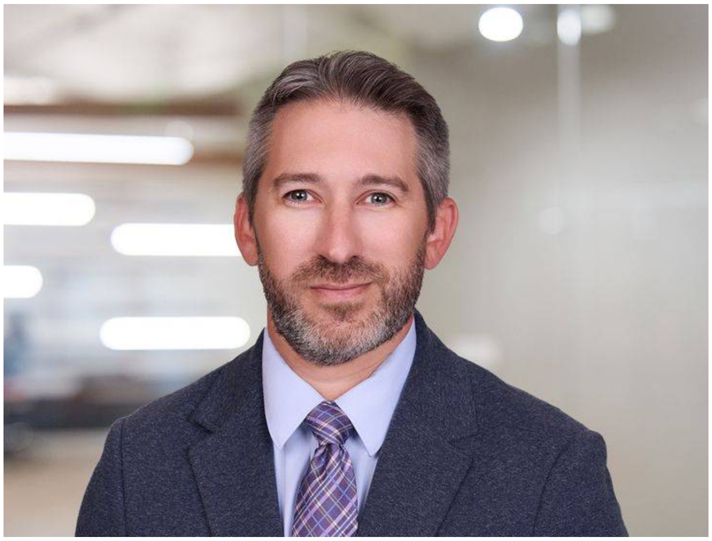
Tip-credit issues continue to get more complicated, and the guidance released by USDOL furthers this trend. Of course, it was only four years ago that USDOL proposed to significantly relax the timekeeping requirements of the 80/20 Rule. Employers of tipped employees can be forgiven for having whiplash as USDOL alternates its guidance under different administrations.

If you need advice or counsel regarding the proper use of the tip-credit, and alternatives such as using a service charge, consider contacting your Fisher Phillips attorney, the authors of this Insight, or any of the members of our Tip-Credit Team, who have a tip-credit toolkit that can help alleviate some of the confusion.

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 any attorney in our Wage and Hour Practice Group, or any member of our Hospitality Industry Team.

Related People

Ted Boehm
Partner
404.240.4286
Email



Marty Heller
Partner
404.231.1400
Email

Courtney Leyes
Partner
615.488.2902
Email

Emily N. Litzinger
Partner
502.561.3978
Email

Service Focus

Wage and Hour

Industry Focus

Hospitality