How USDOL's So-Called "20% Rule" Has Obscured the FLSA's Definition of a "Tipped Employee"

Insights
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Section 3(m) of the federal Fair Labor Standards Act ("FLSA") permits an employer to take the "tip credit" for "tipped employees". Certain requirements must be met though, including that the employee must earn a sufficient amount in tips such that when the direct cash wage (at least $2.13 per hour) and tips are combined, the employee has made at least $7.25 per hour.

But what is a "tipped employee"? The statutory answer to this question is short and sweet:

"A tipped employee means any employee engaged in an occupation in which he customarily and regularly receives more than $30 month in tips."

That's it. There is no cumbersome analysis of how much time an employee spends performing one job duty or another. Whether an employee may be properly treated as a "tipped employee" is tied solely to his or her "occupation" and whether it is one in which the employee "regularly receives more than $30 month in tips." Unfortunately, ensuing regulations and internal enforcement positions from USDOL have muddied this otherwise simple definition.

"Dual Jobs" and "Related Duties"

Take, for example, 29 C.F.R. § 531.56. In subpart (e) of this regulation, USDOL addresses the scenario in which an employee purportedly works in "dual jobs." The example provided in the regulation is an individual who works both as a maintenance man and a waiter for a hotel, and who earns at least $30 in tips per month. Pursuant to the regulation, this individual is only deemed a "tipped employee" during the time the employee works in the waiter position, and the employer may not take the tip credit (and must directly pay the full minimum wage) for the hours the employee spends working as a maintenance man. This regulatory rule is premised on USDOL's conclusion that the individual in this example works in two different occupations for his employer – one as a tipped waiter, and one as an un-tipped maintenance man.

The regulation then proceeds to distinguish this "dual job" scenario from that in which a waitress spends part of her working time on "related duties" (according to the regulation) such as cleaning tables, making coffee, washing dishes and the like and, presumably, the rest of her working time serving customers. By distinguishing this scenario from the waiter/maintenance worker dichotomy, the regulation ostensibly provides that an individual who works as a waitress is considered to have a single "waitress occupation" *even when* she spends part of her time performing "related duties" that do not directly produce tips themselves.

Ok. Maybe this regulation blurred the "tipped employee" definition to some degree in addressing the "dual job" scenario. But at least the regulation recognizes that a "tipped employee" can perform certain duties which are not directly tip-producing themselves without turning her occupation into a non-tipped occupation. Unfortunately, however, USDOL then abandoned any fidelity to the statutory definition of "tipped employee" when it created the notorious "20% Rule."

USDOL sets forth a sub-regulatory "rule" that has no basis in the FLSA itself

In its internal Field Operations Handbook (FOH), meant to assist USDOL personnel during investigations, USDOL takes the position that an employee is not a "tipped employee," and no longer works in a "tipped occupation," when the employee spends more than 20% of her hours worked in a workweek performing "related duties" – *i.e.*, cleaning tables, etc. In other words, this sub-regulatory "rule" purports to limit the amount of the "related duties" which an employee may perform before losing her status as a "tipped employee."

Where did this quantitative analysis come from? Not from the FLSA itself. Nothing in the statute supports a conclusion that a "tipped employee" is determined by the percentage of time that the employee spends performing "related duties." Similarly, 29 C.F.R. § 531.56, which explicitly permits an employee to perform such duties without losing her "tipped occupation," says nothing about limiting such duties to 20% of her worktime. And yet USDOL's sub-regulatory enforcement position purports to put employers in the difficult position of only being able to utilize the **statutory** Section 3(m) 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 20% threshold. To put it charitably, application of this "rule" in the real world is impractical for employers and predictably it has become the basis for an increasing number of lawsuits across the country.

Is change is in the air?

We have highlighted these issues before, but perhaps the tide is turning. Last year a 3-judge panel of the Ninth Circuit Court of Appeals held that USDOL's sub-regulatory "20% Rule" effectively created a new regulation that was inconsistent with the "dual jobs" regulation outlined above, and therefore, was entitled to no deference. The Ninth Circuit has since granted *en banc,* or full panel, review of that panel decision. More recently, a lawsuit filed in Texas federal court by a restauration association seeks to invalidate USDOL's sub-regulatory "20% Rule." And none of this is occurring in a vacuum, as the USDOL currently is evaluating other aspects of the tip credit.

The Bottom Line

One wonders how and why USDOL arrived at the 20% limitation on "related duties" in the first place. Particularly when there is no support for this sort of quantitative analysis in the statute itself. To the extent that USDOL felt it needed a test for its internal manual, surely it would have been better served by utilizing the primary duty analysis as found in the Section 13(a)(1) exemptions, which prioritizes an employee's most important job duty as the critical factor. Hopefully this error will be corrected in the near future, whether by USDOL itself, or by court decision.

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