USDOL Cleans Up Its "20% Rule" Mess

Insights
11.08.18

UPDATED 02 15 19: USDOL has revised its Field Operations Handbook accordingly.

The United States Department of Labor (USDOL) issued four opinion letters today in which it construed issues arising under the federal Fair Labor Standards Act ("FLSA"). The most significant of these letters, FLSA2018-27, is one that addresses the Section 3(m) tip credit which employers may take for certain types of employees under certain circumstances. FLSA2018-27 is an important development that appears to signal the impending demise of the much-maligned, and legally-suspect, "20% Rule" that has caused problems for many employers of tipped employees, particularly in the restaurant industry.

The letter begins by providing an overview of the circumstances allowing for proper application of the "tip credit." For example, the letter examines the "Dual Jobs" regulation – 29 C.F.R. § 531.56 - which recognizes that in some situations, an employee works for an employer in two distinct jobs, i.e. as a server and a maintenance worker, and states that the tip credit may only be taken for the hours worked in the tipped job (the server job). The same regulation then distinguishes that "dual jobs" scenario from the scenario in which a tipped employee works in a single job with various duties.

"Dual Jobs" Regulation Addresses *That* Scenario
In a misguided attempt to help delineate the "dual jobs" scenario from the "related duties" scenario, USDOL previously introduced the "20% Rule" in its internal Field Operations Handbook (FOH), an enforcement manual intended to assist agents in their investigations. The FOH provision stated that tipped employees could spend no more than 20% of their work time performing "related duties," – i.e. making coffee or cleaning tables – without losing the tip credit for the time spent performing those duties. Notably, USDOL never provided an explanation for how it derived the 20% limitation and there is no basis for the limitation in the FLSA itself.

Recognizing that its creation has not helped and instead has led to conflicting court decisions and "confusion," USDOL has reconsidered its stance. USDOL now states that it does not "place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met." USDOL also states that it will be revising the relevant section of

the FOH in the near future.

In the interim, to help employers determine which duties are "related" to a tip-producing occupation, USDOL says that it will rely on those duties mentioned in the "dual jobs" regulation and those in the Occupational Information Network ("O*Net"). If a duty is listed in O*Net as being "core" or "supplemental" for a tip-producing occupation, USDOL will consider the duty to be a "related" duty. For example, "cleaning tables," "rolling silverware," and "garnishing dishes" are each listed as being either "core" or "supplemental" duties to the "Waiter or Waitress" occupation. Therefore, according to USDOL, there is no limitation on the amount of time that a waitress can spend performing such duties. According to UDSOL, the one caveat is that such "related" duties must be performed "contemporaneously with direct customer-service duties."

The Bottom Line

This is welcome news for employers of tipped-employees. The 20% Rule was an arbitrary creation that burdened employers with impractical time-keeping requirements and resulted in numerous lawsuits. Of course it remains to be seen exactly how USDOL will revise the relevant section of the FOH. And as we have mentioned previously, there is pending litigation that may affect this issue. But today's opinion letter represents progress towards a more commonsense, reasonable application of the FLSA.

Related People

Ted Boehm
Partner
404.240.4286
Email