USDOL Moves Forward With Eliminating 20% Rule

Insights
2.18.19

On February 15, the U.S. Department of Labor struck another nail into the coffin of the infamous "20% Rule," the agency's prior enforcement position which purported to limit an employer's ability to take the federal Fair Labor Standards Act tip credit. Under this rule, USDOL would not permit an employer to take the tip credit if the tipped employee spent more than 20% of his or her work time performing "related duties," meaning duties that are not directly customer-facing or tip-producing, but that are related to the tipped occupation (i.e. a server making coffee or cleaning tables).

Previously, in November 2018, USDOL had announced via an Opinion Letter that it was abandoning the 20% Rule and that it would issue a revised Field Operations Handbook in the near future. USDOL has now made good on its promise as the revised FOH no longer contains the 20% limitation on the performance of "related duties."

"Related Duties" Do Not Undercut The Tipped Occupation

USDOL's position on this issue is now clear and unambiguous. First, employers no longer must guess as to whether or not a job task constitutes a "related duty." Instead, USDOL directs employers to consult with 29 C.F.R. 531.56(e), which still distinguishes "Dual Jobs", and the Occupational Information Network ("O*Net") to determine if a duty is related to the tipped occupation in question. Second, if the duty *is* a "related" one, an employer may take the tip credit for "*any amount of time*" that a tipped employee spends performing that duty. In other words, no longer must an employer attempt to track the duration of each discrete job task performed by its tipped employees. The only restriction now is that related duties must be performed contemporaneously with the tipped-duties, or must be performed for a reasonable time immediately before or after performing the tipped duties. On this point the FOH includes a helpful example of a server who vacuums after a restaurant closes and states that an employer can take the tip credit for the time spent vacuuming.

This is another positive step. As we stated on multiple occasions (for example, here and here), this sub-regulatory "rule" was ill-considered and legally-unsupportable. It accomplished little beyond creating a new subset of costly and time-consuming FLSA claims. And while some outlier court decisions may temporarily delay the final collapse of this mistaken rule, its eventual demise now seems certain.

Prior Erroneous Positions Lurking Among the Changes

But not everything appearing in Chapter 30 the Field Operations Handbook is current. Language still exists throughout Chapter 30 regarding limitations on the sharing of tips by employees that are *not*

paid via the 3(m) tip credit. Congress made clear last year that, going forward, an employer, manager, or supervisor cannot keep a portion of *any* employee's tips; as opposed to excluding *all* non-tipped employees (such as back of the house) from *all* tip-sharing arrangements as provided in the FOH. We recommend that employers analyzing dual jobs and the elimination of the 20% Rule, focus their attention specifically on 30d00**(f)** to avoid confusion regarding other tip-related issues addressed in Chapter 30 overall, and 30d00 in particular. Hopefully further revisions consistent with the agency's stated position regarding various tip-sharing scenarios, are on the horizon.

The Bottom Line

As a practical matter, the FOH revisions support the position that employers must consider the nature of a tipped employee's additional duties, as well as the timing, but not on the detailed level that the agency's erroneous, prior position arguably necessitated. At the same time, the agency's failure to revise the surrounding language regarding tip-sharing arrangements could lead to confusion. Employers should be aware of last year's amendment, and ready to defend practices that comply with the law but run afoul of the outdated FOH interpretation.

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