DOL Withdraws Controversial 80/20 Rule for Tipped Employees

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On December 17, 2024, the Department of Labor Wage and Hour Division (DOL) issued a Final Rule withdrawing its controversial 80/20 Rule for tipped employees under the Fair Labor Standards Act (FLSA) and restoring the original 1967 Dual Jobs Rule (Dual Jobs Rule). The withdrawal comes four months after the Fifth Circuit Court of Appeals vacated the 80/20 Rule nationwide.

The now withdrawn 80/20 Rule caused significant administrative challenges for employers as it attempted to tightly regulate the amount of time tip credit employees (i.e., tipped employees) spent on tip producing work versus tip supporting work. The 80/20 Rule attempted to require tip credit employees to spend at least 80% of their time on directly tip producing work and limit tip supporting work to less than 20% of their time and not for more than 30 consecutive minutes. As a practical matter, tracking the time tip credit employees spent on tip producing work versus tip supporting work created significant logistical challenges for most tip credit employers. This requirement has now been withdrawn.

Under the restored Dual Jobs Rule, the distinction is not between how much time a tip credit employee spends on tip producing work versus tip supporting work, but whether the employee is working in a tipped role or not. Under the Dual Jobs rule, employers who claim a tip credit for tipped employees can only do so when the employee works a tipped job (e.g. a job the employee customarily and regularly receives at least $30 a month in tips). If the employee works dual jobs, the employer cannot claim a tip credit when the employee works a non-tipped job. This decision covers all employers claiming tip credits across the U.S.

Tip Credits and the 1967 Dual Jobs Rule

The FLSA allows an employer to pay a tipped employee a minimum wage of at least $2.13/hour and claim a tip credit of $5.12/hour (the difference between full minimum wage of $7.25 and the tipped minimum wage of $2.13), so long as:

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- The employer has informed the tipped employee of the tip credit regulations;
- The claimed tip credit does not exceed the amount the employee earns in tips; and
- All tips received are either retained by the tipped employee or are shared as part of a tip pool of employees who customarily and regularly receive tips.

The Dual Jobs Rule prohibits employers from claiming a tip credit when the employee worked "dual jobs" and one of those jobs was not a tipped occupation. The rule listed the specific example of a waiter who also works as the restaurant's maintenance person. While the employee is in a waiter role, the employer is free to claim the tip credit. However, the employer cannot claim the tip credit when the employee is working as a maintenance person, because it is not a tipped occupation. The rule also states an employer can still claim a tip credit when tipped employees perform "related" duties that do not directly produce tips such as cleaning tables and glasses or making coffee.

The DOL's Short-Lived 80/20 Rule

In 2021, the DOL published a new 80/20 Rule that limited the amount of time tip credit employees could spend performing non "tip-producing" work. The DOL viewed an employee as engaged in a tipped occupation only if 80% or more of their time was spent on directly tip producing work (e.g. taking orders, bringing food, filling water glasses, speaking to guests, etc.) and no more than 20% of their time (and no more than 30 consecutive minutes) on tip supporting work (e.g. dining room prep work, rolling silverware, stocking bussing stations, etc.). This resulted in the need to micro-manage the amount of time that employees spent on tip producing work and led to confusion on practical ways to adhere to such a rule.

In August 2024, the Fifth Circuit Court of Appeals determined, in *Restaurant Law Center v. United States Department of Labor,* that the 80/20 Rule was not in accordance with the law and was arbitrary and capricious. The Court vacated the 80/20 Rule

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nationwide and specifically vacated any version of the rule after the original Dual Jobs Rule issued in 1967.

This Tuesday, the DOL issued a final rule accepting the Fifth Circuit Court of Appeal's decision and reinstating the original 1967 regulatory text of the Dual Jobs Rule.

What the Rule Means for Employers

The DOL's announcement removes any doubt regarding the application of the Dual Jobs Rule. The days of monitoring the minutes that an employee spends performing tip supporting work in comparison to the amount of time completing directly tip producing work are seemingly over. Employers should still be careful when an employee works "Dual Jobs" and should be aware when requiring tipped workers to perform work that is unrelated and generally untipped.

For more information, please contact Neal Shah, Matt Schubert or any attorney in Frost Brown Todd's Labor & Employment Group.

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