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U.S. Department of Labor Modifies Stance on Obama Era 80/20 Rule for Tipped Employees

As labor groups and grassroots organizations across the country continue to fight for higher wages, the United States Department of Labor (DOL) has provided new guidance on what is commonly referred to as the "80/20 Rule"[1] for tipped employees. On November 8, 2018, the DOL issued Opinion Letter FLSA 2018-27 rolling back the Obama era's enforcement of the 80/20 Rule. The new rule eases restrictions on an employer's use of what is known as the "tip credit" and has vast implications for employers of the millions of tipped employees throughout the United States who are paid the minimum wage.

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The Fair Labor Standards Act mandates that non-exempt employees be paid at least the hourly minimum wage (the federal minimum wage is currently $7.25 per hour) for all hours worked. Some states also have minimum wage laws which provide greater employee protections than federal law. However, a majority of states have a special, lower minimum wage, which an employer can pay an employee who receives tips. A tipped employee is defined as an employee who works in an occupation in which he or she "customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Many states allow an employer to pay a lower service rate to tipped employees, such as servers and bussers, and to take a "tip credit" equal to the difference between the service rate paid and the state's basic minimum wage.

For example, in Massachusetts, the basic minimum wage is currently $12 per hour, but tipped employees can be paid a service rate of $4.35 per hour, so long as the employee is informed of the law and the sum of the service rate and tips received by the employee equal or exceed the basic minimum wage.[2] In other words, the employer receives a "tip credit" of $7.65 per hour toward its minimum wage obligation for tipped employees. If the combined service rate and tips received by an employee do not equal at least the basic minimum wage for all hours worked, the employer must make up the difference. However, service employees generally receive tips well in excess of the basic minimum wage. In fact, in some states where the legislature has attempted to raise or eliminate the service rate, such as Maine, tipped employees have proactively lobbied against the change, concerned that customers would stop tipping, resulting in a net decrease in take home pay.[3] Forty-three states allow employers to take a tip credit of varying amounts (the federal tip credit is currently $5.12 per hour), while the remaining seven states require employers to pay tipped employees the full state basic minimum wage before tips.[4]

The 80/20 Rule, contained in section 30d00(f) of the DOL's internal Field Operations Handbook, acted as a limit on the use of the lower service rate. The 80/20 Rule stated that no tip credit could be taken on "related duties" where a tipped employee spent more than 20 percent of working time performing duties related to the tipped occupation, but not directly producing tips, such as cleaning and setting tables, rolling silverware, making coffee, etc.[5] It resulted in numerous lawsuits throughout the country, requiring employers defending wage claims to take on the nearly impossible task of attempting to recreate, minute by minute, the activities performed by tipped employees, separating them into "related" and "un-related" duties. This was further complicated because the DOL offered little guidance on what duties were "related" versus "un-related" to a tip-producing occupation, making it difficult for an employer to determine whether it complied with the law. For example, if a server performed cleaning duties after guests finished dining, such as sweeping and mopping floors, vacuuming the carpet or tidying up a server station, were those duties "related" to the server's tip

producing occupation of serving guests?

The DOL has now largely abandoned the 80/20 Rule. The Opinion Letter recognizes that the 80/20 Rule resulted in confusion and that it would be difficult, if not impossible, for employers to account for the exact amount of time each employee spends on every "related" task performed. The Opinion Letter states that, going forward, the DOL does "… [n]ot intend to 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 consumer-service duties..."

The Opinion Letter also provides guidance for an employer to determine which duties are "related" versus "unrelated" to a tip-producing occupation. The DOL has taken the position that "[d]uties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network … shall be considered directly related to the tip-producing duties of that occupation…" However, such duties must be performed contemporaneously with the duties involving direct service to customers or for a *reasonable* time immediately before or after direct service duties are performed. Clarifying the question asked above, sweeping and mopping floors, vacuuming the carpet and tidying up a server station are included in the related duties for waiters and waitresses.

As a result, as long as the duties are performed contemporaneously with duties involving direct service to customers or for a reasonable time immediately before or after such direct-service duties, it does not matter whether a service employee spends more than 20 percent of working time performing related, non-tipped work. On the other hand, employees cannot spend an unlimited amount of time performing such work while being paid the service rate. If an employee mops floors, vacuums and cleans for an unreasonable amount of time before and after serving guests, the employee will arguably no longer be performing a tipped occupation during that time and could be deemed to have dual jobs – cleaner and server – entitling the employee to payment at the higher basic minimum wage for the non-tipped cleaning work.

Notwithstanding the issuance of the Opinion Letter, attorneys should caution clients against changing their compensation structures for tipped employees. Instead, it is more sensible to wait to see how the change plays out in the courts and the legislature, both state and federal. At a minimum, related work performed before and after direct service duties should continue to be limited to 20 percent of working time. Many states provide a prevailing employee in a wage claim with a statutory entitlement to multiple damages and attorney's fees, so it is better to be overly cautious than risk a potential wage violation.

1 U.S. Department of Labor, Wage & Hour Division, Opinion letter FLSA 2018-27.

2 Massachusetts General Laws Chapter 151, §§ 1 & 7.

3 Dewey, Caitlin, *Maine tried to raise its minimum wage. Restaurant workers didn't want it*., The Washington Post, June 27, 2017.

4 U.S. Department of Labor, Wage and Hour Division, *Minimum Wages for Tipped Employees*, revised January 1, 2019.

5 DOL's Field Operations Handbook, published November 17, 2016, Section 30d00(f).