Hospitality and Labor & Employment
ALERT
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November 2018

FLSA 80/20 Rule Redefined for Employers Taking the Federal Tip Credit

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The U.S. Department of Labor's (DOL) Wage and Hour Division reissued an Opinion Letter from 2009 that addresses whether and when employers may take a tip credit for employees who work *dual jobs* (*e.g.* as a server and a porter). The general rule requires that an employer may only apply the tip credit to an employee's time spent working a tipped job. However, much confusion (and litigation) has surrounded the question of how to define a "tipped" job. This recent guidance explains when employers are permitted to take a tip credit in those murky situations where an employee is performing both tip generating and non-tip generating work, but the non-tip generating work does not constitute a *dual job* (*e.g.* when tipped employees perform side work).

The Opinion Letter specifically addresses language in the DOL's Field Operations Handbook, section 30d00(f), which is the guide for the DOL's investigators. The Handbook indicates that if an employee spends more than 20 percent of his or her time on general preparation work or maintenance, then no tip credit may be taken for the time spent on those non-tipped duties (the "80/20 Rule"). The Handbook is the genesis of the federal 80/20 Rule. This reissued Opinion Letter explains how to apply the 80/20 Rule in an effort to resolve two contradictory 2007 federal court decisions, which offered differing interpretations of the 80/20 Rule.

To clarify the conflicting court views, the DOL explained in its Opinion Letter that the Handbook was not meant to limit duties that are performed contemporaneously with (or immediately before or after) direct customer service duties given that all other requirements of the Fair Labor Standards Act (FLSA) necessary for an employer to take a tip credit are met. In other words, the 80/20 Rule should not restrict duties that are directly related to tip-producing occupations. A duty is considered directly related to the tip-producing occupation if it is listed as a core or supplemental duty and performed with direct service duties.

The DOL provides a list of duties related to tip-producing occupations. A few examples of the duties that are considered directly related to a tip-producing occupation and, thus, do not impact whether the 80/20 Rule is violated, include:

- Removing dishes and glasses from tables or counters and taking them to the kitchen for cleaning;
- Serving food or beverages to patrons;
- Cleaning tables or counters after patrons have finished dining;
- Preparing tables for meals, including setting up items such as linens, silverware, and glassware;
- Assisting a host or hostess by answering phones to take reservations or to-go orders, and by greeting, seating, and thanking guests;
- Escorting customers to their tables;
- Performing cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and cleaning bathroom;
- Rolling silverware, preparing food stations, or preparing dining areas for the next shift or for large parties;
- Stocking service areas with supplies such as coffee, food, tableware, and linens;

- Filling salt, pepper, sugar, cream, condiment, and napkin containers;
- Performing food preparation duties such as preparing salads, appetizers, and cold dishes, as well as portioning desserts and brewing coffee; and
- Garnishing and decorating dishes in preparation for serving.

The guidance provides that a tip credit may not be taken for time employees spend performing tasks that are not specifically listed as related to tip-producing work. Essentially, the DOL is redefining the 80/20 Rule as applying in limited circumstances where employees are conducting *de minimis* non-tip related work.

The reissuance of this guidance will provide some employers with a defense to the onslaught of lawsuits in recent years, claiming that if tipped employees engage in side work for more than 20 percent of their shift, the employer cannot take a tip credit. Employers who operate in jurisdictions subject only to the FLSA (or jurisdictions that follow the FLSA with respect to the tip credit such as Florida or the District of Columbia) will no longer be forced to keep track of the amount of time employees spend doing side work, so long as the supplemental duties are performed contemporaneously with (or immediately before or after) tipped tasks and the businesses otherwise follow the FLSA requirements for taking a top credit.

New York

It is incredibly important to remember that this Opinion Letter addresses the interpretation of the FLSA alone and does not impact state and local laws regarding tip credits, especially New York law.

Under the New York Hospitality Wage Order § 146-2.9, a service employee or food service worker that performs non-tipped duties for two hours or more, or more than 20 percent of his or her shift, shall be *subject to no tip credit for that day*. Employers who run afoul of this rule may invalidate the entire tip pool and be subject to massive penalties including recoupment of the tip credit for all employees over a period of several years (depending on the facts of the case).

There is no indication that the DOL's Opinion Letter has any impact on New York law. As such, New York employers must assume that any side work performed by tipped employees counts towards the 20 percent threshold under New York's 80/20 Rule.

In short, while the DOL changes to the federal 80/20 Rule appear to provide welcome guidance and relief to employers across the country, they do not impact New York employers who must comply with the Hospitality Wage Order's separate and distinct New York 80/20 Rule. Regardless, employers should consult with legal counsel before taking a tip credit and when establishing tip pools to ensure that they comply with all state and federal laws.

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