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DOL Proposes Rules to Limit ‘Side Work’ for Tipped Employees and Regulate Tip Credits

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On June 21, 2021, the U.S. Department of Labor (DOL) announced proposed rules setting forth new tip regulations under the Fair Labor Standards Act (FLSA).

These new rules would reinstate the so-called “80/20” rule under federal law and impose further limits on when and to what extent an employer may take a tip credit against its minimum wage obligations to employees. If enacted, the regulations would have a significant impact on businesses that employ tipped workers, such as restaurants, hotels and other hospitality-sector employers.

Specifically, the DOL’s proposed rule would:

- Prohibit employers from taking a tip credit against their tipped employees’ wages for time spent performing work that does not directly support their tip-producing work (e.g., restaurants could not assign servers to prepare food or clean restaurants as part of their “side work”)
- Limit the amount of “directly supporting” side work (e.g., servers folding napkins or refilling salt and paper shakers) that employees could perform at the tip credit rate to no more than: (a) 20% of tipped employees’ working time; or (b) 30 consecutive minutes at a time.

As New York law already imposes the “80/20” rule, the most significant change that these new FLSA rules would have for New York hospitality employers is that tipped employees could no

longer commence work more than 30 minutes before service begins or work for more than 30 minutes after service ends at the tip credit rate. Instead, employers would be required to pay tipped employees at the regular minimum wage (or higher) for such pre-service and post-service work.

Of course, regardless of its length, such pre-service and post-service work would be counted as non-tipped work. Furthermore, under New York law, if, in the aggregate, such non-tipped work consists of more than 20% of the employee’s time or more than two hours in any one day, then a tip credit can never be taken for any work performed on that day.

In certain jurisdictions outside New York, hospitality employers might be able to pay tipped employees at the full minimum wage solely for their pre- and post-shift side work, while paying those employees at the tip credit rate during service. However, tracking such time could be cumbersome especially with electronic time-keeping systems as those employees would need to be employed under two different job codes and clock in (and out), as appropriate.

The DOL will be publishing the proposed rule in the Federal Register on June 23, 2021. The public will have 60 days to comment on the proposed rule before further action is taken by the DOL. While employers do not need to take any action in response to the DOL’s notice of proposed rulemaking, employers should monitor any developments closely and consult with counsel if and when any new regulations are enacted.

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