Federal Appeals Court Invalidates the U.S. Department of Labor's 2021 Tip Credit Rule

Labor & Employment Law Update

By Kevin Kleine on September 12, 2024

On August 23, 2024, in the case of *Restaurant Law Center, et. al. v. U.S. Department of Labor, et. al.*, the U.S. Court of Appeals for the Fifth Circuit invalidated the U.S. Department of Labor's (DOL) 2021 Tip Credit Rule ("Rule") that required employers to pay tipped workers the general minimum wage rate for their time spent performing work that is not part of a tipped occupation, including downtime. This is a significant development for employers of tipped workers, particularly restaurants and bars, because it means they can claim a tip credit for their tipped workers under the Fair Labor Standards Act (FLSA), regardless of the non-tipped tasks performed, **unless**:

1. Doing so is prohibited or otherwise restricted under state or local law;
2. The employee's tipped wages do not cover the difference between the lower minimum hourly wage rate required to be paid to tipped workers under the FLSA, which is $2.13, and the general minimum wage rate set by federal law or any applicable state or local wage laws; or
3. The employee performs work for the employer under a different occupation (e.g., if the employee is both a server and a maintenance worker for the same employer.)

In reaching its decision, the Fifth Circuit reasoned that the Rule was based on considerations outside the scope of the FLSA and what Congress intended in implementing the tip credit. Specifically, the Fifth Circuit reasoned the DOL's Rule replaces the Congressionally chosen touchstone of the tip-credit analysis—the occupation—with one of DOL's making—the timesheet. And as to untipped work, the Final Rule again ignores such work's clear connection to the occupation itself and instead elevates its lack of connection to tipping. The Final Rule is therefore a completely different approach to the tip credit.

The Fifth Circuit reasoned that the FLSA unambiguously states that "an employer may claim the tip credit for any employee who, when 'engaged in' her given 'occupation . . . customarily and regularly receives more than $30 a month in tips. '" This is a far cry from the DOL's interpretation of "tipped employee," which the Fifth Circuit paraphrased as "any employee who, in a given moment, is engaged

in tip-producing work."

Note: The Fifth Circuit's decision in *Restaurant Law Center, et. al. v. U.S. Department of Labor, et. al.*, only affects federal law and what's required for employers to claim the tip credit under the FLSA. It ***does not*** affect what's required of employers under any applicable state and local wage laws. Thus, employers should be mindful of and continue to follow their state and local laws.