Here We Go Again: DOL Announces Final Rule Regarding Tipped Employees With Dual Jobs

Labor & Employment Law Update

By Heather Bailey and Peter Hansen on November 1, 2021

On October 29, 2021, the U.S. Department of Labor published its final rule regarding tipped employees with dual jobs (*i.e.*, employees who perform both tipped and non-tipped work), rejecting the Trump-era approach to determining when tipped employees may be paid subminimum wages. The final rule reinstates the dreaded "80/20" rule that employers with tipped employees are likely familiar with, and adds a new "substantial amount of time" component to the determination. If you are an employer covered by the Fair Labor Standards Act, listen up!

The 80/20 Rule

Under the reinstated 80/20 rule, employees who spend at least 20% of their workweek on non-tipped job duties that directly support their tip-producing work must be paid the full minimum wage for time spent on non-tipped duties rather than the federal subminimum wage of $2.13. [Some states require employers to pay a higher tipped minimum wage than the $2.13 allowed under federal law, including Illinois ($6.60), Missouri ($5.15), Ohio ($4.40), and Wisconsin ($2.33). Moreover, certain locales also require a higher rate such as Chicago at $8.40 (4-20 workers) and $9.00 (21 or more workers). Employers must follow the law of whichever rate is the highest.] The final rule provides some notable insight into compliance, including:

- Defining "tip-producing work" broadly to include "any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips," and providing specific examples for servers,

bartenders, nail technicians, bussers, parking attendants, and bellhops.

- Examples of non-tipped work that directly supports tip-producing work, including a number of tasks that employers may not previously have considered to be "directly supporting," such as down time while the employee is waiting for customers to arrive.

- Examples of non-tipped work that does not directly support tip-producing work, including preparing food (including salads), ordering supplies, and cleaning areas outside the worker's normal work area (*e.g.*, a bartender cleaning the dining room or bathroom).

Notably, any time paid at the minimum wage rate does not count towards the 20% calculation, meaning it would not impact whether the employer could claim a tip credit. Here is an example in the final rule:

A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 18 minutes of non-tipped directly supporting work twice a day, for a total of three hours a week. The employer may take a tip credit for all of the time the employee spends performing directly supporting work, because this time does not exceed 20 percent of the workweek. Because this employee has been paid the full minimum wage for a total of five hours a week, the employee could perform up to seven hours of directly supporting work (35 hours × 20 percent = 7 hours) without exceeding the 20 percent tolerance.

The "Substantial Amount of Time" Rule

The new "substantial amount of time" rule applies when a tipped employee performs non-tipped duties for more than 30 continuous minutes (regardless of whether the time exceeded 20% of their workweek). When this occurs, the employee must be paid the full minimum wage for the time that exceeds 30 minutes. Accordingly, a tipped employee who spends 45 continuous minutes on non-tipped work may still be paid at the tipped employee minimum wage for the first 30 minute period, but must be paid the full minimum wage for the remaining 15 minutes. Similarly, the employer may claim a tip credit for the first 30 minutes, but not the remaining 15.

What's Next?

The new rule will become **effective December 28, 2021**, so employers in the restaurant, hospitality, and service industries should begin preparations to comply with the dual job regulations and their challenges now, especially since tipped employees appear to be an area the Department of Labor is particularly focused on. While the previous administration tried to clear up these muddy waters, we are back here again in an industry devastated by the pandemic. Thus, determining compliance needs to happen immediately. For example, an

employer needs to decide how they are going to track the non-tip producing work, especially the work done pre and post shift. As always, questions regarding these issues should be directed to experienced labor and employment counsel.

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