

US Department of Labor Proposes Rule to Limit Federal Tip Credit Application

Labor & Employment Law Update

By Sara Zorich on June 23, 2021



On June 21, 2021, the US Department of Labor (DOL) announced that it has proposed new rulemaking, and is seeking input on significant limits to an employer's ability to utilize the tip credit.

Under the current law, the Fair Labor Standards Act and many state laws allow

employers to pay employees in tipped positions a lower cash wage, and take a credit against the tips earned by the employee to make up the balance for the applicable minimum wage. The proposed changes impact when the tip credit is applicable.

The proposed rule places the work that a tipped employee performs into three buckets: (1) tipped work (i.e. a busser bussing a table or server waiting on a table), (2) work directly supporting the tipped work (i.e. busser cleaning the restaurant dining area or preparing tables for the next day), and (3) work not part of the tipped job (i.e. busser cleaning the restaurant kitchen/bathrooms or a hotel housekeeper cleaning nonresidential parts of a hotel, such as a spa, gym, or the restaurant).

The tip credit is applicable to all tipped work. Regarding the second bucket, the DOL has proposed limits on the amount of time the employee can perform "directly supporting" work before the tip credit is no longer applicable. The standards proposed are: (1) if a tipped employee spends more than 20 percent of their workweek performing directly supporting work, then the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek (80/20 rule), and (2) if a tipped employee spends a continuous 30 minutes or more performing work "directly supporting" their job, the employer cannot take a tip credit for that entire period of time that was spent on the directly supporting work tasks.

The two standards can interplay with each other as provided by the following example in the regulations: if a server is required to perform an hour of directly supporting work at the end of each of her five 8-hour shifts, each of those hours spent performing directly supporting work must be paid at the full minimum wage and would not count towards the 20 percent workweek tolerance. If that same server also performs 20 minutes of directly supporting work three times each shift, for a total of 1 hour per day, the employer could take a tip credit for the rest of the server's supporting work because the 5-hour total did not reach the 20 percent tolerance for a 40-hour workweek.

Further, the regulations seek to clarify the third bucket, stating a tip credit cannot be taken for any time a tipped employee spends performing work that is not part of the tipped occupation (defined as "work that does not generate tips and does not directly support tip-producing work"). All time performing any work that is not part of the tipped occupation must be paid at the full minimum wage.

The proposed rule is open for comments for the next 60 days. In light of these proposed regulations, employers should begin reviewing their job descriptions for tipped employees and analyze the job duties and time for tasks related to tipped work, work directly supporting the tipped work and work that is not part of the tipped occupation.

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