

U.S. Department of Labor Issues Final Rule on Tipped Worker Pay

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On October 29, 2021, the U.S. Department of Labor (“DOL”) issued its final rule outlining the circumstances under which an employer is permitted to take a “tip credit” against its wage obligation to tipped employees, paying those employees a reduced minimum wage as low as \$2.13 per hour as long as the sum of those wages and the employee’s tips meet or exceed the federal \$7.25 minimum wage. This final rule is the result of a notice-and-comment period since the DOL initially issued its proposed rule on the subject on June 21, 2021 (see alert [here](#)), and is largely consistent with the language in the proposed rule.

As discussed in our prior alert, the final rule regulatorily codifies the “80/20 rule” for the first time since its 1988 introduction. Under that rule, an employer may not take a tip credit for time that an employee spends performing “non-tipped, directly supporting” duties related to tipped work if the time spent performing those untipped duties exceeds 20% of the employee’s workweek. Further limiting the circumstances under which an employer can take the tip credit, the final rule also requires that tipped employees receive full minimum wage rates when they perform ancillary “side work” for at least 30 consecutive minutes, regardless of how many hours that employee works in a week.

In justifying the final rule’s language and responding to public comments elicited during the notice-and-comment period, the DOL rejected labor contentions that the 20% threshold should be reduced to 10% or 5%, and an assertion by the U.S. Chamber of Commerce that the threshold should be higher than 20% to avoid “arguments over the specifics of tasks that were performed during extremely small amounts of time.” According to the DOL, the 20% threshold “appropriately approximates the point in a given workweek at which an employee’s aggregate non-tipped, directly supporting work is no longer incidental to the employee’s tip producing work, and thus, the employee is no longer engaged in a tipped occupation.” The DOL clarified that the 20% threshold only takes into account the hours during which the employer is invoking the tip credit. For example, if an employee works 40 total hours per week, 35 hours as a server and 5 hours cleaning the kitchen, the 20% threshold is set at 7 hours per week (35×0.2).

Public comments on the “30 consecutive minute” language asserted that the proposed language would render perfect compliance difficult, if not impossible. For example, commenters argued that “if an employee ‘performs non-tipped work for 29 minutes . . . the employer has not violated the law, however, if for some reason the tasks take 31 minutes, now the pay rate must change for the prior half-an-hour,’ or else the employer will be liable, even if it was unaware that the employee had worked the extra 2 minutes.”

In response, the DOL revised the final rule, providing a “tolerance for the first 30 minutes of non-tipped, directly supporting work.” Under this revised language, an employer may take the tip credit for an employee’s first 30 minutes of non-tipped, directly supporting work-when that non-tipped work exceeds 30 minutes, only the time *beyond* the first 30 minutes are subject to the heightened minimum wage requirement. Under the original proposed rule, an employee who performed 45 minutes of non-tipped, directly supporting work would have been compensated at full minimum wage rates for that entire 45-minute period. Under the revised final rule, an employer may take the tip credit for the first 30 consecutive minutes, and need only compensate the employee at full minimum wage rates for the following 15 minutes. The DOL clarified that the first 30 minutes *do* count towards the 20% weekly threshold, should an employer choose to invoke the tip credit during that period. The final version of the regulation still does not address an employer’s obligations under the “30 consecutive minute” rule where untipped work is broken up by de minimis periods of time, including 30-minute bouts of untipped work separated by a rest break or an intermission as short as a trip to the restroom.

Potential Impact on Tipped Worker Employers

This regulation will take effect on December 28, 2021. Employers who have not already should begin to implement recordkeeping and other internal mechanisms to ensure that the tasks performed by tipped employees are accurately tracked. Strong recordkeeping practices will ensure compliance with this new regulation, and will ensure that employers’ pay practices are defensible should litigation arise. As discussed in our prior alert, the regulation will have no impact on states with a direct cash minimum wage of at least \$7.25 or that do not have a tipped minimum wage or recognize the tip credit, as those employers are already paying their tipped staff the full FLSA minimum wage for all hours worked (Alaska, Arizona, California, Colorado, Connecticut (bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington).

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