

U.S. Department of Labor Proposes Employee-Friendly Rules for Tipped Workers

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On June 21, 2021, the U.S. Department of Labor (“DOL”) introduced a proposed rule which, when effective, would impose increased limitations on when an employer can pay a tipped worker the “tipped minimum wage.” The proposed rule was published in the Federal Register on June 23, 2021, and will be open for public comment for 60 days until August 23, 2021 following its publication. Under federal law, employers currently may compensate tipped workers with a direct cash wage as low as \$2.13 per hour. Employers may take a “tip credit” against its wage obligation to the employee for the difference between the \$7.25 federal minimum wage and the \$2.13 federal tipped minimum wage, up to \$5.12 per hour.

The distinction between tipped workers and untipped workers is not as clear-cut in practice as it is in theory, as many tipped workers spend some portion of their shift performing tasks that do not produce tips. As a result, and under 1988 DOL guidance colloquially known as the “80/20 rule,” an employer could continue taking the tip credit for time that an employee spends performing untipped duties related to the employee’s tipped work as long as the time performing those untipped duties did not exceed 20% of the employee’s workweek. While persuasive for the decades since its introduction, the 80/20 rule was never codified by statute or regulation. Under the Trump administration, the DOL rescinded the 80/20 rule as an arbitrary benchmark, and issued new sub-regulatory guidance in 2018 and 2019. That guidance articulated a new “related duties” test, under which employers would no longer be prohibited from taking a tip credit for a tipped employee’s untipped work as long as the untipped work was performed contemporaneously with or for a reasonable time immediately before or after tipped duties. The “related duties” test was codified in the Trump administration DOL’s [December 22, 2020 final rule](#), but relevant portions of the final rule have been delayed by the DOL under the Biden administration through 2021.

Marking a full 180-degree shift from the Trump administration’s codification of the related duties test and elimination of the 80/20 rule, the DOL’s new proposed rule would remove the related duties test before it can take effect, and prohibit employers from invoking the tip credit for employees who spend a “substantial amount of time” performing untipped work. Under the proposed rule, a tipped employee performs untipped work for a “substantial amount of time” (1) if that untipped work exceeds 20% of the hours worked during the employee’s workweek (thereby codifying the previous 80/20 rule), *or* (2) if the untipped work is performed for a continuous period of time exceeding 30 minutes, regardless of weekly hours. Where a tipped employee’s untipped work exceeds 20% of the workweek or 30 consecutive minutes, the employer cannot take the tip credit for untipped work exceeding 20% of the workweek or for any time spent performing untipped duties, respectively.

Potential Impact on Employers of Tipped Workers

While codification of the 80/20 rule does not stray from a tipped worker employer's existing obligations, the introduction of the "30 consecutive minute" rule as a new limitation on an employer's authority to invoke the tip credit may significantly reduce the circumstances under which an employer can invoke the tip credit and compensate a tipped employee as low as \$2.13 per hour. However, the proposed rule does not address whether the "30 consecutive minute" rule applies when 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. Given the potential ambiguity of the 30 consecutive minute rule, employers of tipped workers should be sure to track the work performed by those employees carefully-or implement mechanisms through which tipped employees can track their own time-to insulate against potential wage/hour litigation.

Finally, the proposed rule should have no impact on states with a direct cash 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. Those states are Alaska, Arizona, California, Colorado, Connecticut (bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

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