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A Tip for Employers With Tipped Employees — Stay on Top of the Ever-Changing Guidance on the 80/20 Rule!

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Employers with tipped employees are constantly trying to keep up with the ever-changing and evolving tip credit rules promulgated by the United States Department of Labor (DOL) — specifically, what is known as the 80/20 rule. However, a recent federal appeals court has given the 80/20 rule the pink slip, and it may not be returning anytime soon, in light of an incoming Trump Administration. The 80/20 rule, which attempts to impose restrictions on when and how employers can take advantage of the tip credit for tipped employees, just might be cast aside for the foreseeable future.

Volatility of Tip Credit Rules

Under the Fair Labor Standards Act (FLSA), an employer can take a "tip credit" and pay an employee less than the applicable minimum wage where the employee's tips will make the up the difference (or exceed the minimum wage). For example, an employer can pay a tipped employee a cash wage of $2.13 per hour if the employee's tips for the workweek and the cash wage of $2.13 per hour combined exceed the federal minimum wage of $7.25 per hour. The employer is thus taking a "tip credit" of $5.12 per hour.

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Over the last several decades, tip credit rules have varied widely based on the administration in the White House. The DOL first introduced the 80/20 rule in 1988 in its Field Operations Handbook, which stated that an employer cannot claim the full tip credit if an employee spent more than 20 percent of the employee's time on "non-tipped activities" related to the tipped occupation. In other words, if an employee's non-tipped activities (for instance, stocking service areas, setting tables, rolling silverware, or making coffee) exceeded 20 percent of their time, the employer had to pay full minimum wage.

The 80/20 guidance remained in place until 2009, when it was retracted by a DOL opinion letter. Quickly thereafter, that opinion letter was withdrawn by the Obama Administration, which, in turn, reinstated the original 1988 rule. In 2018, the Trump Administration reissued the 2009 opinion letter, once again rescinding the 80/20 rule. In 2021, under the Biden Administration, the DOL issued a "Final Rule" codifying the original 80/20 guidance by defining what it means to be "engaged in a tipped occupation" under the tip credit provisions of the FLSA. *See* 29 C.F.R. § 531.46(f).

Under the 2021 Final Rule, there were three categories of work: (1) directly tip-producing work; (2) directly supporting work; and (3) work not part of the tipped occupation. An employer could not take a tip credit for any time spent in the third category — work that is not part of the tipped occupation (i.e., a server who is working in the kitchen preparing food). The rule provided that an employer may take a tip credit for tip-producing work, but, if more than 20 percent of the employee's workweek is spent on directly supporting work (the second category), the employer cannot claim a tip credit for the excess work. The 2021 Final Rule also provided that directly supporting work cannot be performed for more than 30 minutes at any given time, otherwise, the employer cannot take a tip credit for the excess time (known as the 30-minute rule).

Recent Invalidation of the DOL Tip Credit Final Rule

On August 23, 2024, the tides changed once again when the Fifth Circuit Court of Appeals released its opinion in *Restaurant Law Center v. United States Department of Labor* invalidating the 2021 Final Rule. The Fifth Circuit found the 2021 Final Rule at odds with the text of the FLSA because it "imposes a line-drawing regime that Congress did not countenance." In other words, the Final Rule segments tipped jobs into their component tasks without any textual basis for so doing. The FLSA clearly permits a tip credit for "tipped employees," but defines such employees not by the work tasks performed, but by the fact of receiving more than $30 per month in tips. As such, a server performing additional duties, such as cleaning tables, making coffee, and washing dishes, is still a server regardless of the amount of time spent on these non-tipped tasks rather than serving customers. The Fifth Circuit explained that the Final Rule's focus on the types of tasks performed and amount of time spent on each is not grounded in the text of the FLSA, which simply states that a "tipped employee" is engaged in an "occupation" in which they receive tips, rather than a "*tipped* occupation." The court noted that "[t]he FLSA does not ask whether duties composing that given occupation are themselves each *individual* tip-producing."

In essence, the Fifth Circuit opined that the DOL's Final Rule imposed restrictions on the tip credit that are not found within the text of the FLSA itself. Thus, the court vacated the Final Rule, noting it is "not in accordance with law" and is "arbitrary and capricious." Importantly, however, the Fifth Circuit's opinion does not affect the "dual-jobs regulation," which focuses on whether an employee performs tasks *unrelated to* his or her tipped occupation (rather than the *amount of time* spent on untipped tasks). Where an employee is employed by the same employer in both a tipped occupation and in a non-tipped occupation, an employer may only take a tip

credit for the work performed by the tipped employee that is part of the employee's tipped occupation. By way of example, if an employee works for a restaurant as both a dishwasher and a server, the restaurant cannot take a tip credit for those shifts during which the employee is exclusively working as a dishwasher (since dishwasher is not a tipped occupation).

Employer Takeaways

The Fifth Circuit's opinion vacating the DOL's Final Rule will be viewed as a "win" by employers, who no longer have to worry about tracking the amount of time each of their tipped employees spends on any given task that is part of their job. Still, employers should not get too comfortable with the change in the law, as history indicates that it is not out of the realm of possibility that another rule change could come in the future. Yet, with an incoming Trump Administration, it is unlikely that the DOL will reinstate an iteration of the 80/20 rule any time soon. The best practice for employers is to stay apprised of the current regulations in this area of the law, and when a change occurs, quickly implement policies and practices to comply with the applicable regulations. If you need assistance with your policies governing tip credits, please contact your Akerman Labor and Employment attorney.
