

Blog Post

Restaurant Industry Takes On Tip Credit “80/20 Rule”

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A restaurant advocacy group has sued the Department of Labor challenging its “80/20 Rule,” which limits the use of a tip credit wage where workers spend more than 20% of their time doing work not directly related to tip-generating activities.

The Restaurant Law Center, a public policy affiliate of the National Restaurant Association and the Texas Restaurant Association, has filed suit (*Restaurant Law Center v. U.S. Dept. of Labor, No. 18-cv-567 (W.D. Tex. July 6, 2018)*) in Texas seeking to declare unlawful the 80/20 Rule, which is part of DOL’s Field Operations Handbook. The Handbook provides the DOL’s Wage and Hour Division investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.

The lawsuit is the latest development in the long struggle between the restaurant industry and government over using tips to comply with the Fair Labor Standards Act’s mandate to pay minimum wage and overtime to workers who are not exempt under one of the recognized exemptions.

The FLSA permits an employer to pay an employee who customarily and regularly receives tips a cash wage that is less than the statutory minimum wage, provided that such cash wage and the employee’s

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tips, taken together, are at least equal to the minimum wage. In 1967, the DOL issued a “dual jobs” regulation to address employees who work two or more jobs, where not all of these jobs generate tips. Under the “dual jobs” regulation, employers are prohibited from taking advantage of the tip credit for hours that an employee works as a non-tipped employee. For example, if an employee is employed as both a server and a maintenance person, the employer cannot use the tip credit for the hours worked in the latter role.

Over the past several decades, however, the DOL has issued various conflicting interpretations of the “dual jobs” regulation. At the crux of the Restaurant Law Center lawsuit is a provision in the Handbook that prohibits an employer from taking a tip credit under the 80/20 Rule. At its core, the 80/20 Rule provides that if a tipped employee spends more than 20% of his or her time during a workweek performing duties that are not directly related to generating tips, such as a server rolling silverware, making coffee or cleaning and setting dining tables, the employer may not take a tip credit for the time spent performing those duties. But employees do not generally log their hours separately by task, and following the Rule has been a nightmare for employers.

In challenging the Handbook’s 80/20 Rule, the Restaurant Law Center asserts, among other things, that the DOL surreptitiously and improperly created the 80/20 Rule, rather than abiding by the rulemaking process, thereby violating the federal Administrative Procedure Act.

Although multiple courts across the country recognize some form of the 80/20 Rule, two federal appeals courts have reached opposite results in determining its validity. In 2011, the U.S. Court of Appeals for the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) determined that the “dual jobs” regulation was ambiguous, and therefore, the court

deferred to the DOL's interpretation in the Handbook, upholding the validity of the 80/20 Rule. In contrast, in September 2017, the U.S. Court of Appeals for the Ninth Circuit (covering California, Washington, Nevada, Oregon, Arizona, Montana, Alaska, Hawaii and Idaho) explained that the Handbook effectively imposed new recordkeeping guidelines on employers to determine which tasks are tip generating and which are not. In doing so, the Ninth Circuit concluded that this created a new regulation inconsistent with the "dual jobs" regulation. Shortly after the Ninth Circuit's three-judge panel issued this opinion, the Ninth Circuit granted a rehearing before the full panel and the case was re-argued in March 2018; the full panel of the Ninth Court has yet to issue its opinion.

If the full panel of the Ninth Circuit upholds its prior decision, or the Fifth Circuit (where the Restaurant Law Center lawsuit is pending) ultimately invalidates the 80/20 Rule on an appeal, there will be a split among the federal appeals courts, paving the way for the U.S. Supreme Court to decide the validity and enforceability of the 80/20 Rule.

In the meantime, employers are still left with uncertainty in determining what is, and what is not, an allegedly "tip-generating" duty and whether they are in compliance with the current state of the 80/20 Rule. While the fate of the 80/20 Rule remains in limbo, employers should consider implementing the following procedures to ensure compliance with the 80/20 Rule while it remains in effect:

- Keep records of the amount of time employees spend performing non-tip eligible tasks, such as cleaning bathrooms, mopping floors, dusting furniture or other tasks unrelated to direct guest services.
- Create and/or review existing job descriptions for all tip-credit eligible employees, including specific tasks to be performed by each position and routinely evaluate the time implications spent on

non-tipped activities or those activities that may not be considered tip-generating.

- Regularly instruct tip-credit eligible employees on time-tracking policies, including requiring tipped-employees to report any shifts for which they claim to have spent more than 20% of their time on non-tip generating tasks.
- Keep in mind that while this article only addresses federal law and the FLSA, some states, like New York, have a more expansive 80/20 Rule, including applying the 20% threshold on a daily basis, rather than the entire workweek. Employers, therefore, must be cognizant of the applicable laws of each state where they do business.

While implementing some or all of these procedures will not eliminate the potential of an 80/20 lawsuit, doing so may give the employer the opportunity to learn of and cure any possible violation prior to a lawsuit being filed, and may assist employers in defending against 80/20 claims.

In any event, it is possible that the 80/20 Rule will no longer matter, if another recent trend continues. Some states are eliminating the tip credit altogether, and requiring employers to pay tipped-employees the full applicable minimum wage without taking into account tips that such employees may receive. Most recently, Washington, D.C. voted to scrap the tip credit, joining California, Minnesota, Washington, Oregon, Nevada, Montana and Alaska. This issue is also making its way through the New York legislature, with Governor Andrew Cuomo in support of ending the tip-credit.

Moving forward, it is important that employers stay informed and consult legal counsel to ensure compliance with applicable law.

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