

Blog Post

A Tip from the Department of Labor: The 80/20 Rule Has Been Rescinded

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Employers are no longer barred from taking the tip credit for tipped employees who spend more than 20% of their time doing non-tipped activities, according to a new U.S. Department of Labor opinion letter doing away with the so-called “80/20 rule.” As restaurant and hospitality employers are aware, the tip credit provision in the Fair Labor Standards Act permits an employer to pay a tipped employee \$2.13 per hour in wages and take a “tip credit” equal to the difference between the cash wages and the federal minimum wage, which is currently \$7.25 per hour. The regulations recognize though that tipped employees may spend some of their time doing non-tipped work.

If the work is sufficiently different – like a waiter who sometimes works as a maintenance man – the employee will be considered to have dual jobs and the employer cannot take the tip credit for the second job. But if the other duties are related – like a waiter spending part of his time cleaning, setting tables and making coffee – the DOL now advises that there is no limit to the amount of the related duties that can be performed while taking the tip credit. As long as these duties are performed at the same time as direct customer-service duties and other requirements of the FLSA are met, the employer can still take the tip credit, according to this new opinion letter.

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The Opinion Letter, FLSA2018-27, actually reinstates a 2009 letter, FLSA2009-23. Readers will recall that earlier this year, the DOL reinstated the practice of issuing opinion letters, which now provide employers another source of guidance on wage and hour issues. The DOL stopped issuing opinion letters during the Obama administration, and instead switched to a practice of offering Administrator's Interpretations (AI), which have broader applicability. However, after Trump took office, the DOL announced that it would resume the practice of issuing opinion letters and it has issued 27 opinion letters so far this year.

Opinion Letter FLSA2018-27 recognizes that employers may need guidance about which duties are related to tipped activities. The Opinion Letter refers employers to O*Net Online for a list of core and supplemental duties for tip-producing occupations and advises that any tasks listed should be considered directly related to the tip-producing activities of that occupation such that the employer may take the tip credit. For example, a restaurant employer may take the tip credit for any amount of time spent by waiters or waitresses doing the following tasks:

- Taking orders from patrons for food or beverages
- Checking with customers to ensure that they are enjoying their meals and taking action to correct any problems
- Checking patrons' identification to ensure that they meet minimum age requirements for consumption of alcoholic beverages
- Collecting payments from customers
- Writing patrons' food orders on order slips, memorizing orders, or entering orders into computers for transmittal to kitchen staff
- Preparing checks that itemize and total meal costs and sales taxes
- Presenting menus to patrons and answering questions about menu items, making

recommendations upon request

- Removing dishes and glasses from tables or counters and taking them to kitchen for cleaning
- Serving food or beverages to patrons, and preparing or serving specialty dishes at tables as required
- Cleaning tables or counters after patrons have finished dining
- Preparing tables for meals, including setting up items such as linens, silverware, and glassware
- Explaining how various menu items are prepared, describing ingredients and cooking methods
- Assisting host or hostess by answering phones to take reservations or to-go orders, and by greeting, seating, and thanking guests
- Escorting customers to their tables
- Performing cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and cleaning bathroom
- Informing customers of daily specials
- Preparing hot, cold, and mixed drinks for patrons, and chilling bottles of wine
- Rolling silverware, setting up food stations, or setting up dining areas to prepare for the next shift or for large parties
- Stocking service areas with supplies such as coffee, food, tableware, and linens
- Bringing wine selections to tables with appropriate glasses, and pouring wine for customers
- Filling salt, pepper, sugar, cream, condiment, and napkin containers
- Describing and recommending wines to customers
- Performing food preparation duties such as preparing salads, appetizers, and cold dishes, portioning desserts, and brewing coffee

- Providing guests with information about local areas, including giving directions
- Garnishing and decorating dishes in preparation for serving

The Opinion Letter advises that employers may not take the tip credit for tasks not contained on the O*Net task lists unless they are subject to the *de minimis* rule contained in the regulations.

The advice in this Opinion Letter should come as welcome news to restaurant and hospitality employers because the 80/20 rule was a source of frequent wage and hour litigation in which plaintiffs argued that they should be paid the full minimum wage because they claim they spent more than 20% of their time performing non-tipped duties. The 80/20 rule was a headache for employers in these lawsuits because many did not keep specific records about the amount of time employees spent performing each specific task. Now that the DOL has rescinded the 80/20 rule, restaurant and hospitality employers have more clarity about when the tip credit can be taken. However, the Opinion Letter only provides guidance about the FLSA, so it is important to determine the impact on any state or local laws and regulations regarding tip credits. If you have questions about the Opinion Letter and its impact on you, contact your Akerman Labor and Employment lawyer.

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