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Blog Post

Hot Tip: End May Be Near for 80/20 Rule!

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Employers in the hospitality and restaurant industry are poised for celebration: the Department of Labor (DOL) has proposed eliminating a rule that requires tracking the time tipped employees devote to non-tip producing activities when counting employees' tips toward the employer's minimum wage obligations. The DOL has taken the position that employers cannot claim a tip credit if a tipped employee spends more than 20% of his or her time "performing preparation work or maintenance," a standard in the agency's Field Operations Handbook known as the "80/20 Rule." Last week, the DOL published a Notice of Proposed Rulemaking (NPRM) proposing to eliminate the 80/20 Rule.

This rule has been the source of many headaches for employers—in part because the rule provided no guidance as to what specific duties constitute "tip-generating" work versus non-tipped duties that do not generate tips. In addition, employers were faced with the administrative nightmare of figuring out how to keep track and record such time. It is no surprise then that employers often criticized this rule as unworkable.

Given the level of uncertainty around the 80/20 Rule, it is also no surprise that it spawned a flurry of lawsuits across the country. To defend against these lawsuits, many employers and their legal teams were forced to undergo the painful task of trying to identify and track—minute by minute—the daily activities of tipped employees, as well as scrutinize

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employee time logs. So naturally, the news that the DOL would abandon the 80/20 Rule was welcomed by these employers.

The Proposed Rule announced on October 8, 2019, was not the DOL's first step towards abandoning the 80/20 Rule. Rather, in November 2018, the DOL reissued a 2009 Opinion Letter, which had rescinded the 80/20 Rule. (The 2009 Opinion letter was originally issued late in the George W. Bush Administration, but subsequently withdrawn by the Obama Administration). See our prior blog post here.

Now, the DOL seeks to implement its guidance from the November 2018 Opinion Letter into a DOL regulation. So what does the Proposed Rule say? It says that "an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with, or within a reasonable time before or after, his tipped duties." (Note: The Proposed Rule also contains other provisions regarding tip-pooling.) Examples of such "related" duties include setting up and cleaning tables, making coffee, and occasionally cleaning glasses or dishes. But the Proposed Rule also states that a "non-tipped duty will be considered related to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET)."

But what happens if the non-tipped duty is not listed in O*NET? Does this mean the employer is out of luck? No, not necessarily. The DOL's enforcement guidance states that when an O*NET description does not exist for an occupation, the DOL will consider any duties usually and customarily performed by employees in that occupation to be related duties so long as the duties are consistent with the related duties for similar occupations listed in O*NET. Still, the NPRM notes that the DOL "is particularly interested in [receiving] comments on how to identify related duties for occupations that may qualify as tipped occupations, but which lack a

description in the O*NET database, perhaps because they are newly emerging." Therefore, it may be likely that more non-tipped duties will be listed in O*NET after the comment period. (Employers can submit comments to the DOL by clicking here.)

Does this mean employers can now stop paying attention to employees working different tasks during their shift?

Most likely, no. While employers may be eager to rejoice the DOL's decision to abandon the 80/20 Rule, employers should consider the following:

1. **The Proposed Rule is just that—"proposed."** The NPRM is only in the initial stage of DOL's rule making process. For now, the NPRM invites employers to submit comments to DOL regarding the Proposed Rule by December 9, 2019. Following the DOL's consideration of the comments, it will publish a Final Rule, which will likely take effect by early to mid-2020. However, once the DOL publishes a Final Rule abandoning the 80/20 Rule, it will likely have an impact in curbing FLSA litigation brought on by employees with dual duties. At minimum, it will provide employers with a strong legal defense in any future lawsuit.
2. **The "dual jobs" concept is still intact.** Employers should not confuse the 80/20 Rule with the "dual jobs" concept, which was established when the DOL first published regulations applying the tip credit. The "dual jobs" concept refers to employees who work in one job routinely satisfying the $30-a-month tip provision, but also work in a second job not performing tipped work. In that situation, the employer may take the tip credit only as to the first job. That is still the rule under the Proposed Rule. For example, consider a hotel maintenance worker who also works as a waiter at the hotel, only his waiter position is a tipped occupation subject to the tip credit. The employee's duties as a maintenance worker cannot be considered as non-tipped duties related

to his duties as a waiter. In other words, the Proposed Rule only allows employers to take tip credit for "related" non-tipped duties.

3. **There are limitations to "non-tipped duties."** The Proposed Rule narrowly defines non-tipped duties. First, as mentioned above, those non-tipped duties must be related to the tip-generating work. The Proposed Rule also makes clear that in determining whether a duty is a "related non-tipped," it will rely on whether those duties are listed in O*NET. If not, employers will need to find other occupations that can be used as a comparison, or at least be able to show that those non-tipped duties are customarily performed by employees working in that position. Second, those non-tipped duties must be performed "contemporaneously with, or within a reasonable time before or after, his tipped duties." If a waiter cleans dishes for an entire shift, and then waits tables the next day, the employer likely will not be able to claim a tip credit for the time the waiter spent cleaning dishes during that first day. Therefore, employers should be mindful of this timing requirement when assigning non-tipped duties to employees.
4. **Some states do not allow employers to claim tip credit.** There is no indication that the Proposed Rule has any impact on state laws. Employers doing business in states with restrictive wage and hour laws, like New York and California, may still be unable to claim a tip credit. Some states have even implemented their own version of the 80/20 Rule. Therefore, employers should pay attention to state laws applicable to their business before relying on the DOL's Proposed, or even Final, Rule.

For now, employers—particularly those in the hospitality and restaurant industries—should sit tight and avoid making any major changes to their current pay practices until this Proposed Rule has gone through the rulemaking process. Though the DOL has made clear of its intention to abandon the

80/20 Rule, the “comment period” may reveal other requirements for employers to claim a tip credit. More importantly, even if this Proposed Rule is implemented, employers should still consult with legal counsel before making any changes to their business practices, especially since some states ban tip credits altogether.

If you have any questions about these new laws and their impact on your company, contact your Akerman Labor and Employment attorney.
