

Legal Update Article

Labor Department Further Delays FLSA Tip Regulations Final Rule Until the End of 2021

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April 30, 2021

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Wage and Hour

On April 28, 2021, the U.S. Department of Labor (DOL) announced that it will further delay, until December 31, 2021, the effective date of portions of the previous administration's [Tip Regulations Final Rule](#) under the Fair Labor Standards Act (FLSA). That Final Rule, issued in late December 2020, originally was scheduled to go into effect on March 30, 2021, but the DOL previously extended that deadline to April 30, 2021. Importantly, the latest delay affects only three portions of the Final Rule: two involving the DOL's ability to assess civil money penalties (CMPs) and one addressing the so-called "20%" or "80/20" rule under the "dual jobs" provisions of the FLSA regulations.

The other portions of the December 2020 Final Rule, including provisions addressing the sharing of tips between tipped and non-tipped workers (if a tip credit is not taken), are effective April 30, 2021.

Will the "80/20" Rule Return?

The December 2020 Final Rule codified, with minor changes, the DOL's previous guidance eliminating the "80/20" rule. That rule limited the percentage of time (*i.e.*, 20%) a tipped worker could spend performing allegedly non-tipped duties and still take a tip credit. Under the December 2020 Final Rule, if tipped employees perform duties related to their tipped occupation, either contemporaneously or for a reasonable period before or after their tipped duties, an employer is permitted to pay them using a tip credit, regardless of whether those duties directly generate a tip. (For details on the December 2020 Final Rule, see our article, [Labor Department Issues Final Rule on Tip Pooling Amendments, Elimination of '20%' Dual Jobs Rule.](#))

In its latest delay of the December 2020 Final Rule, the DOL does not commit to adopting the 80/20 rule as it existed previously, but states it needs more time to study and consider the issue. It is likely that at least a modified version of the 80/20 rule will emerge when new rulemaking begins, which is expected to be completed by December 31, 2021. The possible return of David Weil as the DOL's Administrator of the Wage and Hour Division, a position he held under the Obama administration that supported the 80/20 rule, would make the return of some form of the rule more likely.

Important Changes Go Into Effect

Other than the provisions regarding the 80/20 Rule and CMPs, the remainder of the December 2020 Final Rule will go into effect on April 30, 2021. This includes a 2018 amendment to the FLSA that permits tipped employees, such as restaurant servers, to pool tips with non-tipped workers (such as cooks and dishwashers), so long as the employer does not take a tip credit, while also prohibiting employers, including their managers and supervisors, from keeping tips received by employees under any circumstances. The latter provisions of the Final Rule define "managers" and "supervisors," *i.e.* those ineligible to participate in a tip pool, as individuals who satisfy the "duties" requirement (but not the salary basis requirement) under the FLSA's executive exemption.

If you have any questions about this development or any other wage and hour issue, please contact a Jackson Lewis attorney.

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