Legal Update Article

Eleventh Circuit Refuses to Defer to DOL Opinion Letter Eliminating '20%' Rule

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Wage and Hour

In late 2020, the U.S. Department of Labor (DOL) issued a Tip Regulations Final Rule that, in part, sought to eliminate the so-called "80/20," or "20%," Rule under the Fair Labor Standards Act (FLSA). The 20% Rule has been used by the DOL and courts to determine whether a traditionally "tipped employee" devoted a sufficient amount of time (*i.e.*, at least 80%) to tip-generating duties so that the employer could claim a "tip credit" and pay the employee a reduced cash wage for that work time.

The Final Rule was scheduled to become effective in March 2021, but, following the election of President Joe Biden, the DOL delayed enactment of the portions of the regulation addressing the 20% Rule and then, in June 2021, issued a Notice of Proposed Rulemaking to reinstate the Rule, albeit in a revised form to clarify its application. The proposed rule has not yet become final, although the public comment period has closed.

Meanwhile, the U.S. Court of Appeals for the Eleventh Circuit, reviewing a case addressing the DOL's initial elimination of the 20% Rule in a 2018 Opinion Letter, has now held that the Opinion Letter is not entitled to deference and that the 20% Rule is a reasonable application of the FLSA and its regulations. ***Rafferty v. Denny's, Inc.***, 2021 U.S. App. LEXIS 27680 (11th Cir. Sept. 15, 2021). The Eleventh Circuit has jurisdiction over the federal courts in Alabama, Florida, and Georgia.

Background

The FLSA requires employers to pay non-exempt employees the full federal minimum wage (currently, $7.25 per hour) but treats "tipped employees" — those who customarily and regularly receive at least $30 a month in tips — differently. The FLSA permits employers to pay them a direct wage of $2.13 per hour and take a "credit" for the tips received by the employee to satisfy the remaining portion ($5.12 per hour) of the minimum wage. If the combination of direct wages and total tips is less than the minimum wage for all hours worked in a workweek, the employer must make up the difference.

The 20% Rule, which first appeared in a DOL Field Operations Handbook (FOH) in 1988, required employers to pay tipped employees the full minimum wage, rather than the lower tipped wage, if an employee spends more than 20% of their time performing allegedly non-tipped duties. Under the Rule employers, particularly those in the restaurant and hospitality industries, have been forced to recreate the daily activities of their tipped employees and separate them into "tip-generating" duties, "related, but non-tip-generating" duties, and "unrelated" duties, with little guidance on what activities fell into which bucket and how to capture such time.

The DOL initially withdrew the 20% Rule in a November 2018 Opinion Letter and reaffirmed that withdrawal in a February 2019 FOH amendment. In its place, the DOL concluded 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." A non-tipped duty would be considered as "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). In eliminating the 20% Rule, the DOL noted in part that "an employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties. Rather, such duties are generally properly considered a part of the employee's tipped occupation, as is consistent with the statute."

Nevertheless, some courts refused to apply the DOL's new position, concluding that the Agency's turnabout from the longstanding 20% Rule did not warrant deference under the so-called *Auer* doctrine. Thus, beginning in 2019 the DOL undertook formal rulemaking and in doing so, noted that allowing the tip credit for duties performed "for a reasonable time immediately before or after" a tipped duty "creates a sufficiently intelligible distinction between employees engaged in tipped occupations and non-tipped occupations." In short, added the DOL, the "related duties" test "better effectuates" the text of the regulations than did the 20% Rule, because it focuses on whether an employee is engaged in a tipped "occupation" rather than whether they are "performing certain kinds of duties or tasks within the tipped occupation." In December 2020, the DOL issued a Final Rule to officially put an end to the 20% Rule and thereby compel courts to apply a more-deferential standard to the Agency's new position.

Shortly after the Biden Administration arrived, the DOL delayed the effective date of the provisions of the new Final Rule that would have eliminated the 20% Rule and, in June 2021, proposed a new Final Rule that would reinstate the 20% Rule, with modifications that purport to eliminate the vagueness that routinely has perplexed employers. Under the current proposal, while employee time spent on "tip-producing" (or "tip-generating") duties obviously remains eligible for the tip credit — and conversely work that is unrelated to tip-producing work will remain ineligible for the tip credit — the concept of "related, but non-tip-generating" duties will be replaced with "work that directly supports tip-producing work" and the time spent on such work likewise would be eligible for the tip credit "provided it is not performed for a substantial amount of time," which "substantial" time defined to mean more than 20% or 30 continuous minutes.

The Eleventh Circuit's Decision

In the meantime plaintiff Lindsay Rafferty, a former server at a Denny's restaurant, filed a collective action under the FLSA, alleging Denny's violated the tip credit rule by making servers spend more than 20% of their time performing non-tipped "side work" such as cleaning, food preparation, taking out trash, bussing tables, and other non-tipped duties. The district court denied the plaintiff's motion for conditional certification and granted a subsequent motion for summary judgment filed by Denny's, relying in part on the 2018 DOL Opinion Letter that had eliminated the 20% Rule. The trial court concluded that the plaintiff's claims failed because she had not demonstrated that her alleged "side work" was not contemporaneous with her tip-related activities.

The plaintiff appealed and the Eleventh Circuit reversed, expressly rejecting the DOL's elimination of the 20% Rule in the 2018 Opinion Letter, finding instead that the Department's conclusions in support of the Rule's elimination were unreasonable and unworthy of deference under either of the standards of review established for an agency's informal, sub-regulatory guidance. Absent formal DOL guidance (which did not

yet exist at the time the case was before the district court), the Court of Appeals turned to the FLSA and its regulations themselves to determine whether either placed any limits on the time a tipped worker may spend performing allegedly non-tipped duties.

Despite the absence of any such time limitation in either the statute or its regulations, the Eleventh Circuit nonetheless concluded that a 20% time limitation did indeed apply to the performance of duties "related" to tipped duties, and further held that no tip credit may be taken for performing duties "unrelated" to tipped work. In distinguishing between "related" and "unrelated" tasks, the Court of Appeals held that "the dividing line between related and unrelated duties falls where untipped duties no longer directly support tipped duties," borrowing, nearly verbatim, language from the DOL's current proposed Final Rule. As examples of "unrelated duties," the Court of Appeals listed wiping down microwave ovens and stoves; washing and scrubbing walls; cleaning and scrubbing refrigerators, sinks, trays, and bins; and detailed cleaning on the expediter line.

In summary, the Eleventh Circuit concluded that the 20% Rule was an appropriate standard for determining when an employer may take a tip credit. Accordingly, the Eleventh Circuit reversed the district court's grant of summary judgment to Denny's, concluding that the plaintiff had established a genuine issue of material fact as to whether, and how often, she performed unrelated, non-tipped work.

The Takeaway

Between the DOL's issuance of a proposed rule that would reinstate a slightly modified 20% Rule and now the Eleventh Circuit's upholding of that Rule, it appears that — at least for the foreseeable future — the Rule, in some form, likely will survive. The DOL, of course, could decline to issue a new Final Rule and instead propose a different rule, but that appears unlikely. Thus, employers should review their practices to reduce the risk that tipped workers may claim they performed too much work that was neither tip-generating nor directly supporting tipped work.

Jackson Lewis attorneys will continue to monitor and report on further developments regarding the tipped employee regulations. In the meantime, if you have any questions about the above decision, the DOL's proposed rule, or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.