Special Report

DOL Formally Reinstates '20%' Rule, Adds '30-Minute' Rule Setting Limits on Tip Credit Use

By Justin R. Barnes & Jeffrey W. Brecher

November 2, 2021

Meet the Authors

Justin R. Barnes

(He/Him)
Office Managing Principal
(404) 586-1809
Justin.Barnes@jacksonlewis.com

Jeffrey W. Brecher

(Jeff)
Principal and Office Litigation Manager
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com

Related Services

Wage and Hour

On October 28, 2021, the U.S. Department of Labor (DOL) issued a**Final Rule** establishing limits on the amount of time tipped employees can spend performing work that is not "tip-producing work" and still be paid at the reduced cash wage applicable to tipped employees under the Fair Labor Standards Act (FLSA).

The DOL under the former administration had issued a final rule on the issue, but the current DOL delayed its effective date and has now rescinded and replaced it. The now-rescinded final rule would have eliminated the so-called "20%" Rule, which disallowed the tip credit when tipped employees spent more than 20% of their time performing related but non-tipped duties.

The new Final Rule not only revives the 20% Rule, with modifications, but also adds a "30-Minute" Rule, disallowing the tip credit when a tipped employee spends more than 30 continuous minutes performing work that is not considered tip-producing work.

The Final Rule becomes effective on December 28, 2021.

The History of Tipped Employees and the 80/20 Rule, Briefly

The FLSA requires employers to pay non-exempt employees 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. Because tipped employees receive substantial compensation through tips, 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 combined direct wage and total tips received by an employee is less than the minimum wage for all hours worked in a workweek, the employer must make up the difference. Usually, though, servers receive tips well in excess of the minimum wage and, in fact, often earn far more than traditionally non-tipped workers such as kitchen staff, particularly at fine-dining establishments.

The 80/20 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, were 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.

In a November 2018 Opinion Letter, the DOL withdrew the 80/20 Rule 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), a website funded by the DOL that identifies tasks in various occupations.

Many courts refused to apply the DOL's new position, concluding that the Agency's reversal from the longstanding 80/20 Rule did not warrant deference. Thus, the DOL undertook formal rulemaking and, in late 2020, issued a final rule that would have allowed employers to take the tip credit for duties performed "for a reasonable time immediately before or after" a tipped duty. However, before that final rule became effective, the Biden Administration delayed portions of it – most notably, the provisions involving the withdrawal of the 80/20 Rule – for further reconsideration. The recently issued Final Rule is the product of that reconsideration.

The New Final Rule

The Final Rule essentially creates three buckets of work performed by tipped employees and disallows the tip credit depending on the bucket in which the work falls. The first bucket is work that is classified as "tip-producing work." Under the Final Rule, an employee engaged in "tip-producing work" can be paid using the tip credit without any limitation on the hours engaged in tip-producing work. The second bucket is "work that is *not* part of the tipped occupation," such as cleaning bathrooms or sweeping the parking lot. An employer may not use the tip credit for any of the time spent performing such tasks.

The third bucket is where things get tricky. Under the Final Rule, employers may take the tip credit when an employee is engaged in work that is not "tip-producing" but that is "directly supporting" of tip-producing work. However, there are limits. Directly-supporting work cannot be performed for a "substantial amount of time," which the Final Rule defines as either (a) more than 20% of the hours in the workweek for which the employer has taken a tip credit; or (b) a continuous period of time that exceeds 30 minutes. Placing a specific task in the correct bucket, and then recording the time spent performing such tasks, will be a challenge, even for the most sophisticated employer. The same task, depending on who is performing it and when it is being performed, might be classified as either tip-producing or directly-supporting. For example, if a bartender cuts a lemon in response to a request from a customer for a lemon slice, the task is tip-producing work, but cutting lemons in anticipation of the arrival of customers would be considered directly-supporting work subject to the 20% and 30-minute limitations.

"Tip-Producing" Work

Citing a focus on "customer service [as] a necessary predicate," the Final Rule defines tip-producing work to include "all aspects of the work performed by a tipped employee when they are providing service to customers" and for which they are receiving tips. An employer may take the tip credit for any and all time a tipped employee spends on tip-producing work.

In an effort to provide greater clarity to employers, the Final Rule contains a non-exhaustive list of examples of duties that typically are considered tip-producing. For example, tip-producing duties for servers would include all duties directly associated with providing table service, such as taking orders, making recommendations, and serving

food and drink; walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers; filling and refilling drink glasses; attending to customer spills or items dropped on the floor adjacent to customer tables; processing credit card and cash payments; and removing plates, glasses, silverware, or other items on the table during the meal service. Moreover, the Final Rule provides that while *general* food preparation is not a duty of tipped servers, a server nonetheless may engage in some limited kitchen work that the DOL would consider tip-producing, such as "toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made soup, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets." The DOL distinguishes these tasks from general food preparation normally assigned to kitchen staff, such as preparing salads and slicing fruits and vegetables.

Similarly, tip-producing duties for bartenders would include preparing drinks; talking to customers seated at the bar; ensuring that a patron's favorite game is shown on the bar television; and bringing a high chair and coloring book for an infant seated at a bar-area table. The Final Rule provides comparable additional examples for bussers and service bartenders, who typically receive their tips through the servers and not directly from the customers, as well as for nail salon technicians.

The Final Rule further notes that while there is no limit on the amount of time for which an employer may take a tip credit when a tipped employee is performing tip-producing work, when those duties are being performed outside of the customer service experience, those same duties would instead be considered directly-supporting work. For example, when a server is rolling napkins or filling salt shakers while waiting for customers to arrive, those tasks would be considered as directly supporting, while they would be considered tip-producing when performed to fulfill the needs of an existing customer.

Directly-Supporting Work

The Final Rule defines directly-supporting work as "work [] either performed in preparation of or [that] otherwise assists the tip-producing customer service work," adding that directly-supporting work "is the kind of work that is generally more foreseeable to employers and that employers are more likely to specifically assign." As with tip-producing work, the Final Rule provides an extensive (but non-exclusive) list of examples of duties that generally would be considered as directly-supporting work.

Examples of directly-supporting work for servers and bussers during customer hours would include those activities commonly performed before or after table service, such as rolling silverware, setting tables, and stocking the busser station; refilling salt and pepper shakers and ketchup bottles; rolling silverware and folding napkins; sweeping or vacuuming under tables in the dining area; and setting and bussing tables. Examples of directly-supporting work for bartenders during customer hours typically would include wiping down the surface of the bar and tables in the bar area where customers are sitting; cleaning bar glasses and implements used to make drinks for those customers; slicing and pitting fruit for drinks; arranging bottles in the bar; fetching liquor and supplies; vacuuming under tables in the bar area; cleaning ice coolers and bar mats; and making drink mixes and filling up drink mix dispensers. The Final Rule includes comparable examples for parking attendants, bellhops, housekeepers, and nail salon technicians. Again, where these very same duties are performed as part of the service that the tipped

employee is providing to the customer, they may be considered tip-producing tasks.

What about idle time, *i.e.,* the period of time where a server is simply waiting for a customer to arrive? The Final Rule addresses this scenario and provides that time spent waiting for a customer is not tip-producing activity but instead would be considered directly- supporting work, subject to the 20% and 30-minute limitations.

What Constitutes a "Substantial Amount of Time"?

As noted above, while there is no limit on the use of the tip credit for *tip-producing* work, an employer may take the tip credit for *directly-supporting* work only to the extent that such work does not last for a "substantial amount of time." When does the amount of time spent become "substantial"? As set forth in the Final Rule, the amount of time becomes substantial when a tipped employee spends more than 20% of their time during a given workweek, or more than 30 consecutive minutes during any shift, engaged in directly-supporting work.

The application of this provision can prove to be tricky as well. The 20% workweek and 30-consecutive-minute limits apply only to the time that an employee has been paid at the tip credit rate. For example, if during a 40-hour workweek an employee works 20 hours as a server at the tip credit rate and 20 hours as a cook at full minimum wage, the 20% Rule is applied *only* to the 20 hours worked at the tip credit rate. Thus, the employee may perform a maximum of four hours (20 hours x 20%) of directly-supporting work, subject to the 30-consectuive-minute limitation, at the tip credit rate without violating the 20% Rule. The time worked by the employee at full minimum wage is not included in determining the maximum time devoted to directly-supporting work. Additionally, the Final Rule makes clear that if the employee's work exceeds either the 20% or 30-minute limitation, the tip credit is unavailable only for the period in excess of the 20% or 30 minutes, not the entire shift, workweek, or other period during which tip-producing work was performed.

The Takeaway

While the expanded examples of tip-producing and directly-supporting tasks in the Final Rule provides some additional clarity, questions remain that likely will continue to cause employers to struggle with tip credit compliance. As litigation in this area likely will continue, employers may decide simply to abandon the use of the tip credit during any period the business is not open to customers, as the DOL has taken the position that any work performed during such periods cannot qualify as tip-producing work, while directly-supporting work would be constrained by the 20% and 30-Minute Rules. Keep in mind that the Final Rule will have no impact on those states that do not permit a tip credit at all. Therefore, state law also must be considered.

If you have any questions about the Final Rule, tip credit compliance, or any other wage and hour question, please consult the Jackson Lewis attorney(s) with whom you regularly work.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit https://www.jacksonlewis.com.