Legal Update Article

Restaurant Associations' Effort to Invalidate DOL's 'Dual Jobs' Rule Rejected by Texas Federal Court

By Justin R. Barnes, Jeffrey W. Brecher, Felice B. Ekelman & Amanda A. Simpson

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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

The "Dual Jobs" Final Rule, which regulates when employers may take a tip credit under the Fair Labor Standards Act (FLSA), is a valid and reasonable exercise of the Department of Labor's (DOL) authority, a federal district court in Texas has ruled. *Restaurant Law Ctr. v. United States DOL*, 2023 U.S. Dist. LEXIS 115630 (W.D. Tex. July 6, 2023).

Thus, the court denied the motion for summary judgment and motion to temporarily enjoin the Final Rule filed by the Restaurant Law Center (RLC) and the Texas Restaurant Association and granted the DOL's corresponding motion for summary judgment.

Dual Jobs Final Rule

In 2021, the DOL issued the Dual Jobs Final Rule, seeking to limit the amount of time employers may assign tipped employees duties that directly support their tipped work, but are not directly tip-producing, and still pay the employees using the tip credit rate of $2.13 per hour.

In the Final Rule, the DOL codified an informal rule, often referred to as the "80/20" or "20%" rule, which limits the amount of time an employee may spend on directly supporting tipped work to 20% of the employee's hours in a given workweek, while still allowing the employer to take the tip credit. In addition, the Final Rule included a new "30-minute" rule, which imposes a 30-minute limit on the amount of *continuous* time on a shift that a tipped employee may spend performing directly-supporting tipped work.

The Lawsuit

In December 2021, before the Final Rule went into effect, the RLC (an independent public policy organization affiliated with the National Restaurant Association) and the Texas Restaurant Association filed a lawsuit in the U.S. District Court for the Western District of Texas, seeking to enjoin the DOL from enforcing the Final Rule and to have it invalidated.

In February 2022, the district court denied the plaintiffs' motion to preliminarily enjoin the Final Rule while the lawsuit proceeded, on the grounds that the plaintiffs had failed to produce sufficient evidence of the "irreparable harm" employers would suffer as a result of the Rule. Such harm is, in addition to the demonstration of a substantial likelihood of success on the merits, a prerequisite to obtaining a preliminary injunction.

The plaintiffs appealed and, in May 2023, the U.S. Court of Appeals for the Fifth Circuit reversed, finding that the compliance costs asserted by the plaintiffs were sufficient to establish the irreparable harm necessary for a preliminary injunction under applicable Court of Appeals precedent. The Fifth Circuit remanded the matter for further consideration, including on whether the plaintiffs could show a likelihood of success on the merits.

Felice B. Ekelman
Principal
212-545-4005
Felice.Ekelman@jacksonlewis.com

Amanda A. Simpson
Office Managing Principal
(407) 246-8408
Amanda.Simpson@jacksonlewis.com

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The Decision on Remand

On remand, the district court addressed the preliminary injunction request and the merits simultaneously (as the parties agreed that the underlying issues essentially were the same) and analyzed the regulation under the two-step *Chevron* framework.

Under that analysis, established by the U.S. Supreme Court in *Chevron, USA, Inc. v. Natural Resources Def. Council, Inc.,* 467 U.S. 837 (1984), the court first considers whether Congress has directly spoken to the precise question at issue. If so, the analysis ends. If not, the court proceeds to step two, where it examines only whether the agency's construction of the statute is a permissible one, that is, a reasonable interpretation of the statute in question. The Supreme Court has agreed next term to address whether *Chevron* should be overruled or otherwise modified. *Loper Bright Enters v. Raimondo,* 2023 U.S. LEXIS 1847 (May 1, 2023).

The district court concluded that the DOL was given Congressional authority to implement regulations under the FLSA. It also concluded that the definition of a "tipped employee," found in the statute, is ambiguous. While the statute defines a tipped employee as one "engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips," it does not further define the terms "engaged in" or "occupation." Given the FLSA's remedial purpose, the court rejected the plaintiffs' contention that the DOL's focus on these terms effectively had "written out" the minimum $30-per-month in tips requirement. On the contrary, held the district court, accepting the plaintiffs' "binary interpretation could undermine the purpose of the statute by allowing employers to use the tips an employee earns while performing tip-producing work to subsidize direct cash wages paid to that employee when he or she performs non-tip producing work, or work that does not directly support tip-producing work." The district court further rejected the plaintiffs' arguments that various statements in the legislative history of the FLSA contradicted the DOL's approach.

Applying *Chevron* step two, the court concluded that the Agency's "80/20" and "30-minute" rules were reasonable, and neither arbitrary nor capricious, interpretations of these terms. "The Rule's explanation of 'engaged' in an 'occupation' that regularly receives tips, supports the statutory structure of the FLSA and is consistent with the tip-related modification of the term 'occupation,'" concluded the court. "This modification includes performance of work that is part of the tipped occupation, including tip-producing work that provides services to customers for which the employee receives tips, as well as work that directly supports tip-producing work, if it does not exceed a certain amount of time."

Finally, the court addressed the plaintiffs' argument that the DOL's dual jobs regulation was in violation of the "major questions" doctrine. That doctrine, which was relied upon by the Supreme Court in *West Virginia v. EPA,* 142 S. Ct. 2587 (2022), and *Biden v. Nebraska,* 2023 U.S. LEXIS 2793 (June 30, 2023), holds that in cases where an agency purports to possess an extraordinary breadth of authority to make decisions having significant economic or political ramifications, a court should "hesitate before concluding that Congress meant to confer such authority."

In *West Virginia v. EPA,* the Court concluded that the Environmental Protection Agency did not have the authority under the Clean Air Act to impose "generation shifting" costs

on the energy industry in an effort to reduce the effects of pollution from coal production, absent clear Congressional authority. Similarly, in *Biden v. Nebraska,* the Court held that the major questions doctrine was implicated when the Secretary of Education, citing to its authority under the HEROES Act to "waive or modify" student financial assistance programs as "deem[ed] necessary in connection with a war or other military operation or national emergency," sought to outright cancel $430 billion in student loans.

Unlike in *West Virginia v. EPA,* the case at hand did not implicate the major questions doctrine, concluded the district court. While the Supreme Court has not defined what constitutes "vast economic significance," cases where the doctrine has been triggered typically have involved billions of dollars, while the instant case involved at most a few hundred million dollars. Moreover, the Final Rule does not "substantially restructure" the market, invoke any "newfound power," or rely on a "rarely used" or "ancillary provision" of the law. On the contrary, held the court, the DOL has been interpreting the tipped credit rules for decades, under authority clearly granted to it by Congress.

Takeaway

Counsel for the plaintiffs has indicated that a second appeal is likely. Jackson Lewis attorneys will continue to monitor the case. Given the Fifth Circuit's reversal of the district court's earlier decision denying the motion for preliminary injunction, the Court of Appeals may not be as deferential to the DOL's Dual Jobs Final Rule as the district court.

Regardless, for now, the Dual Jobs Final Rule remains in effect, and employers with tipped employees must ensure that they comply with the Rule's requirements, as well as with any tipped employee laws of the state(s) in which they operate, as those laws may be even more stringent than the federal regulations.

If you have any questions about the latest ruling, the Dual Jobs Final Rule, or any other wage and hour developments, please contact the Jackson Lewis attorney(s) with whom you regularly work.