Podcast

Tipping the Scale: The New 80/20 Rule

By Y. Jed Charner & Eric R. Magnus

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The Fifth Circuit Court of Appeals struck down the 80-20 labor rule, which regulates the amount of time that tipped employees can spend performing work that does not directly generate tips. Businesses with tipped employees have long struggled with implementing the DOL's final rule that disallowed the tip credit if employees spent too much time performing duties related to their so-called tip producing duties.

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Transcript

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind: How will my business be impacted?

The Fifth Circuit Court of Appeals struck down the 80-20 labor rule, which regulates the amount of time that tipped employees can spend performing work that does not directly generate tips. Businesses with tipped employees have long struggled with implementing the DOL's final rule that disallowed the tip credit if employees spent too much time performing duties related to their so-called tip-producing duties.

On this episode of We get work™, we discuss what the Fifth Circuit's ruling means for the restaurant industry. Today's hosts are Eric Magnus and Jed Charner. Eric is a principal and the office litigation manager of the Atlanta, Georgia office of Jackson Lewis. He is also co-leader of the Class Actions and Complex Litigation Practice Group. Jed is an associate in the Washington, DC region office of Jackson Lewis. Both Eric and Jed are members of the firm's Hospitality Group.

Eric and Jed, the question on everyone's mind today is now that the 80-20 rule is no longer in effect, what should restaurant and other affected hospitality employers understand about compliance and how does this impact my business?

Y. Jed Charner
Associate

All right. Happy to be here today with you, Eric, to talk about recent developments with the 80-20 rule. Let's get right into it. Let's start with the basics. What is the 80-20 rule?

Eric R. Magnus

Principal and Class Actions and Complex Litigation Co-Leader

The 80-20 rule is an interpretation by the U .S. Department of Labor going back to the late 1980s that attempts to draw limitations on the amount of time that tipped employees —employees that are paid less than the federal minimum wage of $7.25 — can spend engaged in non-tip producing duties. The idea here is that the Department of Labor felt that there needed to be some line at which a tipped employee performing non-tip producing duties is no longer engaged in tipped work. The 80-20 rule was their attempt to draw an artificial line to come up with that distinction. And it has been the subject of controversy and differing opinions by virtually every administration that has come into office since the late 1980s.

Charner

Essentially the 80 and 20 are percentages. They're number percentages of time in a work week. And the 20 percent is a limitation on the amount of side work, non-directly tip-producing work, that a tipped employee can do for which the restaurant can still avail itself of paying. less than the regular minimum wage. Under the federal law, $7.25 per hour is a regular standard minimum wage. The tipped minimum wage is $2.13 an hour. You [the employer] can take a tip credit for the $5.12 an hour difference.

Yet there's a limitation if a server, let's say, spends more than 20 percent of their time in a work week doing not directly tip customer service duties. Then you cannot take a tip credit for more than that 20 percent. That's the rule.

We're going to get to recent really important developments regarding that rule. But let's take a step back a little bit to give us context and let's talk about the origin and the history of this rule leading up to 2024, because it's actually really important in understanding what to do about the recent developments.

Magnus

I'll give the macro context and you can fill in with what I'm missing because it's a sorted history. For a very long time, the vast majority of my career, the 80-20 rule was only contained in what we call sub-regulatory guidance in the Department of Labor's field operations handbook. The field operations handbook does not go through the notice and comment process the federal agencies have to go through in order to adopt new regulations. It is meant to be guidance to Department of Labor field investigators on what rules to abide by when doing investigations.

So that was it. That was the entirety of the 80-20 rule. The first time it was actually promulgated as a formal regulation by President Biden in 2021. And *that* is the rule that, I'm sure we will get to momentarily, was the subject of the litigation pending at the Fifth Circuit. But during the time that the 80-20 rule was in the field operations handbook, beginning at least with the [second] Bush administration, every administration that came into office, Bush, Obama, and thereafter, took differing approaches on whether 80-20 was a proper interpretation of the dual jobs regulations.

So, it got to the point where it was being enforced by the Department of Labor during Democratic administrations, not being enforced by Republican administrations. But during the Trump administration, there was an express rebuke of the 80-20 rule as a correct interpretation of the dual-jobs regulation. But the rule had become so ingrained in many federal courts as a proper deferral to the Department of Labor's view on it, as codified in the field operations handbook, that most courts just ignored what President Trump's Department of Labor was advising and were still enforcing the 80-20 rule as a proper interpretation. So that's kind of where we were when President Biden finally proffered it as a proper rule of notice and comment in 2021.

Charner

Yes. Just to add a little bit to that, there has been since 1967, we're talking almost 60 years, a regulation called the Dual Jobs Rule. The Dual Jobs Rule is actually simpler and less nuanced and less complicated.

Magnus

And not controversial.

Charner

Right. It's very simple. The Dual Jobs Rule says the tip credit that a restaurant or other employer can take advantage of paying less than the regular minimum wage is only available if an employee works in both a tip job — let's say an employee works at a restaurant as a server part time and then as a cook in the back of the house part time, which is not a tip job. You can't take tip credits for cooks. — and a non-tip job.

So the dual jobs rule says you can only take a tip credit for the time and the hours that an employee is working in a tipped occupation, not in a non-tipped occupation. That's not controversial nor is that complicated — as long as you track the hours that the employer works each job, which you would need to do under the dual jobs rule. So that's rather straightforward.

For a long time, there was this guidance in the field operations handbook. Then, as you've mentioned, plenty of litigation about it in which a lot of courts have agreed with the Department of Labor's interpretation or guidance, which was never in a regulation until 2021, saying, "Well, if an employee is only working as a server, only working as a bartender or a tip job, there's other limitations that are come by way of the same principles of there's only a certain amount of time that you could not be directly servicing a customer and the employer can take advantage of the tip credit.

In that context, as you were saying, there were a lot of court decisions saying it made sense, it was logical and it was the law, even though it was never actually in a regulation or never really codified in any code of federal regulations or anything like that. As you mentioned, in the Trump administration, they had done away with it. Courts ignored it and said that wasn't valid to do away with it.

Let's fast forward to December 2021. Finally, for the first time, the US Department of Labor actually issued a regulation about this with the 80-20 rule and actually went further than just an 80-20 rule. So, let's talk about the components of the regulation of 2021, which will get us to the recent court decision saying that is no longer a good law,

which we'll discuss. But let's talk about the full components of the 2021 regulation.

Magnus

So there were really two landmark sort of things that the 2021 regulation did. The first one and the easier one to understand is the 30-minute rule. The 30-minute rule was really a creation out of whole cloth by the Department of Labor in 2021 that said if a tipped employee spends 30 minutes or more engaged in non-tip producing duties, it doesn't matter whether it's 20 percent or more of their time, that has to be paid a minimum wage. And that is an extraordinarily common thing to happen at restaurants. It is really common for tipped employees to come in before and stay after the time that the restaurants are even open to customers to do preparatory or concluding work, whether it's a server bartender or the like. So that was a real new novel idea that was in the 2021 rule.

But the other major thing is that the 80-20 rule created what one of our clients likes to call “three buckets.” Bucket one, bucket two and bucket three of categories of duties. And it actually laid out examples of all the duties and tried to do it holistically of bucket one is tip-producing duties. Bucket two is duties that are part of the job of a server or bartender of a tip job that are not directly tip-producing duties and bucket three are duties, like Jed was saying a little earlier, unrelated to tipped occupations that violate the dual jobs rule.

We had not ever received that level of clarity from the Department of Labor as to what constitutes those three buckets before. Prior to the 2021 rule, we used to rely on non-legal sort of guidance from industry sources like O.net and things like that that were industry documents that tried to document what were the typical job duties of servers, what are related, what are the typical job duties of bartenders, et cetera, hosts and hostesses. But there was never any official guidance. That was the second sort of very new novel thing in the 2021 rule.

Charner

I would agree with that. The 2021 rule laid it out that you can't take a tip credit if an employee is spending more than a substantial amount of time doing supporting work that's not direct to producing work. And then it says, “Well, there's two categories of substantial amount of time that fall into that invalid tip credit”: if it's more than 20 percent of the work hours in a work week or if it's time in excess of 30 minutes continuously. It's either or — if it's a 30-minute time period or if it's 20 percent.

So, I agree with you. There was the 30-minute rule and then the laying out clearly what's direct to producing work. The laying out clearly what's direct to producing work and supporting work actually had helpful components of it because the 80-20 rule existed, but there was very little clarity and guidance as far as what is considered direct tip-producing work and what is not direct tip-producing work and is considered supporting work.

Magnus

The clarity was helpful because it used to be, in all our motions, we used to make sort of cute, funny arguments like, “if you sweep the air around a customer's table while they're staring at you, is that tip producing? And if they're not staring at you, is it all

of sudden not tip producing?" It [the 80-20 rule] was designed to sort of cut off those sorts of arguments that we like to make. I always used to make the argument of "how, court, could you possibly ever rule on a motion for summary judgment when the determination of what's tip-producing is an opinion of a customer who's a third party to this litigation. So it cut off that kind of argument that everyone used to make because, as you said, the rule clearly laid out what fit in each bucket.

Charner

There were certainly still some scenarios and questions. Actually, the Fifth Circuit opinion that we're to get to laid out some of the contradictory scenarios of when something would be considered direct to tip-producing and supporting work. But for the most part, it laid out and said, "Well, when you're customer facing, everything you're doing while you're customer facing, let's say a server taking orders and even cleaning up the table, bussing the table while the customer is there and those kinds of things, serving the food obviously, giving the check, that's all customer-facing duties, that's quote unquote, tip producing work. Bartender, the same thing: making and serving drinks, giving food, talking to customers at the bar. Bussers, it's basically while customers are present, everything you're doing. But you can do the same thing, bus a table, clean up a table, prep a table, set a table, after customers have left and then that's called non tip-producing work. And you can question, what's really the difference.

But the standard under the 2021 regulation was if you're directly facing the customer, that's tip producing work for which there is no limitation. And if it's a pre- and post-direct customer service, that's where the limitation is. Importantly, idle time would also be considered not direct to tip-producing work. The only time that has no limitation is when you're facing customers, when customers are there. Idle time, pre and post and all of that — let's say if the restaurant's not busy for some time, that all goes into the bucket where it can't exceed 20 percent.

Magnus

While the 2021 rule was clear, it turns out that it's legislation, right? You get the Department of Labor, as it turns out, and I'm sure we'll get to right now, doesn't get to decide what is tip-producing and what's not tip-producing. While it was clear and employers can follow it, the Fifth Circuit has now ruled that the Department of Labor doesn't have the authority to be deciding what falls into those three buckets.

Charner

In the 2021 rule, the addition of the 30-minute rule certainly was significant. If a tipped employee wants to claim that they're doing side duties of more than 20 percent of their work, that's not an easy thing to prove. How do you divide the time in a week, in a day, on a particular shift? How do you divide that?

The 30-minute rule, it tended at times to be more clear. If a restaurant schedules an employee to come in more than 30 minutes before it opens its doors, then employees will say, well, that can't be customer-facing work. That can't be direct tip-producing work. Customers aren't even there yet. And that opened the door for what employees would say are easier claims to prove in that regard. In that way, that was a significant

expansion of the general substantial amount of time rules by adding the 30-minute rule.

Alright, so we've discussed the 2021 regulation. Let's fast forward to today, September 2024, and, specifically, a really important development in late August 2024 with the court deciding on a challenge to that regulation. Let's talk about that. What was the challenge and what did the court decide?

Magnus

In 2023, the Restaurant Law Center and the Texas Restaurant Association brought a case in Texas arguing, essentially, that the 80-20 rule and the 30-minute rule were not a valid exercise of the Department of Labor's authority; that they were not correct, that those rules are not appropriate interpretations of the dual jobs regulation.

So, the case arrived at the Fifth Circuit and there was oral argument earlier in the summer [of 2024]. And the court opinion was issued at the end of August [2024], shooting down, holding invalid the 80-20 rule and the 30-minute rule.

What happened during the life of the case that really, really, really changed the outcome and was outcome determinative was the Supreme Court's decision in the *Loper Bright* case. The Supreme court decided — and that has been the subject of a previous podcast that we did, so you can check that out — that the courts are not to defer to agency interpretations of ambiguous statutes under what was the *Chevron* deference doctrine that had been in place for 30 something years. So that happened during the time that this case, the 80-20, 30-minute rule case, was pending in the Fifth Circuit. And it was, I think fair to say, outcome determinative because once the deference to the Department of Labor's view on the 80-20 rule and 30-minute rule were thrown out the window, there was nothing left to stop all the arguments that we always made as to how arbitrary and silly the 80-20 rule and 30-minute rule were, because the Department of Labor's opinion no longer matters.

That is a core competency, let's say, of the Fifth Circuit's decision, that under*Loper Bright*, we have to do our own interpretation of "is the 80-20 rule and 30 -minute rule a valid interpretation of dual jobs rule?" There is no question that the decision could have come out differently had *Loper Bright* come out differently. The decision went into detail, using the examples Jed made reference to earlier, about why it's an arbitrary line in the sand that the dual jobs regulation was clearly designed to distinguish between wholly different occupations that are tipped and non-tipped. And that it was never attempting to give this level of nitpicking through the duties of what any server, bartender, host or any other tipped employee is clearly part of their normal job.

That's really what it came down to, that there's no authority. The DOL has no basis under the statute to draw those kinds of distinctions. And if Congress wants to do that, then they certainly can. But that's essentially what it comes down to. We can talk about the effect of the Fifth Circuit's decision, and you can weigh in on anything you think I missed.

Charner

The backdrop of the decision is the 80-20 litigation going on in Texas and then going

up to the Fifth Circuit Court of Appeals, which is the jurisdiction of Texas and the federal court system. That had started in 2023 before the Supreme Court agreed to hear the *Loper* case.

The *Loper* case is a much broader issue, in general, of what kind of review should courts give to agency interpretations and decisions in interpreting statutes and applying statutes which were passed by Congress and are actual laws versus agency interpretations, let's say by an agency, by the Department of Labor or any agency. And the *Loper* case had nothing to do with the 80-20 rule or even employment laws at all — it had to do with fishing and wildlife regulations. But it's a very broad general principle that the court addressed; very significant in a lot of different ways and a much broader issue.

But it was certainly interesting, and the Fifth Circuit certainly made clear that the *Loper* decision instructing it to review the 80-20 rule regulation, like all regulations, which are not passed by Congress but are enacted by an agency, with a stronger scrutiny and less deference to just assuming that unless it really makes no sense, it should be the law. Like you said, it looked at the law and said the dual jobs regulation talks about two different jobs. It doesn't talk about slicing and dicing. If a person's working as a server, working as a bartender, what they're doing from minute to minute, what they're doing from hour to hour and task to task. And the court also pointed out some of the contradictions — where if you're cleaning a table while a customer is there, then that's called customer service work. But once the customer walks away and then you clean the table, that's not direct customer service work. That's supporting work for your customer service work. And pointing out all these things, they said, “Well, you know, these are things that the Department of Labor said are true, but it's not in the statute and we don't need to give deference and frankly, sometimes factually contradicting each other about what is directly supporting ...” And therefore, the court said “we don't think that's the law because that isn't in the law. The law is the Fair Labor Standards Act and that's not in there.”

So essentially the Fifth Circuit Court of Appeals, which is the only decision of a court of appeals addressing the 2021 regulation, said it is no longer valid law. So, if you just go based on the Fifth Circuit decision in August 2024, it says that the 80-20 rule is no longer the law, the 30-minute rule is no longer the law. It did expressly say that the dual jobs rule is the law. That is a regulation and it actually said that makes sense. You should not be able to take a tip credit for the time that a server works as a cook or as a cleaner or as a maintenance worker or anything else. That's not a tipped occupation. And it's hard to argue with that. That does make sense. That's not really the issue. The issue is the nuances of while you're working as a tipped employee and all the slicing and dicing.

Okay, so we have this Fifth Circuit decision, really the only court that has addressed the 2021 regulation itself. But we do have that backdrop of years of court decisions saying the 80-20 rule is a good law. So where does that take us now? Let's talk about what does that mean for restaurants within the Fifth Circuit, which is Texas and Louisiana and Mississippi. What does that mean there? What does it mean in other jurisdictions? There's a whole bunch of other courts of jurisdictions and circuits in the federal circuit. Do we need to consider state laws? It is a wide variety of issues to consider and it's really important to break it down.

Magnus

From a 40,000-foot view, the way I would view it is there are two issues. You have to go back to the state of the law prior to the 2021 rule but shedding light on that *Loper Bright* is saying you shouldn't be deferring to federal regulations. So that's the problem here: If you're going back to the pre-2021 decisions, all of the circuit court decisions that held the 80-20 rule as a valid interpretation of the statute did so under the guise of *Chevron* deference to the Department of Labor's interpretation. The bottom line is that outside of the Fifth Circuit, every judge is going to have to decide whether he or she believes the 80-20 rule or something near it is a proper interpretation of the statute. And there's going to be differing opinions on that. And because of that, it's hard to talk about just abandoning any caring at all about what your servers and bartenders are doing because we don't know what the state of the law is anywhere else.

I've spoken with most of the plaintiffs' lawyers that do this sort of work since the Fifth Circuit's ruling came out. They're surely not going to abandon 80-20 cases outside of the Fifth Circuit. They believe it's a valid interpretation of law. They believe, like the Department of Labor, that there has to be some line at which a tipped employee is no longer doing tipped employment if they're not doing work that earns tips — and they're going to keep pushing for it.

On the flip side, you can file motions to dismiss in 80-20 cases anywhere because you can argue that any authority that supported the 80-20 rule prior to the 2021 rule was based on *Chevron* deference and *Chevron* deference is gone. So, this issue is going to get teed up in every case, but the law is wildly unclear outside of the Fifth Circuit. And it's going to even vary by circuit because there is the degree to which some of the circuit court opinions defer to the DOL varies. It's not the same language in every circuit court opinion. It's going to be frustratingly unclear everywhere else.

The only thing you can say for sure is: You can file a motion to dismiss under *Twombly* and *Iqbal* for failure to state a claim in the Fifth Circuit and you should be winning that issue. It is vacated in the Fifth Circuit. But other than that, we're at the nascency. Judges are going to have to decide it and every circuit's going to have to decide it. There are six states that have their own iterations of 80-20. Jed, you're in one of them so you can talk about that.

Charner

Exactly. I try to go through a checklist, go in steps. Number one is the Fifth Circuit decision only addressed the federal regulation and didn't address anything on any state law level. And in employment law, as in many other areas of law, if you want to make sure that you're in compliance with all laws, it's a checklist. Are you in compliance with federal laws? State laws can be more stringent. Are you in compliance with state laws? Sometimes there's local laws, and with employment laws that's often the case. You need to go down the list.

There's six states, including my home state where I practice and live in Maryland, that have their own 80-20. Maryland has a regulation codifying an 80-20 rule where the tip credit cannot be taken for side work in excess of 20 percent of the work week. New York also has a similar regulation. So, the Fifth Circuit opinion doesn't address it.

Challenges to the legality of such regulation come under state laws and different procedures and standards. In New York, there is such litigation that's ongoing but the law has not been struck down though.

So as long as it's in place and has not been struck down, really the Fifth Circuit opinion didn't weigh on that. You can make the same legal and logical arguments under state law principles, but those arguments have not been decided. So, if you are in Maryland, you're in New York or any other state that has that, then wisdom counsels to comply with the state regulation, the state law that has that.

Magnus

Likewise, this whole category of litigation didn't exist in some states that don't allow you to take the tip credit at all. In Nevada, California . . . there are many states that do not permit a tip credit whatsoever, in which case you have to be paying everyone above minimum wage and none of this was ever an issue. So, there's always that issue as well.

Charner

In those states that didn't allow tip credit, the fiscal decision is of no consequence because you have to comply with the stricter state laws. On the federal level, there was two components of the 2021 regulation of the substantial amount of time. What is considered a substantial amount of time? You have the excess of 30 minutes of side work and the excess of 20 percent of time in a work week. So the 30-minute rule was the new creation of the 2021 regulation. And this is the only circuit court decision addressing it and saying it is no longer valid law. And typically when you have such a situation, even if it's only one circuit that has said that, but if there's no contradicting opinion from another circuit . . .

Magnus

But the reason there's no contradicting authority in other circuits is because the circuit court authority that exists in other circuits, like the *Fast vs. Appleby's* case in the Eighth Circuit, the *Rafferty vs. Duffy's* case here in the Eleventh Circuit, [is because] those cases pre-existed the 2021 30-minute rule. There is no federal circuit court case independently holding the 30-minute rule as a valid interpretation of the statute.

Charner

Right. So, I would think one has the right to assume that if the law was enacted in 2021, and this is the only decision addressing it and saying it's not a good regulation, it's invalid, then it in fact is invalid and does not need to be complied with.

The 80-20 component, as you were explaining, has more nuance and complexities to it. It has been analyzed under a less stringent standard of review multiple times in the past by courts saying it is good law. The Supreme Court changed it to a stricter standard of review and this is the first decision analyzing under that. Having said all that, there certainly will be further litigation in other circuits about this and there is risk that the 11th Circuit and 8th Circuit, which has looked at it previously and said it actually makes sense that there's a limitation, would say even looking at it under a stricter standard review, it still makes sense and it is a logical extension of the dual

jobs regulation; even though you're working as a server, there's a limitation on the amount of time that you can take the tip credit if you're not directly servicing a customer.

While those decisions have not been issued, that's the sort of conundrum here: You know the litigation will occur and it's not with no context because those same courts have upheld the rule, albeit under a less stringent standard of review. Certainly those who represent the restaurants will say times have changed with the stricter standard of review with the new *Loper* decision. But that's where the conundrum lies and probably wisdom counsels on being careful about 80-20 compliance, not bending over if someone does file a claim because you can certainly make the arguments, like you said, that there's no such thing anymore and that is not a valid claim.

I would add even the 30-minute rule component; probably carefulness is advisable about not scheduling servers to come in more than 30 minutes before restaurant even opens because that same time will go in the 20 percent bucket and then onto producing bucket and then you'll need to make sure that you're not exceeding the 20 percent because it could go into that bucket also.

It's good for restaurants, this decision, certainly in theory, and if other courts take the same approach, helpful to avoid these complexities of tracking time and those kinds of things, the 80-20, 30-minute rule. But it's not so simple to say that the story is over based on the Fifth Circuit decision because that's one circuit and we know there's previous law in other circuits that they may go back to and may not just abandon those other circuits when the litigation gets there.

In summary, the first thing to do is make sure that when you talk about “do I still need to comply with 80-20?” [is check]. If you are in a state that has its own state law, and that state law has not been struck down, then you do need to comply with the state laws. If you're in the Fifth Circuit, I would say the Fifth Circuit has struck it down. I think you should be good. If you're not in the Fifth Circuit, then there certainly is an element of placing yourself at risk of what will the court say in the future. Will they agree with the Fifth Circuit considering their background of some of this course of not agreeing?

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