Legal Update Article

DOL Returns to Pre-2021 Dual Jobs Regulation for Tipped Employees

By Justin R. Barnes, Jeffrey W. Brecher & Eric R. Magnus

December 18, 2024

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

Takeaways

- The December 2024 final rule restores the language of the dual jobs regulation to its original version, removing the language imposing the "80/20" and 30% non-tipped work restrictions added by the Biden Administration
- The technical correction was issued in response to a Fifth Circuit decision invalidating these provisions.
- Employers should review their tip credit compliance, including compliance with state law requirements.

Related links

- 2024 final rule
- Fifth Circuit Strikes Down DOL Tip Credit Rule: What It Means for Employers
- Tipping the Scale (Podcast)

Article

The U.S. Department of Labor (DOL) published a final rule on Dec. 17, 2024, restoring the pre-2021 language of the "dual jobs" regulation for tipped employees under the Fair Labor Standards Act (FLSA). This is a technical correction to conform the regulation to a recent federal appellate decision vacating the DOL's 2021 final rule amending the long-standing regulation.

Background: Tip Credit and Dual Jobs Rule

The FLSA permits tipped employees to receive $2.13 per hour in a direct wage, so long as the combination of their direct wage and tips equals at least the $7.25 hourly minimum wage. (Many states have laws that require higher tipped rates.)

The DOL issued a final rule in 2021, often referred to as the "80/20" or "20%" rule. The 80/20 provision, which first appeared in the DOL's field handbook in 1988, limits the amount of time an employee may spend on work that does not directly produce tips (such as taking a customer's order). Under the 2021 rule, no more than 20% of the employee's hours in a given workweek can be spent on work that supports tip-producing work but does not directly generate tips (such as setting tables).

The 2021 final rule also imposed a new "30-minute" restriction, limiting to 30 minutes the amount of continuous time during a shift that a tipped employee may spend performing tasks that are "directly supporting" tipped work. This was a new provision that DOL had never imposed before in any guidance.

In a recent decision, *Restaurant Law Center v. U.S. Department of Labor,* the U.S. Court of

Eric R. Magnus
Principal and Office Litigation Manager
404-525-8200
Eric.Magnus@jacksonlewis.com

Related Services

Hospitality
Restaurants
Wage and Hour

Appeals for the Fifth Circuit vacated the 2021 rule, capping a long-running legal challenge. The appeals court rejected the arbitrary line drawn between tip-producing and tip-supporting work, saying it conflicts with the statutory scheme that Congress established under the FLSA. That scheme, the court noted, "does not ask whether duties composing that given occupation are themselves each individually tip producing." On Oct. 29, 2024, the appeals court issued a mandate vacating the 2021 final rule.

Pre-2021 Regulatory Text Restored

The final rule published on December 17 reinstates the text of the dual jobs regulation as it existed prior to the effective date of the invalidated rule. That text explains that if an employee is working two separate occupations (such as server and cook), the tip credit is available only when the employee is working in the tipped occupation. But it does not impose any time restrictions on the amount of non-tipped work that tipped employees may perform.

The DOL's issuance of a final rule revising its regulation and revoking its 2021 revisions is an acknowledgement by the agency that it is bound by the Fifth Circuit's decision. The DOL had sought rehearing of the Fifth Circuit panel's initial opinion, but only to clarify the scope of the remedy to make clear that the underlying dual jobs rule itself remains intact, and only the 2021 modifications are invalidated.

It is not clear whether the DOL will file a petition for review with the U.S. Supreme Court before the Biden Administration ends. The issuance of this final rule amending the regulatory language may signal an appeal will not be filed. Even if it were to be filed, the second Trump Administration would likely withdraw it, as the Biden rule is inconsistent with the rule the first Trump Administration previously proposed.

Back to Square One

After years of dueling amendments to the original 1967 dual jobs regulation by Democrat and Republican administrations, and hundreds of lawsuits, we are back to where we began: the original 1967 version of the dual jobs rule is now the operative regulation. In a bit of irony, it was a heated dispute regarding the meaning of the 1967 dual jobs regulation that led to multiple attempts to revise the regulation.

For the time being at least, it will be up to the courts to revisit the 1967 regulation and determine what it requires. There is caselaw in several federal circuits outside the Fifth Circuit upholding the 80/20 rule as it existed prior to the 2021 rule. In each of these rulings, courts deferred generally to the DOL and its interpretation of its dual jobs rule. But that regulation itself is no longer subject to the deference it may once have been afforded. The Supreme Court's decision in *Loper Bright* overturned the decades-old *Chevron* doctrine of judicial deference to a federal agency's interpretation of an ambiguous statute. ***Loper Bright Enters. v. Raimondo***, No. 22-451, and *Relentless, Inc. v. Department of Commerce,* No. 22-1219 (June 28, 2024).

A new Trump Administration may also give it another go and propose a new regulation to replace the haggard 1967 regulation.

For More Guidance

For a general discussion of the Fifth Circuit's decision invalidating the DOL's 2021 dual jobs rule and its impact on employers of tipped workers, listen to our podcast: Tipping the Scale: The New 80/20 Rule.

Contact your Jackson Lewis attorney if you have questions about compliance with the dual jobs restrictions and the requirements for taking the tip credit against the minimum wage under federal law and the states where your business operates.