Legal Update Article

Labor Department Abandons '80/20' Tip Credit Rule, to Relief of Restaurant, Hospitality Industries

By Jeffrey W. Brecher & Eric R. Magnus

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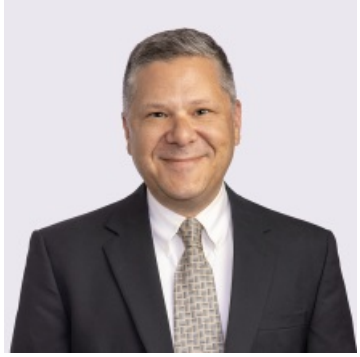
Meet the Authors

Jeffrey W. Brecher

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



Eric R. Magnus

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

Related Services

Hospitality
Wage and Hour

The Wage and Hour Division (WHD) of the Department of Labor (DOL) has reissued a 2009 opinion letter, effectively withdrawing enforcement guidance that made the tip credit under the Fair Labor Standards Act (FLSA) unavailable for tipped employees who spend more than 20% of their time performing allegedly non-tip-generating duties.

This "20%" Rule (sometimes called the "80/20" Rule) had fueled numerous lawsuits throughout the country. Employers, particularly those in the restaurant and hospitality industries, were forced to recreate, minute by minute, the daily activities of their tipped employees and separate them into "tip-generating" duties, "*related,* but non-tip-generating" duties, and "*un*related" duties, with little guidance on what activities fell into which bucket and how to capture such time. On November 8, 2018, the DOL abandoned that Rule.

Background

The FLSA requires employers to pay non-exempt employees the hourly minimum wage (currently, $7.25), but treats "tipped employees" differently. Tipped employees are those who customarily and regularly receive at least $30 a month in tips. Because tipped employees receive substantial compensation through tips, the FLSA permits employers to pay them a direct wage of $2.13 an hour and take a "credit" for the tips received by the employee to satisfy the remaining portion 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 given 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.

In 1967, the DOL first published regulations applying the tip credit. The regulations established the concept of "dual jobs," clarifying that when an employee is engaged in one occupation routinely satisfying the $30-a-month tip provision, but also is engaged in a second occupation (and not performing tipped work), the employer may take the tip credit only as to the first occupation. The regulations give as an example of dual jobs a hotel maintenance worker who also works as a waiter at the hotel; only his waiter position is a tipped occupation subject to the tip credit. In contrast, examples of employees not performing dual jobs are "a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" and a "counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group."

In a 1988 revision to its internal Field Operations Handbook (FOH), the DOL expanded the dual jobs concept to include single jobs involving *dual tasks.* The revision explained that where "tipped employees spend a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken for the time

spent in such duties." This was the birth of the 20% Rule. It is unclear, however, when the DOL first publicly disclosed this rule, but it appears to have been years after its issuance.

The FOH enforcement guidance had problems from the get-go, perhaps most notably its failure to address what specific duties constitute allegedly "tip-generating" work versus duties "related to tipped work" but that are not themselves tip-generating. Moreover, how should an employer categorize and record such time? For example, if a server fills ketchup bottles, rolls silverware into napkins, or wipes down tables while waiting for the next customer to arrive, are any of those tip-generating activities or are they simply related but untipped duties? If a customer asks for a lemon wedge for his or her drink, is the server engaged in tip-generating work when pulling a lemon from the refrigerator, cutting a wedge, and bringing it to the customer? In addition, is — or should — the answer be different if the lemons were cut by the server preparing for a customer's arrival? These are just a few of the scenarios that have made employers' heads spin. Consequently, employers routinely have urged courts not to defer to the Rule, challenging it as unworkable and inconsistent with both the FLSA and its implementing regulations.

At one point, the DOL agreed with employers, withdrawing the Rule in a January 16, 2009, opinion letter. The opinion letter, however, signed during the waning days of the Bush Administration, was promptly withdrawn by the incoming Obama Administration based on the fact that it had been signed but never mailed.

Despite the problems with the Rule, beginning around 2000, tipped workers brought a flurry of litigation alleging a violation of the Rule based on the language of the FOH guidance and, later, the Eighth Circuit's decision in *Fast v. Applebee's, Int'l,* 638 F.3d 872 (8th Cir. 2011), deferring to the Rule. In 2017, employers received what turned out to be a short-lived victory when a three-judge panel of the Ninth Circuit disagreed with the analysis in *Fast.* The panel noted that "[b]ecause the dual jobs regulation is concerned with when an employee has two jobs, not with differentiating between tasks within a job, the [FOH's] approach is inapposite and inconsistent with the dual jobs regulation." The panel decision also stated that the guidance "ignores the regulation's requirement to identify distinct jobs" and contradicts the statute, which "considers only whether an employee is engaged in a single job that generates the requisite amount of tips." In September 2018, the Ninth Circuit overturned the panel holding in an *en banc* decision, *Marsh v. J. Alexander's LLC,* 905 F.3d 610 (9th Cir. 2018), concluding that the Rule *is* valid and entitled to deference.

Abandonment of the 80/20 Rule

The DOL has now reissued the 2009 Opinion Letter (designated as FLSA2018-27). That opinion letter states, contrary to the 20% Rule, "We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met." The Opinion Letter also provides guidance regarding which duties are related to tipped work and which are not, stating, "We also believe that guidance is necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act."

To that end, the Opinion Letter explains that the "[d]uties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in

the Occupational Information Network (O*NET), … shall be considered directly related to the tip-producing duties of that occupation[,] … as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties." Conversely, employers may not take a tip credit for any duties *not* listed in the relevant O*NET task list. Thus, now employers have guidance regarding what work its tipped workers may perform without losing the tip credit.

This does not mean, of course, that tipped employees are allowed to spend an unlimited amount of time performing so-called non-tip-generating work. If they do, they arguably will no longer be performing only a tipped occupation, but instead may be found to be performing dual jobs. Employers also should consider state law, which may be more restrictive in its approach. For example, some states do not permit a tip credit to be taken at all. Other states permit a tip credit, but with some restrictions.

If you have any questions about this development or any other wage and hour issues, please consult the Jackson Lewis attorney(s) with whom you regularly work.