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New DOL Proposed Rule Reverses Course on Treatment of Tipped Employees

On Monday, June 21st, the Department of Labor ("DOL") issued a Notice of Proposed Rulemaking ("NPRM") that would alter regulations interpreting who is considered a "tipped employee" under the Fair Labor Standards Act ("FLSA") yet again. Specifically, the NPRM proposes (1) to withdraw the dual jobs portion of the Final Rule promulgated in December 2020; and (2) a new regulatory framework by which to determine whether an employee is performing work that meets the definition of a tipped occupation and allows the employer to take a tip credit under the FLSA. Specifically, the FLSA allows an employer to pay a tipped employee less than the minimum wage – specifically $2.13 per hour under Federal law – only when the worker is engaged in a tipped occupation because the tips the employee receives should make up for the rest of minimum wage hourly rate. The NPRM creates a revised standard by which an employer would determine who is a "tipped employee" and for what portion of that employee's work hours the employer can take a tip credit and pay the employee at the lower rate. The standard the DOL proposes to adopt generally reflects the interpretive guidance it maintained for decades before a new standard was established during the Trump Administration – the "80/20 Rule" – along with some other changes that the DOL asserts better define tipped work.

Background of the Dual Jobs Standard for Tipped Employees

Under the FLSA, "tipped employees" are defined as those employees who customarily and regularly receive more than $30 a month in tips. As stated, employers can pay tipped employees a reduced cash wage and claim a "tip credit" to make up the difference between the reduced cash wage and hourly minimum wage. When the DOL first published its regulations on application of the tip credit, it directly addressed the scenario where an employee has "dual jobs" under 29 C.F.R. 531.56(e) – two jobs for the same employer. In that situation, employers can take the tip credit only for the tipped job (i.e., the one routinely satisfying the $30-a-month provision). Later, the DOL revised its Field Operations Handbook (FOH), vastly broadening the scope of its "dual jobs" distinction by applying it to dual *tasks*. It stated that when "tipped employees spend a substantial amount of time (in excess of 20%) performing preparation work or maintenance, no tip credit may be taken for the time spent in such duties." This is what's known as the "80/20 rule."

The DOL enforced this interpretation until 2018 when it withdrew the relevant guidance and replaced the "dual jobs" analysis with an opinion letter originally published in 2009. That opinion letter set a new standard by which to evaluate what time can be treated as part of the tipped job for which an employer can take a tip credit; namely that an employer could take a tip credit for *all* tasks directly related to tip-producing work. We delve into the

2018 interpretation in more detail here. More specifically, this letter and subsequent guidance issued in 2019 explained that an employer can take a tip credit for *any time* (i.e. greater than 20%) the employee spends performing duties *related* to the tipped occupation even if those duties do not directly produce tips. It directed employers to tasks listed in O*Net to determine what would be considered "related duties." The guidance also stated that related duties must be performed contemporaneously with the tipped duties for a *reasonable time* immediately before or after performing tipped duties. On December 30, 2020, the DOL published a Final Rule ("2020 Tip Rule") that largely incorporated this guidance into the updated regulations. In supporting the issuance of the 2020 Tip Rule and its incorporation of the updated guidance, the DOL pointed out that the 80/20 rule was difficult to administer because it did not explain what non-tipped duties are considered "related" and it created a significant administrative burden to closely monitor employee time.

After extending the effective date of the 2020 Tip Rule twice, the DOL issued the current NPRM, which proposes to withdraw the new interpretation of "dual jobs" because it does not actually meet the justifications to support its passage. Namely, the DOL argues that the 2020 Tip Rule does not clearly define key terms, so it would not limit litigation and or be any easier for employers to administer. In addition, the DOL asserts that reference to O*NET to determine what constitutes "related duties" for tipped work did not provide the clarity needed to justify the new rule. And as part of withdrawing the "dual jobs" portion of the 2020 Tip Rule, the DOL described a new standard to assess what constitutes time for which the employer can take a tip credit, that incorporates the old 80/20 guidance into the regulations and creates a new carve out by expanding the definition of "substantial amount of time."

New Standard Proposed by the Biden DOL

The proposed rule establishes two main types of work for which an employer can take a tip credit because the employee is considered engaged in a "tipped occupation" – (1) tip-producing work; and (2) work that "directly supports tip-producing work provided it is not performed for a substantial amount of time." For example, a server's tip-producing work would be waiting tables, while her tip-supporting work would be cleaning tables to prepare for the next customers. In the NPRM, the DOL explains its determination that the term "directly supports" is more concrete than the prior used "related duties" terminology, which could be interpreted to mean duties only remotely related to the tipped work. The DOL also proposes to provide examples of both tip-producing work and tip-supporting work in the standard to assist employers in determining which tasks are included. The proposed rule includes a couple illustrative tasks for different types of tipped occupations, such as servers and bartenders, but it is certainly not an inclusive list, leaving ultimate interpretation of those terms to employers.

Where the proposed rule significantly differs from the 2020 Tip Rule and 2018 and 2019 guidance, is in how it defines "substantial amount of time." Again, an employer can only take a tip credit for work that directly supports tip-producing tasks where that work is not performed for a "substantial amount of time." The proposed rule defines "substantial amount of time" as work either:

- exceeding 20% of the hours worked during the work week; or
- performed for a continuous period of more than 30 minutes.

As implemented, that means an employer cannot take a tip credit for any tip-supporting work beyond the 20% cap. Thus, if a bartender spends cumulatively 9 hours of her 40-hour workweek slicing and pitting fruits for

garnishes, wiping down the bar, and washing glasses, her employer could take a tip credit for 8 of those hours, but any time beyond those 8 hours must be paid at the full minimum wage because any additional time exceeds 20%.

In justifying its return to the 80/20 Rule, the DOL asserts that employers have "ample ability" to assign tipped employees "a non-substantial amount of non-tipped duties that directly support tip-producing work" which should remove the need to track employees' duties minute-by-minute. The DOL further explains that because it provides some examples of tip-producing work and tip-supporting work, employers should be able to proactively identify the tip-supporting tasks and ensure they are assigned in a manner that will avoid going above 20% of the employee's hours. But, despite the DOL's assertions, the distinction between tip-producing work and tip-supporting work still lacks necessary clarity and, even if an employer could attempt to assign work in a way that, in theory, would avoid reaching the 20% threshold, that does not mean it could not be potentially exceeded in practice and, thus, require close monitoring of employee time.

As to the second part of the definition, if a tipped employee works on a tip-supporting task for more than 30 minutes, an employer cannot take a tip credit for any of that time. For example, if that same bartender spent 45 minutes cleaning the bar and wiping down and drying glasses at the end of her shift, her employer could not take a tip credit for any of that 45-minute period and is required to pay the bartender the full minimum wage. Here, the DOL reasoned that a tip credit is not appropriate because the employee is unable to earn tips for that substantial and continuous period of time. However, that continuous period of time for which the employer must pay the full minimum wage does not count toward the cumulative 20% cap on work directly supporting tip-producing tasks for the work week. Only work completed at increments of 30 minutes or less should be counted toward the 20% cap.

Next Steps

Per the publication date of the NPRM, the DOL will be accepting written comments on the proposed rule until August 23, 2021. These written comments are a good way for the hospitality industry to raise issues and concerns with the current proposal, and advocate for revisions to the proposed rule that make it more practical and workable for impacted employers. We will continue to follow the progress of this rule and bring you any additional updates.