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Fifth Circuit Vacates DOL Final Tip Credit Rule

On August 23, the Fifth Circuit issued an opinion in *Restaurant Law Center v. U.S. Department of Labor* vacating the Department of Labor's (DOL) final rule and its long-standing so-called 80/20 guidance concerning how employers must pay tipped employees under the Fair Labor Standards Act (FLSA). The Fifth Circuit found the final rule contrary to the FLSA's plain text and ruled that it was arbitrary and capricious by drawing a line for tip credit application based on factors not found in the statute.

The FLSA permits employers to take a "tip credit" when paying the wages of any "tipped employee," provided the employee's tips and hourly wages when combined equal or exceed the minimum wage (29 U.S.C. § 203(m)(2)(A)). Section 203(t) provides a "tipped employee" means "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips" (29 U.S.C. § 203(t)).

The DOL's final rule, issued in December 2021, codified the agency's long-standing 80/20 guidance setting a 20% cap on time a tipped employee could spend performing non-tipped duties related to their tipped occupation in order for the employer to claim the full tip credit. According to the final rule, "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation" (29 C.F.R. § 531.56(f) (2021)). In its final rule, the DOL parsed its own newly created "tipped occupation" into three subcategories: "(1) directly tip-producing work (e.g., a server 'providing table service'); (2) directly supporting work (e.g., a server 'setting and bussing tables'); and (3) work not part of the tipped occupation (e.g., a server 'preparing food')."

Under the final rule, an employer cannot take a tip credit for time an employee spends on work unrelated to their tipped occupation. Rather, an employer can utilize the tip credit for tip-producing work, but only so long as the employee spends no more than 20% of their workweek (or no more than 30 continuous minutes) performing directly supporting work.

The Restaurant Law Center and the Texas Restaurant Association challenged the final rule as contrary to the FLSA and argued that it was arbitrary and capricious. The Fifth Circuit agreed.

The court first analyzed the rule under the U.S. Supreme Court's newly announced standard of review for agency rules set out in *Loper Bright Enters. v. Raimondo* (144 S. Ct. 2244, 2273 (2024)). The Fifth Circuit found the DOL's interpretation of the FLSA's tip credit contrary to the plain text of the statute. The court rejected the final rule's disaggregation of a tipped employee's "occupation" from a single job into discrete component tasks subject to time limitations. The court found no support in the FLSA for this interpretation, noting: "Because the Final Rule is so granular in divvying up component tasks, a single occupation could quickly break apart, implausibly, into many."

Further, the court found the final rule's focus on the tip-producing nexus of a tipped employee's duties and specific time limitations to be arbitrary and capricious, as such requirements are not found anywhere in the FLSA. The court also held that the DOL could not rewrite the FLSA's clear statutory terms in favor of its sense of how the law should operate, noting:

> In short, as to supporting work, the Final Rule replaces the Congressionally chosen touchstone of the tip-credit analysis – the occupation – with one of DOL's making – the timesheet. And as to untipped work, the Final Rule again ignores such work's clear connection to the occupation itself and instead elevates its lack of connection to tipping. The Final Rule is therefore "a completely different approach to the tip credit."

The Fifth Circuit's decision vacates the final rule that became effective in December 2021 as it relates to tip credit but leaves intact the DOL's dual-jobs regulation (29 C.F.R. § 531.56(e) (1967-2021)), which delineates between an employee working two distinct jobs and one engaged in a single job performing a range of tasks. That regulation within the final rule does not contain any percentage- or minutes-based cutoff for how much untipped work is too much.

Whether the DOL will take the position that its 80/20 guidance as to tip credit in effect before 29 C.F.R. § 531.56(f) became a rule in December 2021 is still valid remains to be seen, though the Fifth Circuit's decision may certainly be a basis to challenge that DOL guidance as legally enforceable. It is likely the Fifth Circuit's decision will be a catalyst for similar challenges to other DOL rules, court rulings in other jurisdictions and lawsuits filed before the *Loper Bright* decision involving the DOL. It is anticipated that the DOL may seek an *en banc* review or appeal to the U.S. Supreme Court. In addition, the upcoming presidential election may also impact the strategy the DOL pursues.

At this time, employers utilizing the tip credit for determining appropriate wages for employees outside the Fifth Circuit should be aware that the DOL may insist that its 80/20 guidance for tip credit should be followed when determining appropriate wages. Additionally, employers must continue to abide by state laws regarding tip credit availability and related regulations and guidance, which remain intact and are not preempted by the FLSA where more protective of employees.

FOR MORE INFORMATION

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