

Silverware Rollers Unite! DOL Proposes New Rule on Use of Tip Credit for Non-tipped Work

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As we discussed in [April](#), the Biden administration halted the implementation of some of the Trump administration's changes to the rules on taking a tip credit for non-tipped work. For those that never have had a server job, employers who have tipped employees (waitstaff, bartenders, etc.) have the option to pay those type of workers \$2.13 per hour and take a credit against the tips those workers earn up to the minimum wage of \$7.25 per hour. However, there have been a lot of changes back and forth on what to do with work that a tipped employee may also do that does not generate tips (stocking the bar, rolling silverware, cleaning the dining room). How should that work be paid? President Biden's Department of Labor has now attempted to clarify that question with a new rule.

The Pre-Trump Rule and Trump's Changes

Before Trump was president, the Department of Labor had what was known as the 80/20 rule. If a tipped worker spent more than 20% of his or her shift on non-tipped tasks, the employer could not take the tip credit for those tasks and ended up paying full minimum wage for that time. In 2018, a DOL Opinion Letter rescinded that rule (although it didn't get a lot of traction with the courts). The Trump administration later proposed a new rule that was to go into effect in March 2021 that completely did away with the 80/20 rule and allowed employers to take the tip credit for non-tipped duties that were done immediately prior to or after their tipped duties.

Return of the 80/20 Rule

Last week, the [Department of Labor announced](#) that they are promulgating a new rule that brings back the old 80/20 rule, with a few new features. Under the new rule, if an employee performs non-tipped work for a substantial amount of time, then the employee is no longer doing work to support the tipped occupation and the employer cannot take the tip credit for that time. The new rule specifically states that if the non-tipped work is done for more than 20% of all hours worked during the employee's workweek or exceeds 30 continuous minutes, the employer may not take a tip credit for that time and must pay the employee minimum wage. This is only a proposed rule and the comment period runs until August 23, 2021.

Do I Take the Credit or Not?

Currently, because the DOL halted the Trump changes, we are still under the old rule that states that if a tipped worker spends more than 20% of their shift doing non-tipped work, then the employer cannot take the tip credit for that time. It will be interesting to see if the new rule becomes final. If so, employers with tipped workers will have to be careful to religiously calculate exactly what their tipped employees are doing and how long they are doing it. One can imagine different clock-in procedures for each type of work. Stay tuned to this space for any further developments.

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National Law Review, Volume XI, Number 182

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