

DOL's Wage and Hour Division Issues Final Rule Regarding Tip Credits and Dual Jobs

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On Oct. 29, 2021, the Wage and Hour Division of the United States Department of Labor (DOL) released its final rule regarding “dual jobs” for tipped employees under the Fair Labor Standards Act (FLSA). The final rule, which becomes effective on Dec. 28, 2021, withdraws a prior final rule from 2020 regarding dual jobs and amends regulations to distinguish between tipped occupations and non-tipped occupations.

Employers of tipped workers will need to review the daily duties of their employees to ensure that they don't run afoul of the new minimum wage standards regarding the tip credit. Employers will want to pay particular attention to the daily tasks completed by employees and identify whether certain tasks are tip producing work or directly support tip-producing work. A key component for compliance will be breaking up duties that directly support tip-producing work to no more than 30 continuous minutes, for instance, by spreading those tasks out throughout a shift.

The FLSA requires that hourly, non-exempt employees be paid a minimum wage of \$7.25 per hour. Employers receive a credit toward the required minimum wage for tipped employees, up to \$5.12 per hour, so long as the employee receives enough tips while working to cover that difference. A tipped employee is a worker who regularly receives more than \$30 per month in tips. The DOL distinguishes between work that is directed toward producing tips, which allows for the minimum wage credit, and work that is not directed to producing tips, which receives no credit. Employers can still receive the tip credit for non-tipped work when it is performed by tipped employees as part of a tipped occupation, and the new rule is aimed at clarifying this distinction.

The DOL's new rule is in some respects a revival of the old 80/20 rule, in which non-tipped work that was incidental to tipped work was counted as part of a “tipped occupation,” so long as the non-tipped work encompassed no more than 20% of an employee's time. Under the DOL's final rule, the following work is considered part of a tipped occupation:

- Any work performed by a tipped employee that provides service to customers for which the employee receives tips; and

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- Non-tipped work that “directly supports” the tip-producing work performed by a tipped employee.

For tip-producing work, the DOL has explained that the work must be of the type in which the employee would regularly and customarily receive tips. Examples of service to customers for which the employee receives tips include:

- a server serving food and drinks, filling water glasses, or cleaning a spill at the customer’s table;
- bussers clearing tables;
- nail technicians performing manicures and helping their customer select the specific type of service;
- parking lot attendants taking keys and parking cars; or
- housekeepers cleaning rooms.

Non-tipped work “directly supports” tip-producing work if:

- The work is performed in preparation for, or to otherwise assist in the provision of tip-producing customer service work; and
- No more than 20% of the tipped employee’s total hours in a week, or 30 continuous minutes in a single period, are spent on the non-tipped work.

An example of work directly supporting tip-producing work would be:

- bartenders fetching and stocking beers for the bar, slicing fruit for drinks, cleaning ice coolers, and making drink mixes;
- servers and bussers cleaning the beverage station, rolling silverware, setting tables, or stocking busser stations;
- nail technicians cleaning pedicure baths or sterilizing private rooms between customers;
- housekeepers stocking the housekeeping cart; or
- parking lot attendants cleaning the valet stand or moving around cars.

Notably, the DOL continues to assert that general food preparation, such as assembling a salad, is not part of a tipped occupation. However, garnishing dishes and similar activities like toasting bread, brewing coffee, ladling premade soup, and adding salad dressing are considered part of a tipped occupation. Moreover, downtime spent waiting for customers to arrive is considered to directly

support tip-producing work and can be categorized as a tipped occupation. Of course, any of these tasks will be considered a non-tipped occupation if the employee spends too much time performing them.

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National Law Review, Volume XI, Number 306

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