

DOL final rule restores 80/20 standard for tipped employees

by Amy Jordan Wilkes and Cayman L. Caven
Burr Forman McNair

The U.S. Department of Labor (DOL) is resurrecting the so-called 80/20 rule under which an employer can take a tip credit on work that directly supports tip-producing work only if it's less than 20 percent of all hours worked during the workweek. The new standard is effective December 28, 2021.

How we got here

The Fair Labor Standards Act (FLSA) generally permits employers to pay tipped employees less than the minimum hourly wage, provided (1) the tips they receive are at least equal to the difference between the required cash wage (at least \$2.13 per hour) and the federal minimum wage and (2) the workers are given appropriate notice. The approach is known as the “tip-credit rule.”

In December 2020, the DOL promulgated proposed FLSA regulations for tipped employees, which would have allowed employers to take the tip credit for tipped employees performing “dual jobs” involving both tipped and nontipped duties. Their enactment was repeatedly delayed, however, until they were eventually abandoned. The agency recently announced the publication of its final rule, which officially withdrew the 2020 proposed rule and returned to the traditional 80/20 standard.

What new regulation requires

The DOL’s new rule also requires that work directly supporting tip-producing work must be less than 30 continuous minutes to qualify for the tip credit. It also clarifies what is considered (1) tip work, (2) work that directly supports tip-producing work, and (3) nontipped work. The final rule contains numerous examples of duties meeting each definition:

- Tip-producing work includes any work performed by a tipped employee who “provides

service to customers for which the tipped employee receives tips.” The DOL has stated tip-producing work is intended to be “broadly construed to logically include all activity within that category.”

- Work that directly supports tip-producing work is “performed in preparation of” or “otherwise assists the tip-producing customer service work.”
- Nontipped work covers any duty that doesn’t meet the description of tip-producing work or work directly supporting tip-producing work.

According to the final rule, any time spent performing nontipped work must be compensated at the full minimum wage, and there is no exception for *de minimis* (minimal or insignificant) time. Time spent “directly supporting” tip-producing work may be paid at the tip-credit rate, but only if the work isn’t performed for a “substantial amount of time,” which is defined as either (1) more than 30 continuous minutes or (2) more than 20 percent of the hours in the workweek for which the employer has taken a tip credit.

Take action

You should continue to follow the traditional 80/20 rule for employees subject to the tip credit. Also, be prepared to keep track of wages, hours, duties, and other conditions of employment for tipped servers in the event they claim unpaid wages under the FLSA.

Amy Jordan Wilkes and Cayman L. Caven are attorneys with Burr & Forman LLP. You can reach them at awilkes@burr.com or ccaven@burr.com.