BURR FORMAN LLP

# Department of Labor Releases Final Rule for Tipped Employees

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**Tip Credits under the Fair Labor Standards Act**

The Fair Labor Standards Act ("FLSA") generally permits employers to pay tipped employees less than the minimum hourly wage, provided that the tips the employee receives are at least equal to the difference between the required cash wage (which must be at least $2.13 per hour) and the federal minimum wage and the employee is given appropriate notice. This is known as the "tip credit" rule.

**Newly-Published DOL Regulations Resurrect the 80/20 Rule**

Although the Department of Labor ("DOL") previously promulgated proposed FLSA regulations for tipped employees in December 2020, their enactment was repeatedly delayed until the proposed regulations were eventually abandoned. The DOL recently announced the publication of its final rule, which officially withdrew the 2020 proposed rule that allowed employers to take the tip credit for tipped employees performing "dual jobs" of both tipped and non-tipped duties, and returned to the traditional view of the 80-20 rule under which an employer can only take a tip credit on work that directly supports tip-producing work if it is less than 20 percent of all hours worked during the workweek.

The DOL's new rule also requires that work that directly supports tip-producing work must be less than 30 continuous minutes to qualify for the tip credit, as well as clarifying what is considered tip

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work, work that directly supports tip-producing work, and non-tipped work. Numerous examples of duties that meet each definition are included in the final rule. 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 that "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." Non-tipped work includes any duty that does not meet the description of tip-producing work or work directly supporting tip-producing work. According to the final rule, any time spent performing non-tipped work must be compensated at full minimum wage and there is no exception for *de minimis* time. Time spent "directly supporting" tip-producing work may be paid at the tip credit rate, but only if the work is not performed for a "substantial amount of time," which is defined as either (1) more than 30 continuous minutes, or (2) more than 20% of the hours in the workweek for which the employer has taken a tip credit. The final rule becomes effective on December 28, 2021.

On December 3, 2021, the Restaurant Law Center and the Texas Restaurant Association filed a lawsuit in the United States District Court for the Western District of Texas seeking to stop the 80-20 rule from going into effect on December 28, 2021. The Complaint alleges that the DOL is "impermissibly attempting to re-write" the portion of the Fair Labor Standards Act governing tip credits, and it seeks to enjoin and vacate the DOL's final rule.

**TAKE ACTION**

Employers should continue to follow the traditional 80-20 rule for employees subject to the tip credit, which is now a requirement beginning December 28, 2021, unless it is enjoined and vacated through the litigation in Texas. Employers should also be prepared to keep track of wages, hours, duties, and other conditions of employment for tipped servers in the event that they claim unpaid wages under the FLSA.

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