Legal Update Article

Labor Department Brings Back the '80/20' Rule — Along With New Companion, the '30-Minute' Rule

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Wage and Hour

The Department of Labor (DOL) has issued a new Notice of Proposed Rulemaking (NPRM), again seeking to regulate the circumstances under which an employer may pay a tipped employee a direct wage below the minimum wage. The NPRM withdraws provisions of a recently published Final Rule that formally eliminated the so-called "80/20," or "20%," Rule, which limited the amount of time (*i.e.*, no more than 20%) tipped employees could spend performing tasks related to their allegedly tip-generating duties, while still allowing their employer to claim a tip credit. When the Tip Regulations Final Rule was published in December 2020, the DOL deemed the 80/20 Rule "unwise," "difficult to administer," and a failing to "adequately consider the practical difficulties" of complying with it. What a difference a few months — and an election — makes. Now, the DOL seeks not only to resurrect the confusing and difficult 80/20 Rule, but to do so with a confounding addition: the "30-Minute" Rule.

A Brief History of Tipped Employees and the 80/20 Rule

The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees minimum wage (currently, $7.25 per hour), but allows employers to satisfy the minimum wage obligation to "tipped employees" — those who customarily and regularly receive at least $30 a month in tips — differently. Because such employees receive additional compensation through tips, the FLSA permits employers to pay them a direct wage of $2.13 per hour and take a "credit" for the tips received by the employee to satisfy the remaining portion ($5.12 per hour) of the minimum wage. However, if the combined direct wage and total tips received by an employee are less than the full minimum wage for all hours worked in a workweek, the employer must make up the difference.

The 80/20 Rule, which first appeared in a DOL Field Operations Handbook (FOH) in 1988, required employers to pay tipped employees the full minimum wage, rather than the lower tip credit wage, for any time during the week an employee spent more than 20% of their time performing duties that were not tip-generating or related to their tip-generating duties. Under this Rule employers, particularly those in the restaurant and hospitality industries, were forced to recreate the daily activities of their tipped employees and separate them into "tip-generating" duties, "related, but non-tip-generating" duties, and "unrelated" duties, with little guidance on what activities fell into which bucket and how to capture such time. Not surprisingly, this led to significant wage and hour litigation, which has now plagued the hospitality industry for more than 20 years.

DOL Withdraws the 80/20 Rule and Issues New Guidance

During the previous administration, the DOL initially withdrew the 80/20 Rule in a November 2018 Opinion Letter and reaffirmed that withdrawal in a February 2019 FOH amendment, replacing the strict 20% limit with a "reasonable time" standard: "An employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with, or within a reasonable time before or after, his tipped duties." A non-tipped duty would be considered as "related" to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET), a DOL-sponsored website that identifies job duties performed in thousands of occupations. In eliminating the 80/20 Rule, the DOL noted, in part:

> [A]n employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties. Rather, such duties are generally properly considered a part of the employee's tipped occupation, as is consistent with the statute.

Notwithstanding this pronouncement by the DOL, many courts refused to apply the DOL's new position, concluding the agency's rejection of the 80/20 Rule did not warrant deference under the so-called *Auer* doctrine. In response, beginning in 2019, the DOL undertook formal rulemaking to remove and replace the 80/20 Rule through FLSA regulations, rather than continuing to rely on the FOH, Opinion Letters, or other sub-regulatory guidance. During the rulemaking, the DOL noted that allowing the tip credit for duties performed "for a reasonable time immediately before or after" a tipped duty "creates a sufficiently intelligible distinction between employees engaged in tipped occupations and non-tipped occupations."

In December 2020, the DOL issued the Tip Regulations Final Rule that purported to officially put an end to the 80/20 Rule. Because the Rule's elimination and replacement was accomplished through an amendment to the FLSA regulations, courts would have been compelled to apply the more-deferential *Chevron* standard to the agency's new position. Or so was the plan.

The 80/20 Rule Returns, With a Twist

Shortly after the Biden Administration arrived, it became clear that, while some aspects of the Tip Regulations Final Rule would — and did — remain in place (*i.e.*, those addressing tip pooling and the prohibitions on employer retention of, and managers or supervisors sharing in, tips), the provisions eliminating and replacing the 80/20 Rule were in jeopardy. The Biden DOL twice delayed the effective date of these provisions and now has proposed a new rule that would again amend the regulations to reinstate the 80/20 Rule, with slight modifications.

Under the current proposal, employee time spent on "tip-producing" (or "tip-generating") duties remains eligible for the tip credit and, conversely, work that is unrelated to tip-producing work remains ineligible for the tip credit. However, the concept of "*related*, but non-tip-generating" duties will be replaced with "work that *directly supports* tip-producing work" and the time spent on such work will be eligible for the tip credit only if "it is not performed for a substantial amount of time." That raises two questions. First, what constitutes "directly supporting" work versus work that generates a tip? And second, what constitutes a "substantial amount of time"?

As to the first question, in place of the detailed list of tip-related tasks in O*NET, the NPRM provides only the following:

> Work performed by a server that directly supports the tip-producing work includes, for example, preparing items for tables so that the servers can more

> easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include slicing and pitting fruit for drinks so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail [salon] technician would include cleaning the pedicure baths between customers so that the nail technicians can begin customers' pedicures without waiting.

As for what constitutes a "substantial amount of time," the NPRM provides that the amount of time spent on "directly supporting" tasks or activities will be deemed substantial if:

> (1) For any workweek, the directly supporting work exceeds 20 percent of the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or
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> (2) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any of that continuous period of time.

Accordingly, the DOL has now proposed to reimplement the same 80/20 Rule that, only months ago, it claimed had proven difficult for both employers and the courts to consistently apply. Moreover, the DOL further proposes to replace the Final Rule's "reasonable time before and after" standard for engaging in tip-related duties with a strict, 30-minute limitation on continuous performance of such duties. While asserting in the NPRM that "measuring a 'substantial amount of time' in this way provides a uniform and accurate measure of when a tipped employee is still engaged in a tipped occupation," the DOL fails to recognize that an employer could comply with this 30-minute limitation while still having its workers undertake a significant amount of "directly supporting" sidework — at least until the 20% weekly maximum is reached (*e.g.*, multiple 25-minute periods of "directly supporting" work separated by brief periods of tip-generating work).

The Takeaway

Work remains to be done in finalizing the proposed rule. If implemented as proposed, the reemergence of the 80/20 Rule, along with the new 30-Minute Rule and the elimination of the O*NET occupational activities list as a reference of tip-related duties, likely means litigation in this area will continue to flourish. Of course, the DOL's turnabout will have no impact on states that do not permit a tip credit at all, or on the few states that expressly retained the original 80/20 Rule in anticipation of its elimination by the previous administration.

Beginning June 23, 2021, employers may submit comments to the DOL regarding the proposed rule during the ensuing 60 days. Following the DOL's consideration of the comments, it likely will publish a new Final Rule, typically with at least 60 days' notice prior to its effective date. Thus, the effective date of a new Final Rule probably will be in late 2021 or early 2022.

Jackson Lewis attorneys will continue to monitor and report on this development. In the meantime, if you have any questions about the proposed rule or any other wage and hour