

Fifth Circuit Reverses Denial of Preliminary Injunction to Invalidate DOL Tipped Dual Jobs Rule

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Wage and Hour

The U.S. Court of Appeals for the Fifth Circuit has reversed and remanded a district court's denial of a motion to preliminarily enjoin the Dual Jobs Final Rule addressing when employers may take a tip credit under the Fair Labor Standards Act, published by the Department of Labor (DOL) in 2021. *Restaurant Law Ctr. v. United States DOL*, 2023 U.S. App. LEXIS 10494 (Apr. 28, 2023). The Court of Appeals concluded the plaintiffs, including Restaurant Law Center (RLC), sufficiently had demonstrated evidence of "irreparable harm" if the Rule was not temporarily enjoined while the merits of the lawsuit were considered.

The Fifth Circuit Court of Appeals has jurisdiction over the federal courts in Louisiana, Mississippi, and Texas.

Dual Jobs Final Rule

In 2021, the [DOL issued the Dual Jobs Final Rule](#), seeking to limit the amount of time employers may assign tipped employees duties that support their tipped work, yet are not directly tip-producing, while allowing employers to pay the employees using a tip credit rate.

Federal law permits tipped employees to receive \$2.13 per hour in a direct wage, so long as the combination of their direct wage and tips equals at least the hourly minimum wage (\$7.25). Many states have laws that require higher tipped rates.

The DOL sought to codify prior guidance by formally implementing the "80/20" or "20%" rule, which limits the amount of time spent on directly supportive tipped work to 20% in a workweek. However, the DOL also added a new "30-Minute" rule, which places a 30-minute limit on the amount of continuous time a tipped employee may spend performing directly supportive tipped work while still allowing the employer to take the tip credit.

Lawsuit

In December 2021, prior to the effective date of the Dual Jobs Final Rule, the RLC (an independent public policy organization affiliated with the National Restaurant Association) and the Texas Restaurant Association filed a lawsuit in the U.S. District Court for the Western District of Texas, seeking to enjoin the DOL from enforcing the Final Rule and to have it invalidated.

In February 2022, the plaintiffs filed, and the district court denied, a motion to preliminarily enjoin the Rule while the lawsuit proceeded. In denying the motion, the district court concluded the RLC had failed to produce sufficient evidence of the damages, i.e., the "irreparable harm," employers would suffer as a result of the Rule. In addition to demonstrating a substantial likelihood of success on the merits, a party

seeking a preliminary injunction must establish sufficient evidence of proof of such damages.

Fifth Circuit Decision

On appeal by the plaintiffs, the Fifth Circuit reversed the lower court decision.

Contrary to the findings of the district court, the Court of Appeals concluded the compliance costs set forth by the RLC, even if overstated, were more than sufficient to establish the “irreparable harm” requirement under Fifth Circuit precedent, as “the nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm.” (Citing *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (“[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs[.]”).

The Court of Appeals added that the DOL itself estimated compliance costs to employers at a not-insubstantial \$177 million annually, an amount likely understating the actual expense employers would have to undertake complying with the new 30-Minute rule, given the DOL estimated, without any factual basis, that such compliance would require only 10 minutes per week per employer. “Our precedent requires only that alleged compliance costs must be more than de minimis,” noted the Court of Appeals, not “[stringent] insist[ence] on a precise dollar figure.”

Because the district court simply assumed, rather than determined, that the plaintiffs could establish the second requirement of a preliminary injunction — the likelihood of success on the merits — the Fifth Circuit remanded the matter for further consideration.

Takeaway

The case now returns to the trial court for reconsideration of the RLC’s motion for preliminary injunction and, quite possibly, a concurrent ruling on the parties’ respective motions for summary judgment. While the case was on appeal, it was reassigned from Judge Robert Pitman, a 2014 appointee of President Barack Obama, to Senior Judge David Ezra, an appointee of President Ronald Reagan, but subsequently was assigned back to Judge Pitman. Although the Fifth Circuit left a decision on the merits to the district court in the first instance, the tone of the panel’s opinion suggests the Court of Appeals may be skeptical of the merits of the underlying Final Rule as well.

Jackson Lewis attorneys will continue to monitor and report on this case as it develops. In the meantime, the Dual Jobs Final Rule remains in effect and employers with tipped employees should ensure they comply with the requirements of the Rule. Moreover, employers must ensure they comply with the law of the state(s) in which they operate, as such law may differ from federal regulations.

If you have any questions about the ruling, the Dual Jobs Final Rule, or any other wage and hour developments, please contact the Jackson Lewis attorney(s) with whom you regularly work.

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