Legal Update Article

DOL Proposes FLSA Regulations to Close Door on '80/20' Rule, Implement Tip Pooling Amendments

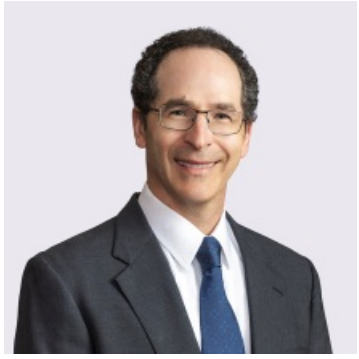
By Jeffrey W. Brecher & David R. Golder

October 8, 2019

Meet the Authors

Jeffrey W. Brecher

(Jeff)
Principal and Office Litigation Manager
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com



David R. Golder

Principal
(860) 522-0404
David.Golder@jacksonlewis.com

Related Services

Class Actions and Complex Litigation
Wage and Hour

The Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) on October 8, 2019, to eliminate the "20% Rule," or "80/20 Rule," under the Fair Labor Standards Act (FLSA).

The 20% Rule, which first appeared in a DOL Field Operations Handbook (FOH) in 1988, requires employers to pay tipped employees the full minimum wage, rather than the lower cash wage applicable to tipped employees, if an employee spends more than 20% of his or her time performing allegedly non-tipped duties (which were undefined).

While the DOL withdrew the Rule in a November 2018 Opinion Letter, and reaffirmed that in a February 2019 FOH amendment, courts have disagreed on whether the DOL's latest guidance deserves deference. The proposed regulation seeks to elevate that guidance to the regulatory level and to revise the former regulation that was the genesis of the Rule.

The NPRM also seeks to implement changes on tip pooling, made by the Consolidated Appropriations Act (CAA) of 2018. That Act prohibits employers, managers, or supervisors from keeping employee tips, including those from a tip pool, regardless of whether the employer takes a tip credit under the FLSA. The Act, however, would allow employers to mandate a tip pool that includes traditionally tipped (*e.g.,* servers and bartenders) and non-tipped (*e.g.,* cooks and dishwashers) positions *if* the employer does not pay the tipped employees using a tip credit (that is, the employee is paid the full minimum wage without any credit for tips). The proposed rule clarifies who is considered a "supervisor" or "manager" and, thus, is excluded from receiving tips. Employers implementing policies regarding tipped employees must also consider state laws.

General Background

The FLSA requires employers to pay non-exempt employees minimum wage (currently, $7.25 an hour), but treats "tipped employees" — those who customarily and regularly receive at least $30 a month in tips — differently. Because tipped employees receive substantial compensation through tips, the FLSA permits employers to pay them a direct wage of $2.13 an hour and take a "credit" for the tips received by the employee to satisfy the remaining portion ($5.12 an hour) of the minimum wage. If the combined direct wage and total tips received by an employee is less than the minimum wage for all hours worked in a given workweek, the employer must make up the difference. Usually, though, servers receive tips well in excess of the minimum wage and, in fact, often earn far more than traditionally non-tipped workers, such as kitchen staff, particularly at fine-dining establishments.

The NPRM addresses two issues as it relates to tipped employees: (1) whether the "20% Rule" should be eliminated; and (2) with respect to tip pooling, whether an employer that does not utilize the tip credit may require tipped employee to share tips with non-tipped workers, as well as who is considered a supervisor or manager ineligible to receive

employee tips under any circumstances.

The 80/20 Rule

The "20%" or "80/20" Rule fueled numerous lawsuits throughout the country over the past two decades. Under the Rule, employers, particularly those in the restaurant and hospitality industries, were asked to segregate the daily activities of their tipped employees 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. For details of the 80/20 Rule, see our article, Labor Department Abandons '80/20' Tip Credit Rule, to Relief of Restaurant, Hospitality Industries.

In November 2018, the DOL abandoned that Rule when it reissued a 2009 Opinion Letter originally issued late in the George W. Bush Administration, but subsequently withdrawn by the Obama Administration. Over the past year, courts have disagreed as to whether the DOL's 2018 withdrawal of the 80/20 Rule is entitled to deference under the so-called *Auer* doctrine.

The NPRM reflects the position DOL adopted a year ago in the November 2018 Opinion Letter and, later, in an amendment to its Field Operations Handbook, when it rescinded the 80/20 Rule. Consistent with that guidance, under the proposed regulation, "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 will be considered 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). Examples of such "related" duties include setting up and cleaning tables, making coffee, and occasionally cleaning glasses or dishes.

Tip Pooling

Under the 2011 tip pooling regulation promulgated during the Obama Administration, employers were prohibited from requiring tipped workers to pool their gratuities with non-tipped workers, *regardless* of whether the employer takes a tip credit. That rule was challenged repeatedly in court following its implementation, resulting in a circuit split. *Compare Oregon Restaurant & Lodging Ass'n v. Perez,* 816 F.3d 1080 (9th Cir. 2016) (upholding the tip-pooling rule); *with Marlow v. New Food Guy, Inc.,* 861 F.3d 1157 (10th Cir. 2017) (finding the rule invalid). With passage of the CAA in 2018, Congress directed that the 2011 rule would have no further force or effect until the DOL took further action.

The proposed rule expressly permits employers to mandate tip sharing among tipped and non-tipped workers, so long as the employer does not take a tip credit. Employers that do not take an FLSA tip credit will be able to include traditionally non-tipped employees, such as cooks or dishwashers, in a mandatory tip pool. The employer must fully redistribute tips at least as often as it pays wages and must align its policy of paying credit card- and cash-based tips. This change likely will increase the compensation for back-of-the-house workers (such as cooks), who now will be able to share in the lucrative tips received by servers, and addresses what many believe was an unfair system that rewarded servers with tips but ignored those who worked to enable servers to generate tips.

Significantly, while the proposed rule permits employers to broaden the scope of those eligible to participate in a tip pool, it also implements the CAA's limitation. The CAA

prohibits employers, including supervisors and managers, from keeping any portion of employee tips. The statute, however, does not define the terms “supervisor” or “manager.” The NPRM seeks to clarify those terms by explaining that the duties test applicable to the “white collar” executive exemption will control who meets the definition of a manager or supervisor under the tip-pooling rules. Under the executive exemption, an employee must have management as his or her primary duty; must customarily and regularly direct the work of at least two employees; and must have the authority to hire or fire other employees or provide recommendations regarding employment status that are given particular weight. Moreover, an employee who owns a 20% equity interest in the business at issue and who is actively engaged in its management also would be considered a manager or supervisor.

Employers may submit comments to the DOL regarding the proposed rule by December 9, 2019. Following the DOL’s consideration of the comments, it will publish a Final Rule, typically with at least 60 days’ notice prior to its effective date. Thus, the effective date of a Final Rule likely will be in early to mid-2020.

If you have any questions about these proposed rules or any other wage and hour developments, please contact a Jackson Lewis attorney.