Legal Update Article

Connecticut Retains '80/20' Tip Credit Rule in New Wage and Hour Legislation

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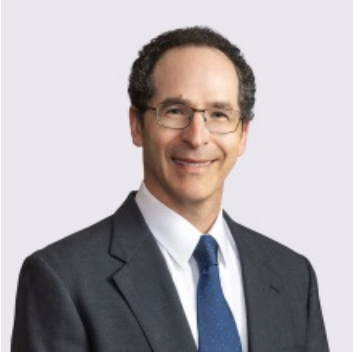
Meet the Authors



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Wage and Hour

The Connecticut Legislature has passed legislation mandating that the state's minimum wage regulations incorporate the "80/20" or "20%" tip credit rule. Governor Ned Lamont is expected to sign House Bill No. 7501, "An Act Concerning the Workforce Training Needs in the State and Revisions to and Regulations of Gratuities Permitted or Applied as Part of the Minimum Fair Wage," into law.

Unless vetoed, the law will go into effect no later than January 2, 2020, 15 days after the legislative session ended. The Connecticut legislature passed House Bill No. 7501 during a special session held on December 18, 2019. The legislation is a compromise version of a bill vetoed by Governor Lamont earlier in the year.

Requirements

The new legislation requires the state's Labor Commissioner to adopt new regulations regarding "employees who perform both service and nonservice duties and allowances for gratuities permitted or applied as part of the minimum fair wage," that is, traditionally tipped employees performing what commonly is referred to as "dual jobs." Significantly, the new law requires that those regulations incorporate the "80/20" or "20%" tip credit rule that was enforced by the U.S. Department of Labor (DOL) under the Fair Labor Standards Act until the DOL abandoned the rule in November 2018.

The legislation also directs that the new regulations repeal current Section 31-62-E4 of the state's regulations. That section, as written, requires employers to segregate time spent on "service and non-service duties," but it fails to define or otherwise clarify what constitutes "service" and "non-service" duties.

Under the new law, the Labor Commissioner must post a notice of intent to adopt the new regulations no later than April 1, 2020. It also requires the Labor Commissioner to consult with representatives of the restaurant industry, restaurant employees, service employees and "other interested stakeholders" before doing so.

Following adoption of new tip credit regulations, the Commissioner must conduct random wage and hour audits of tipped workers in not less than 75 Connecticut restaurants and prepare a compliance report, to be issued within one year of the adoption of the new regulations and submitted to the joint standing committee of the General Assembly responsible for labor matters.

The new law also addresses the potential penalty damages a restaurant employee may recover if he or she proves a violation of the tip credit regulations. It also provides a "good faith" defense to the award of such damages. The law clarifies that a good faith belief "includes, but is not limited to, reasonable reliance on written guidance from the Labor Department."

Finally, on the rise of class actions involving the current tip credit regulations filed in

state and federal court, House Bill No. 7501 provides that, effective from the bill's passage, an individual may not bring a class action premised on violations of the tip credit regulations, unless the individual satisfies the judicial rules of practice governing class action certification and can prove to the court that the proposed class members performed duties "that were not incidental to service duties … *for more than a de minimis amount of time"* and were not properly compensated "for some portion of their nonservice duties."

History of DOL Tip Credit Rule

The DOL first published regulations applying the tip credit, including the establishment of the "dual jobs" concept, more than 50 years ago. Under this concept, when an employee is engaged in a traditionally tipped occupation, but also is engaged in a second, traditionally non-tipped occupation for the same employer, the employer may take the tip credit only as to the first occupation.

The DOL regulations gave as an example of dual jobs a hotel maintenance worker who also works as a waiter at the hotel; only his waiter position is a tipped occupation subject to the tip credit. In contrast, examples of employees not performing dual jobs are "a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" and a "counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group."

In a 1988 revision to its internal Field Operations Handbook (FOH), the DOL expanded the dual jobs concept to include single jobs involving dual *tasks.* It explained that where "tipped employees spend a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken for the time spent in such duties." This gave rise to the "80/20" tip credit rule.

During the Obama Administration, tipped workers brought a flurry of litigation alleging a violation of the rule. This resulted in a split among federal courts of appeal as to whether the rule was enforceable.

In November 2018, the Trump DOL issued an Opinion Letter abandoning the rule and later revised its internal agency guidance accordingly.

Connecticut's lawmakers have now decided to continue following the DOL's pre-November 2018 rule and guidance.

Next

Connecticut restaurant employers should consider reviewing their policies and procedures to ensure their operations are compliant with the new regulations when they are available. If you have any questions about this law or any other wage and hour issue, please consult a Jackson Lewis attorney.