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Fifth Circuit Strikes Down the DOL's Rule for Tipped Employees

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On August 23, 2024, the U.S. Court of Appeals for the Fifth Circuit vacated the U.S. Department of Labor (DOL)'s "80/20" rule, which has been in existence for decades, but was formally reintroduced by the DOL in 2021. This rule concerned tipped wages covered by the Fair Labor Standards Act (FLSA), under which employers are permitted to take a tip credit and pay workers $2.13 an hour, assuming tips will make up the difference to meet the minimum wage requirements.

According to the now vacated 80/20 rule, employers were able to claim a tip credit so long as a worker did not spend more than 20% of the worker's time on "non-tipped" activities.

Specifically, the 80/20 rule described three categories of work:

1. Directly tip-producing work (e.g., a server "providing table service");
2. Directly supporting work (e.g., a server "setting and bussing tables); and
3. Work not part of the tipped occupation (e.g., a server "preparing food").

In *Restaurant Law Center v. U.S. Department of Labor*, the court found that the rule's interpretation of what it means for an employee to be spending time on tipped activities creates an arbitrary and impermissible demarcation between tip-producing and tip-supporting work, which is in conflict with the statutory language and intent of the FLSA.

Under the FLSA, a "tipped employee" is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." The court found that the language of the DOL's rule creates a complicated paradox that contradicts the status of employees. Essentially, the court reasoned with the understanding that the majority of tip-producing work is of a fluctuating nature and cannot fall neatly into the DOL's interpretation of what it means to be engaged in tipped or non-tipped activities.

For example, a server who relies on tips might not necessarily be engaged in a tipped activity per the DOL's rule, if they are rolling silverware or completing their kitchen side-work, for example. The court found that rather than taking away a worker's "tipped-employee" status when they are not actively engaging in work directly related to generating tips, they will only lose that status if they engage in a completely unrelated occupation.

Finding that the 80/20 rule goes against the FLSA and the legislature's original intent, the court has vacated the rule and set it aside. The Fifth Circuit instead provides that an employee engaged in a tip-producing *occupation* will be considered to be spending his or her time on tipped-activities, regardless of whether such activities are directly generating tips.

It is important to note that Pennsylvania and other states have their own tipping regulations. As such, employers must ensure they are in compliance with both state and federal tipping regulations. For example, in Pennsylvania, the minimum wage for tipped employees is $2.38 per hour, which is higher than the federal $2.13 an hour, assuming tips will make up the difference to meet the $7.25 hourly minimum wage

requirement. If that minimum wage is not met through tips, employers will be required to pay the difference, and the tip credit only applies if the employee received over $135 in tips for a month.

Additionally, Pennsylvania has incorporated the now vacated federal 80/20 rule. While the Pennsylvania 80/20 rule was not expressly vacated by the court's decision, enforcement of the 80/20 rule pursuant to the Pennsylvania regulations may be subject to change following the vacatur of the DOL's provision. Ultimately, if the federal DOL implements a new rule that is more protective than Pennsylvania's 80/20 rule, employers will have to comply with the rule that is more beneficial to employees.

If you have questions about permissible tipping or other labor & employment issues, please contact your Knox Law attorney, our labor & employment group, or call us at 814-459-2800.
