

Restaurant Association's Challenge to New DOL Regulation Rejected by Texas Federal Court

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The challengers in this case—*Restaurant Law Center, et al. v. DOL*—sought a nationwide preliminary injunction of the new DOL regulation, but the Court denied the requested relief. Some background helps explain the Court's decision.

Under the federal wage and hour law—the Fair Labor Standards Act (“FLSA”)—employers may pay tipped employees a base hourly rate less than the minimum wage rate (*i.e.*, \$7.25 per hour), but only if the tips such employees receive in a workweek—when added to the base hourly rate pay—result in an effective hourly rate at or greater than the applicable minimum wage rate. This practice of using tips to make up the difference to meet or exceed the minimum wage rate is known as use of the “tip credit.”

DOL regulations have addressed many issues related to this “tipped employee” exception over years, including when and for whom it can and cannot be used. In general, the “tip credit” can only be used for “tipped employees.”

The FLSA defines “tipped employees” as employees “engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.”

But what about employees who work in a position with both tipped duties and non-tipped duties, or so-called “dual jobs”? This has been a thorny issue in the restaurant industry for year, because formal DOL regulations did not include any bright-line rules for how to navigate this issue.

In 1988, the DOL first adopted—from an enforcement and guidance perspective—what has become known as the “80/20 rule.” This rule provides that, for an employer to be able to use the tip credit for an employee, the employee must not perform non-tipped duties more than 20% of their work time. While not a formal regulation, the DOL consistently enforced this rule, as part of its Wage and Hour Division Field Operations Handbook, for the next thirty years.

However, in 2018, the DOL rescinded the “80/20 rule.” Then, in 2020, the DOL finalized a new rule that allowed employers to use a tip credit for employees during periods of non-tipped work immediately before or after tipped work, regardless of the amount of time involved in such non-tipped work. Employers largely lauded the flexibility of this new standard.

But, in 2021, before this 2020 rule could go into effect, the DOL withdrew it and issued a new rule that re-adopted and formally incorporated the “80/20 rule.” After clearing the administrative rulemaking process, the new regulation with the “80/20 rule” went formally into effect on December 28, 2021.

Restaurant associations challenged the new regulation in early December 2021 before it even went into effect, claiming it constituted impermissible lawmaking, was arbitrary and capricious, violated the Administrative Procedure Act (“APA”), and violated a separation of powers.

However, the Texas federal court denied their request for a nationwide injunction. The Court’s decision largely focused on the issue of irreparable harm, which the challengers were required to show, but—according to the Court—did not. The Court reasoned, in part, while “regulations may be costly...that does not make them unlawful.”

While the Court did not directly address the merits of the challengers’ legal claims themselves, it did nod to the fact that the “80/20 rule” had been challenged many times before and “repeatedly upheld.” This appears to be a signal from the Court that it will also deny the challenge on its merits if the challengers choose to proceed after denial of injunctive relief.

The takeaway from this case is that the “80/20 rule” is likely here to stay for the foreseeable future. The rule undoubtedly presents many administrative and practical challenges to employers using the tip credit, including but not limited to accurately tracking the amount of time individual employees perform “tipped” and “non-tipped” duties each week in fast-paced environments like restaurants.

An unwary, and even well-intentioned, employer using the tip credit can find itself in serious trouble—both in DOL investigations and in private FLSA lawsuits—if it does not carefully tend to such challenges and nuances of wage and hour rules for tipped employees. Liabilities, penalties, fees and costs associated with wage and hour violations—even if unintentional—can be very substantial.

So, if you are using or contemplating using a tip credit, do not hesitate to reach out to a member of our Labor & Employment Team to discuss how this new DOL regulation might impact your business.