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U.S. Department of Labor Releases its Dual Jobs Final Rule, Which Resurrects and Revises the Prior 80/20 Rule for Tipped Employees

Effective December 28, 2021, employers must meet the requirements of the Dual Jobs Rule in order to take the tip credit under the Fair Labor Standards Act (“FLSA”) for employees who perform tip and non-tip-producing work.

November 29, 2021

On October 28, 2021, the U.S. Department of Labor, Wage and Hour Division (“DOL”) published the dual jobs final rule (“Dual Jobs Rule”) as the final provisions of its Tip Regulations Under the Fair Labor Standards Act (“FLSA”), which is known as the 2020 Final Tip Rule. The Dual Jobs Rule governs when an employer may take a tip credit under the FLSA for those employees who perform both tipped and non-tipped duties.

Background

The 80/20 Rule

In 1988, the DOL declared that an employer may take a tip credit against tipped employees for the time spent in duties related to the tipped occupation even if those duties were not directed towards producing tips. For instance, employers could take the tip credit against a tipped server’s hourly rate of pay where that server spent working time cleaning tables and making coffee in connection with their customer-facing work. However, the DOL clarified in its Field Operations Handbook that the tip credit could not be taken when tipped employees devoted more than 20% of their time to non-tip-producing activities, such as cleaning tables and making coffee in the example above. This became known as the “80/20 Rule.”

2020 Final Tip Rule

In November 2018, the DOL changed course and reissued a prior opinion letter declaring that there is no limit on the amount of non-tip-producing duties a tipped employee may perform, so long as the tipped employee performs such duties contemporaneously with, or for a reasonable time before or after, performing direct customer-

facing, tip-producing services. The DOL then formally adopted this opinion in December 2020 (with a March 1, 2021, effective date), which abolished the 80/20 Rule, in the 2020 Final Tip Rule.

However, after the change in Presidential administrations, the DOL delayed the March 1, 2021, effective date of the 2020 Final Tip Rule. On April 28, 2021, the DOL implemented certain provisions of the 2020 Final Tip Rule related to tips, tip pooling and recordkeeping, but announced that it was further delaying the effective date of the provisions of the 2020 Final Tip Rule that revised the 80/20 Rule.

Thereafter, on October 28, 2021, the DOL announced publication of the Dual Jobs Rule, reinstating the 80/20 Rule. The Dual Jobs Rule will take effect on December 28, 2021.

When Can Employers Take the Tip Credit Under the Dual Jobs Rule?

Under the Dual Jobs Rule, employers may take a tip credit only when the tipped employee is performing tip-producing work or performing work that directly supports tip-producing work, so long as that non-tip-producing work does not:

- exceed 20% of the employee’s weekly work; or
- exceed 30 continuous minutes.

If a tipped employee spends more than 20% of their weekly work time or more than 30 minutes of continuous work time on non-tip-producing work, the employer may not take the tip credit for that excess time.

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What Do Employers Who Take the Tip Credit Need to Do Now?

Employers will need to carefully schedule and track non-tip-producing work time that directly supports tip-producing duties for any tipped employee for which the employer takes the tip credit.

Employers must also review state and local laws related to tip credits, as the Dual Jobs Rule does not supersede such laws.

For instance, New York employers subject to the New York State Hospitality Industry Wage Order (“NYS Hospitality Wage Order”) must now comply with both the requirements under that Order (which remained in effect

throughout this time) as well as the Dual Jobs Rule. Under the NYS Hospitality Wage Order, employers cannot take the tip credit if an employee spends more than 20% of time in any given **shift** (as compared to workweek) performing non-tip-producing work, or more than 2 total hours in any given day performing non-tip-producing work. If employees perform non-tip-producing work for more than 20% of their shift or more than 2 total hours in any given day, New York employers cannot take a tip credit for **any time worked that day** (as compared to the excess time). New York employers will now need to carefully schedule and track side work for all employees from whom they take the tip credit to ensure that they are not performing 30 minute or more of continuous side work in order to satisfy the additional requirement imposed in order to comply with the FLSA.

Please contact an attorney in MSF’s Employment Group if you need assistance with respect to this information.



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