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IN–DEPTH DISCUSSION

DOL Proposal to Resurrect 80/20 Rule for Tipped Employees Fails to Alleviate Longstanding Industry Concerns

By Daniel B. Boatright on June 23, 2021

On June 23, 2021, the U.S. Department of Labor (DOL) published a notice of proposed rulemaking (NPRM), which reverses course from a December 2020 final rule and seeks to resurrect the so-called "80/20 Rule" that governs how tipped employees must be paid under the Fair Labor Standards Act (FLSA). Despite the DOL's attempt to add clarity, the proposed rule is fraught with ambiguities and contradictions.

Littler and its Workplace Policy Institute (WPI) have been monitoring this issue closely and have submitted comments at every step of the way. We anticipate that we will again provide comments to the DOL on why the latest version of the 80/20 Rule is ill-focused and infeasible. We encourage interested persons in the hospitality industry to make their voices heard as well by submitting comments to the DOL by August 23, 2021.

The History of 80/20

In 1988, the DOL attempted to clarify an existing "dual jobs" regulation by inserting a provision in its Field Operations Handbook that instructed DOL field investigators that the tip credit is not available when tipped employees devote more than 20% of their time to non-tip-producing activities. This concept, known as the 80/20 Rule, was not often relied upon until the early 2000s, when it became the focus of tip-credit litigation.

During the Obama administration, the DOL publicly took the position that employers could only apply a tip credit for employees spending less than 20% of their shift performing non-tipped work. This position led to more litigation and proved completely unworkable for the hospitality industry,

in part due to lack of guidance on which duties qualified as tipped or non-tipped. The position also left employers with the onerous task of identifying, down to the minute or second, the work done by tipped employees on any given shift.

In November 2018, the DOL reissued and adopted a nearly decade-old opinion letter (and later made corresponding changes to the Field Operations Handbook) clarifying how employers could pay tipped employees who perform related non-tipped duties. That opinion letter stated there was no limit on the amount of duties related to a tip-producing occupation that may be performed, so long as the tasks were performed contemporaneously with direct customer service duties, or for a reasonable period of time immediately before or after performance of direct customer service duties. In other words, as long as side work was "running" side work—*i.e.*, related duties performed during the course of a shift—there was no 20% or other limit to the amount of side work that could be performed. If servers were brewing coffee and rolling and polishing silverware during operational hours while simultaneously serving guests, this type of work could be performed while the employer was still applying a tip credit toward the employees' wages. The only quantitative limitation was that the server's wages and tips combined must equal or exceed the minimum wage. The DOL further stated that duties set out in the federal occupational database, O*NET, www.onetonline.org, were presumed to be related to the tipped occupation.

In December 2020, the DOL issued a final rule that essentially adopted the language in the opinion letter. By eliminating the focus on the percentage of time spent on "non-tipped" duties *(i.e.*, the 80/20 Rule), the December 2020 rule jettisoned an unworkable task-by-task timekeeping requirement, and replaced it with a reasonable, occupation-focused standard that ensured tipped employees would receive the full protection of the FLSA's minimum wage and overtime provisions.

In February 2021 and again in April 2021, the DOL delayed the effective date of the December 2020 final rule to allow the DOL "time to address additional questions of law, policy and fact and complete separate rulemaking." The June 24 NPRM is that "separate rulemaking."

The June 2021 80/20 Reboot

In the June 2021 NPRM, the DOL seeks to resurrect the 80/20 Rule with a few modifications that the DOL contends address some of the concerns that have been raised with respect to the 80/20 Rule. The reboot falls far short of addressing the concerns, largely because the 80/20 Rule continues to be impractical, and compounds the existing confusion regarding the proper application of the tip credit.

In the June 2021 NPRM, the DOL proposes to divide a tipped employee's work duties into three categories: (1) tip-producing work; (2) work that directly supports tip-producing work; and (3) unrelated work (*i.e.*, work that is neither tip-producing nor directly supportive of tip producing work). In the text of the proposed rule and in the preamble to the NPRM, the DOL provides examples of each category for a few tipped occupations, including restaurant servers, bussers, and bartenders.

	Server	Busser	Bartender
Tip-producing	• Waiting tables	• Filling water glasses • Clearing dishes from tables • Replacing table linens	• Making drinks • Serving drinks • Talking to customers
Directly supporting	• Preparing items for tables to facilitate service • Cleaning tables • Folding napkins • Preparing silverware • Garnishing plates • Sweeping under tables	• None identified	• Preparing fruit garnishes • Wiping down bar • Wiping down tables in bar area • Cleaning bar glasses and implements used behind bar • Arranging bottles behind bar • "Briefly" retrieving from storage items such as alcohol, ice and napkins
Unrelated	• Preparing food • Cleaning bathroom	• None identified	• Preparing food • Cleaning dining room

Under the proposed rule, any time spent in the category of unrelated tasks must be compensated at full minimum wage (*i.e.*, no tip credit may be taken). Time spent on "directly supporting" duties may be paid at a tip credit rate, but only if the work is not performed for a "substantial amount of

time." A "substantial amount of time" is defined as either: (1) more than 30 continuous minutes; or (2) more than 20% of the "hours worked during the employee's workweek." Although the proposed rule is not clear, presumably the "hours worked during the workweek" refers only to the hours worked as a tipped employee, and would not include, for example, any hours worked as a cook or in another non-tipped position.

The proposed rule provides that the first 20% of "directly supporting" work may be paid at a tip credit rate, but any time in excess of 20% must be paid at full minimum wage. In contrast, if an employee spends more than 30 continuous minutes on "directly supporting" work, all of that continuous time must be paid at full minimum wage.

The DOL has requested comments on the proposal, and specifically invites comments on the definition of tip-producing work and any occupations and examples the DOL should consider.

Opportunities for Comment

As Littler and WPI have long maintained, the 80/20 Rule is flawed, and we will be submitting comments to remind the DOL of the overarching concerns with the 80/20 methodology. Beyond that, the June 2021 reboot has problems that cry out for comment and revision.

If there is to be an 80/20 Rule, then the attempt to clearly define the three categories of work is an essential starting point. But the current proposal falls far short. For example, what duties are encompassed within "waiting tables" by a server? Does that include time spent walking to the back-of-house and returning with food and drink items? Does it include filling soft drink glasses? Does it include time spent processing cash and credit card transactions? All of these functions are an integral part of waiting tables and should be encompassed within tip-producing duties. If the DOL refuses to rely on an external resource like O*Net to define the scope of tipped occupations, then the regulation itself should give employers and employees detailed instructions — but providing a few illustrative examples simply invites litigation to fill the enormous void.

The current proposal also contains contradictions that invite varying interpretations. For example, a busser's work in clearing a table and replacing table linens is identified by the DOL as tip-producing, but if a server or bartender wipes down a table to prepare it for the next guest that is merely "directly related." Similarly, a bartender can make and garnish a drink, and that work is tip producing. But garnishing a plate is merely "directly related."

Beyond that, the June 2021 proposal does nothing to address the concern that the 80/20 Rule requires employers to attempt to track tipped employees' activities on a second-by-second basis throughout the course of a shift. Even if/when DOL decides how each task is to be placed in one

of the three categories, as a practical matter there continues to be no reasonable means to accurately track the few seconds devoted to each task before a tipped employee moves on to the next.

Proponents of the 80/20 Rule suggest that the time-tracking dilemma is solved by assigning only tip-producing tasks. Perhaps that is a possibility if/when DOL clearly defines those tasks. But what is an employer to do if the limitation to tip-producing tasks results in significant idle time? Which category does idle time go into?

The proposal also does not account for multi-tasking. How does one characterize the time a bartender spends wiping down the bar while simultaneously chatting with customers?

Takeaways

We urge concerned employers and industry groups to make their voices heard by providing comments before the August 23, 2021 deadline. Stakeholders should seize this opportunity to make the DOL understand lingering problems with the proposed rule.

Employers also must continue to be mindful that the FLSA does not preempt more protective state or local laws. Many states have tipped employee pay provisions that do not allow for a tip credit at all, or otherwise differ from the FLSA in important respects.