BASICS OF THE DOL'S NEW "TIP CREDIT" RULES

Changes Become effective December 28, 2021 – Are you Ready?

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On October 28, 2021, the United States Department of Labor (DOL) published a final rule addressing when employers can take the "tip credit" for tipped employees. The rule becomes effective December 28, 2021, so employers need to act now to develop policies and practices to comply. As discussed below, the DOL's new rules make compliance no easy task.

As a reminder, the Fair Labor Standards Act – which requires non-exempt employees to be paid at least "minimum wage" – allows an employer to satisfy a portion of its minimum wage obligation to any "tipped employee" by taking a partial credit known as the "tip credit" toward the minimum wage obligation based on tips the employee receives. An employer that elects to take the "tip credit" must pay the tipped employee a direct cash wage of at least $2.13 per hour, ($5.575 per hour effective January 1, 2022, for Missouri employers) but can take a credit against its wage obligation for the difference – up to $5.575 per hour in Missouri – from the employee's tips. If the employee's tips are not sufficient to bring the employee's wages up to at least minimum wage, the employer must make up the difference.

But when can an employer take this "tip credit"? As discussed in a previous post **[https://www.mcmahonberger.com/news/the-tip-credit-conundrum-how-the-dols-proposed-tip-credit-amendments-will-pose-compliance-challenges-for-employers/]** this question has plagued employers of tipped employees for years. In December 2020, the Trump administration's DOL issued new rules to provide clarity, but it never took effect: the Biden administration delayed the Trump administration rule's effective date in order to craft an entirely different one. The comments[1] to the DOL's proposed rules yielded several important changes. Below is a summary of the DOL's final tip credit regulations.

When can a tip credit be taken?

Employers can take the tip credit when the employee performs work that is "part of the employee's tipped occupation." The rules identify two categories of work that qualify: (1) work that produces tips; and (2) work that directly supports the tip-producing work, ***if*** the directly supporting work is ***not*** performed for a substantial amount of time.

"Work that produces tips"

The first category is straightforward. It is defined as "all aspects of service to customers" and involves services provided by an employee for which the employee receives tips. Common examples provided by the rules are servers providing table service, taking orders, and serving food and drink, bartenders making and serving drinks and talking to customers, and bussers assisting servers with their tip producing work and clearing tables.

"Work that directly supports the tip-producing work"

The second category is more challenging. What kind of work "directly supports" tip-producing work? The rules define it as "work…in preparation of or to otherwise assist tip-producing customer service work." The new rules offer only an "illustrative" and non-exhaustive list, some of which are summarized below.

Servers:

Directly supports tip producing work

- Dining room prep work like refilling salt & pepper shakers, ketchup bottles
- Rolling silverware
- Folding napkins
- Sweeping or vacuuming under tables *in the dining room area* (and presumably nowhere else)
- Setting and bussing tables

Does <u>not</u> qualify as tip-producing or directly supporting tip work

- Preparing food, including salads
- Cleaning the kitchen or bathrooms

Bussers:

Directly supports tip producing work

- Pre- and post-table service prep work – folding napkins & rolling silverware
- Stocking the busser station
- Vacuuming dining room
- Wiping down soda machines, ice dispensers, food warmers & other equipment *in the service alley* (and presumably nowhere else)

Does <u>not</u> qualify as tip-producing or directly supporting tip work

- Cleaning the kitchen or bathrooms

Bartenders:

Directly supports tip producing work

- Slicing & pitting fruit for drinks
- Wiping down the bar or tables in the bar area
- Cleaning bar glasses
- Arranging bottles in the bar
- Fetching liquor & supplies
- Vacuuming under tables *in the bar area* (and presumably nowhere else)
- Cleaning ice coolers and bar mats

Does <u>not</u> qualify as tip-producing or directly supporting tip work

- Cleaning the dining room or bathroom

The inclusion of these lists in the final rule was the DOL's response to numerous comments that the phrase "directly supports the tip-producing work" was vague, ambiguous, and lacking in guidance. Although the list provides some clarification, plenty of guesswork for employers remains.

Unfortunately, the lists do not reveal a clear rationale for what does and does not qualify as "directly supporting" tipped work. Why does sweeping the dining room floor "directly support" tip-producing work for servers but sweeping the bathroom floor does not? If "cleanliness" supports tip-production, is there any reason to think customers would tip for a clean dining

room but not for a clean bathroom? Why does “cleaning ice coolers and bar mats” – neither of which customers are likely to see – support tip-producing work for bartenders? How does wiping down soda machines, ice dispensers, and food warmers support tip-production for bussers?

Further, the inclusion of some activities in some lists, but not others, suggests they are “directly supporting” for some kinds of workers, but not others. For instance, would a server cleaning an ice cooler be engaged in work that directly supports tip-producing work? It is in the list for bartenders, but not servers. What about a server vacuuming some part of the dining room not directly under tables? Vacuuming the dining room generally is only in the busser list. Maybe the above examples do directly support tip-production for these workers; after all, the lists are just non-exhaustive illustrations. But the employer must guess at their peril.

Finally, ambiguity still abounds. Can a busser wipe down soda machines or ice dispensers anywhere or only “in the service alley”? Where exactly is the “service alley”? The rules say bartenders can wipe down the bar or tables “in the bar area” but categorically exclude cleaning “the dining room” from tip-supporting work for bartenders. In restaurants with bars, where exactly does the “bar area” end and the “dining room” begin? Adding to the confusion, the prior DOL rule specifically stated that a server who toasted bread or made coffee was engaged in tip-credit eligible work, but the new rules explicitly exclude “preparing food, including salads.” Must a server now be paid full minimum wage for toasting bread and brewing coffee?

Without any clear underlying rationale, the DOL’s illustrative but non-exhaustive and ambiguous lists of examples place the employer in the position of divining what the DOL or a court might later decide “supports” tip-producing work. An employer who guesses wrong faces significant consequences because if work does not produce tips or “directly support” tip production, it does not qualify for the tip-credit at all. Stated another way: the employer who guesses wrong will be liable for having failed to pay the employee minimum wage and be on the hook for liquidated (double) damages and the employees’ attorneys’ fees.

“Performed for a substantial amount of time”

But correctly categorizing the work as “directly supporting” tip-production is only half the battle. As explained above, the new rules state that a tip-credit can only be taken for “directly-supporting” work if it is not performed for a substantial amount of time. The new

rules define a “substantial amount of time” in two ways: (1) more than 20 percent of the hours in the workweek for which the employer has taken a tip credit; and (2) any continuous period of time exceeding 30 minutes. The 20 percent threshold is a codification of the DOL’s prior guidance on the “80/20 rule.” The 30-minute cap is a new restriction on the taking of the tip-credit which further complicates compliance.

As explained in our prior posting, the 80/20 rule has been the source of numerous lawsuits against restaurants and bars because it is exceptionally difficult for employers to monitor and accurately track “directly supportive” work. However, before the new rules, the employer could still average “directly supportive” work over all the hours in a workweek, regardless of how long on any particular day the employee performed it.

The new 30-minute cap now makes careful monitoring of employee tasks crucial to ensure that no “directly supporting” work lasts more than 30 minutes at a time. Any time spent on “directly supporting” work that lasts more than 30 minutes at a time now automatically becomes full-minimum-wage work for which the employer cannot take a tip credit. A policy which prohibits “directly supporting” work of more than 30 minutes will not dispense with the need for monitoring because that time must still be added to the calculation of whether all “directly supporting” work constitutes more than 20 percent of the time claimed for the tip-credit in a workweek.

Employers must monitor not only working time, but also non-working “idle” or “down time.” Buried in the DOL’s discussion of its final rule is a passage which makes clear that down-time is “directly supporting” work. As a consequence, down time counts toward the 20 percent cap for “directly supporting” work, and, ostensibly, the 30-minute cap for “directly supporting” work also applies. Restaurants and bars often have slow times during a day when there are few if any customers. All of the idle time of a tipped-employee during those periods must be tracked and added to the other “directly supporting” work when determining whether the 20 percent threshold is crossed. Further, it follows that any idle time of more than 30 minutes must also be paid at the full minimum wage. This will also be a significant issue for other employers of tipped employees like parking attendants, bellhops, and nail technicians who frequently have significant amounts of down-time between customers.

How to comply?

Given the requirements of the new rules, there is no simple mechanism for employer compliance save one: stop taking the tip credit entirely and pay tipped employees the full minimum wage. However, for many employers of tipped employees, that is not an option.

Those employers who wish to continue to take the tip credit would be well advised to consult with experienced wage and hour counsel on the potential impact of the new rule. Such a review would include a careful evaluation of the tasks their tipped employees perform and a determination of whether such tasks are tip-producing, directly supportive of tip production, or are ineligible for the tip credit. The schedules of tipped employees may also need to be adjusted in light of the rules' requirements. Policies may also need to be developed to prohibit tipped employees from performing certain kinds of work, and new documentation and reporting requirements created to obtain employee verification of the amount of tip-credit and non-tip-credit eligible work performed. Last, but not least, managers and supervisors should be trained in the DOL's new rules and appropriate monitoring practices implemented.

[1] The Missouri Restaurant Association – with assistance from McMahon Berger – submitted comments to the proposed rules, which yielded multiple changes in the final rule published. See https://www.federalregister.gov/documents/2021/10/29/2021-23446/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal

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Learn more about Rex Fennessey
Rex represents employers in all facets of labor and employment law. He is widely recognized in the field of wage and hour litigation, and has represented clients in numerous class action and collective action lawsuits. He defends employers against discrimination claims in Federal and State courts and before administrative agencies.