

# DOL Publishes Final Rule to Resurrect 80/20 Rule for Tipped Employees

By Daniel B. Boatright on October 29, 2021

On October 28, 2021, the U.S. Department of Labor (DOL) announced publication of a final “dual jobs” rule, which reverses course from a December 2020 final rule and resurrects the so-called “80/20 Rule” that governs how tipped employees must be paid under the Fair Labor Standards Act (FLSA). When the proposed rule was announced earlier this year, several stakeholders, including Littler’s Workplace Policy Institute (WPI), submitted detailed comments to the DOL explaining why they believed the latest version of the 80/20 Rule was ill-focused, inconsistent with the FLSA, and unworkable in practice. While some of those comments resulted in improvement to the final rule, the DOL elected to discount or disregard some of the key concerns identified.

The final rule becomes effective December 28, 2021, but may be subject to legal challenge before then. Below is a summary of the final rule and its implications.

## 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 advising 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 relied upon frequently until the early 2000s, when it was first published on the DOL’s website and became the focus of tip credit litigation.

In November 2018, the DOL reissued and adopted a nearly decade-old opinion letter (and later made corresponding changes to the Field Operations Handbook) stating that there was no limit on the amount of duties related to a tip-producing occupation that a tipped employee may perform, 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. The only quantitative limitation was that the tipped employee’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](http://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. 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.” On June 23, 2021, the DOL issued a notice of proposed rulemaking, and the October 28, 2021 final rule is the culmination of that separate rulemaking process.

### **The October 2021 80/20 Reboot**

In the October 28, 2021 final rule, the DOL has declared that a tipped employee’s work duties must be divided into three categories: (1) tip-producing work; (2) directly supporting work; and (3) work that is not part of a tipped occupation. According to the preamble to the final rule, this categorization of work duties is part of a “functional test to determine when a tipped employee is engaged in their tipped occupation because they are performing work of the tipped occupation, and therefore the employer may take a tip credit against its minimum wage obligations.”

Per the final rule, work is “tip-producing” (the first of the three categories) if it “provides service to customers for which tipped employees receive tips.” Work is “directly supporting” (the second category) if it “is performed in preparation of or to otherwise assist tip-producing customer service work.” Any duties that are neither tip-producing nor directly supporting are not part of the tipped occupation (the third category).

In adopting its “functional test,” the DOL expressly eschewed a fixed list of duties, and O\*Net as a source of those duties, purportedly because the functional test “allows for better flexibility and adaptability to categorize those duties than would a fixed list of tip-producing and directly supporting duties.”

Under the final rule, **any** time spent in the third category (tasks not part of the tipped occupation) must be compensated at full minimum wage (*i.e.*, no tip credit may be taken). The preamble expressly states that there is no *de minimis* exception for this category. Thus, according to the DOL, if a tipped employee spends 30 seconds tidying up a restroom, the employee is entitled to full minimum wage for that 30 seconds.

Time spent in the second category of “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 in the workweek for which the employer has taken a tip credit.

Importantly, the final rule does clarify some portions of the proposed rule that were ambiguous with respect to “substantial amount of time.” The final rule makes clear that the first 30 minutes of continuous “directly supporting” work may be compensated at a tip credit rate (subject to the 20% limit), but any time in excess of 30 minutes must be paid at full minimum wage. The final rule also clarifies that the 20% limitation refers only to hours for which the employer has taken a tip credit. For example, if a tipped employee works a total of 40 hours in a week, but 5 of those hours are paid at full minimum wage for whatever reason (*e.g.*, time worked in an untipped position, or “directly supporting” work in excess of 30 minutes), then the 20% calculation applies only to the 35 hours for which the employer took the tip credit. The employee could devote up to 7 hours (20% of 35 hours) to “directly supporting” duties during those 35 hours.

The preamble also makes clear that the 20% calculation need only be done once each workweek. This is an important recognition to avoid a never-ending cycle of recalculations. For example, if a tipped employee recorded 35 hours at a tip credit rate (and thus could perform up to 7 hours of “directly supporting” work), but the employer determined the employee actually devoted 8 hours to “directly supporting” work and converted 1 hour to full minimum wage pay to comply with the 20% cap, the analysis stops there. The employer is not required to perform another calculation using 34 hours of pay at the tip credit rate, only to find that the 7 hours of remaining “directly supporting” work now exceeds a new 20% cap (20% of 34 hours would permit only 6.8 hours of “directly supporting” work).

But the final rule still fails to appreciate the challenges of tracking and recording “directly supporting” work. The DOL noted the concern Littler’s WPI raised about tipped employees who quickly pivot among various work duties. But the DOL dismissed the concern on the “belief” that employers can simply assign “directly supporting” work only in blocks of scheduled time, and thus can ensure that such work is not performed for a substantial amount of time.

In response to comments by WPI and others, the DOL also attempted to provide more examples of duties that it deems to fall into each of the three categories. The final rule emphasizes that the examples are “illustrative” and “not exhaustive.” Although the final rule is somewhat of an improvement over the proposed rule, the final rule still leaves ambiguities and inconsistencies (discussed below), which will likely only be sorted out through litigation. The DOL otherwise defends its approach to categorization of duties by insisting that the “tip-producing” category is intended to be “broadly construed to logically include all activity within that category.”

The final rule contains examples for tipped employees employed in restaurants and hotels, nail salons, and valet parking. Below is a summary of the provisions related to restaurant servers, bussers, and bartenders. Those items identified with “(P)” appear only in the preamble, and thus are not part of the “law” to the same extent as those items that appear in the final rule itself. It remains to be seen whether any of the preamble-only items will be subject to challenge in future litigation.

	<b>Server</b>	<b>Busser</b>	<b>Bartender</b>
<b>Tip-producing</b>	<ul style="list-style-type: none"> <li>• Providing table service</li> <li>• Taking orders</li> <li>• Making recommendations</li> <li>• Serving food and drink</li> <li>• Walking to kitchen or bar to retrieve food or drink orders and deliver to table (P)</li> </ul>	<ul style="list-style-type: none"> <li>• Assisting with server tip-producing work</li> <li>• Filling water glasses</li> <li>• Clearing dishes from tables</li> <li>• Fetching and delivering items to and from tables</li> <li>• Bussing tables</li> <li>• Changing table linens</li> </ul>	<ul style="list-style-type: none"> <li>• Making and serving drinks</li> <li>• Talking to customers at bar</li> <li>• Serving food to customers at bar</li> <li>• Changing TV channel for customer (P)</li> </ul>

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| <ul style="list-style-type: none"><li>• Adding a garnish to a plate before serving (P)</li><li>• Toasting bread to accompany prepared eggs (P)</li><li>• Adding dressing to pre-made salads (P)</li><li>• Scooping ice cream onto pre-made dessert (P)</li><li>• Ladling pre-made soup (P)</li><li>• Assembling bread or chip baskets (P)</li><li>• Placing coffee in pot for brewing (P)</li><li>• Filling water and drink glasses (P)</li><li>• Verifying customer food allergies (P)</li><li>• Cleaning spill or dropped item at or adjacent to customer table (P)</li><li>• Processing credit card and cash payments (P)</li><li>• Setting a table while customers are seated (P)</li><li>• Removing plates, glasses, and silverware <b>during</b> meal service (P)</li><li>• Bringing highchair or coloring book for child (P)</li></ul> | <ul style="list-style-type: none"><li>• Setting tables (resetting tables between customers (P))</li></ul> |  |
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<p><b>Directly supporting</b></p>	<ul style="list-style-type: none"> <li>• Dining room prep work</li> <li>• Refilling shakers and ketchup bottles</li> <li>• Rolling silverware</li> <li>• Folding napkins</li> <li>• Sweeping or vacuuming under tables</li> <li>• Setting and bussing tables</li> <li>• Cleaning around beverage station (P)</li> </ul>	<ul style="list-style-type: none"> <li>• Pre- and post-table service prep work</li> <li>• Folding napkins</li> <li>• Rolling silverware</li> <li>• Stocking busser station</li> <li>• Vacuuming dining room</li> <li>• Wiping down soda machines, ice dispensers, food warmers, and other service alley equipment</li> </ul>	<ul style="list-style-type: none"> <li>• Slicing and pitting fruit for drinks</li> <li>• Wiping down bar</li> <li>• Wiping down tables in bar area</li> <li>• Cleaning bar glasses</li> <li>• Arranging bottles behind bar</li> <li>• Fetching liquor and supplies</li> <li>• Vacuuming under tables in bar area</li> <li>• Cleaning ice coolers and bar mats</li> <li>• Making drink mixes</li> <li>• Filling drink mix dispensers</li> </ul>
<p><b>Not part of tipped occupation</b></p>	<ul style="list-style-type: none"> <li>• Preparing food, including salads (<i>but see exceptions above in tip-producing category</i>)</li> <li>• Cleaning kitchen or bathrooms</li> </ul>	<ul style="list-style-type: none"> <li>• Cleaning kitchen or bathrooms</li> </ul>	<ul style="list-style-type: none"> <li>• Cleaning dining room or bathrooms</li> </ul>

Notably, according to the preamble, some of the items in the “directly supporting” category are elevated to the tip-producing category if performed in response to a specific customer request. For example, a bartender who retrieves a particular type of beer from the storeroom to satisfy a customer request is performing tip-producing work, but if the bartender simply retrieves beer to restock for future orders the work is only “directly supporting.” Similarly, a bartender who cleans bar glasses or implements to make a drink to fulfill a specific customer order is engaged in tip-producing work.

The final rule retains some inconsistencies from the proposed rule. For example, bussing and resetting tables is tip-producing work for a busser, but is only “directly supporting” work for a server. That said, the preamble states that setting a table for a present customer, and removing dinnerware while customers are present (“pre-bussing”) are examples of tip-producing work for a server.

One of the more curious positions the DOL takes involves food preparation. The preamble and final rule state that a tipped employee cannot perform **any** food preparation, and that includes making salads. However, the preamble states that “a server’s tip-producing table service may include some work performed in the kitchen.” The preamble lists the following food-related activities as tip-producing (and not merely “directly supporting”): adding dressing to pre-made salad; adding a garnish to the plate; toasting bread to accompany prepared eggs; ladling pre-made soup; scooping ice cream onto pre-made dessert; assembling bread and chip baskets; and placing coffee in pot for brewing. Although the DOL apparently seeks to draw a line between preparing food versus plating food that is already prepared, the line is blurry at best (as indicated by the toasting bread and brewing coffee examples).

The final rule clarifies that, for tipped employees who are in an occupation in which they both prepare and serve food, such as a counterperson or sushi chef, tip-producing work includes all food preparation and service work.

Although not mentioned in the final rule itself, the preamble also addresses two other ambiguities from the proposed rule. First, if a tipped-employee is multi-tasking, such as talking to a customer at the bar while organizing the bar, the tip-producing activity “trumps” such that the time is considered tip-producing. Second, the DOL takes the position that idle time while waiting for customer service activity is “directly supporting” work and is subject to the 30-minute and 20% limitations. Presumably, this means that unpaid rest breaks must also be included in the “directly supporting” category and subject to the 20% limit. Intermittent idle time throughout the course of the workday may very well present the biggest challenge for employers to accurately capture.

Finally, as an example of the flexibility of the functional test, the preamble states that “[i]f during the COVID-19 pandemic, a server receives tips from serving customers by taking their phone orders and providing them with carry-out meals, employers can properly categorize those tasks as tip-producing.” Although this example may be of limited usefulness in and of itself, it does underscore the evolving nature of tipped employment and the need for the law to be able to adapt accordingly.

## Takeaways

First and foremost, employers need to prepare for the effective date of the final rule on December 28, 2021. Although the final rule may be subject to legal challenge, there is no guarantee that any challenge will alter the rule in any meaningful way. So what does compliance look like?

Employers should focus tipped employees’ work on those activities that the DOL has found lead to tips. The chart above provides many examples in a restaurant setting, but in general tip-producing work means **work done for specific customers**. The final rule and preamble clearly explain that customer-related work does not necessarily have to be performed in the presence of the customer (e.g., adding a garnish to a plate in the kitchen), but the final rule is very much focused on customer-specific work.

Work that generally prepares employees to provide customer service falls into the “directly supporting” category and should be tracked carefully to maintain compliance with the 30-continuous-minute and 20% limitations.

Idle time will now be a critical part of the tipped employee pay equation. If an employee has more than 30 continuous minutes of idle time without engaging in tip-producing activity, the employee should be paid full minimum wage for the time in excess of 30 minutes AND the first 30 minutes should be included in the 20% analysis. Perhaps the most challenging aspect of this proposition is that, according to the DOL, any idle time, regardless of how long, now goes into the “directly supporting” category and is subject to the 20% limit. As noted above, intermittent idle time throughout the course of the workday would be very difficult to record accurately. That said, employers should be able to rely on the DOL’s view of multi-tasking (discussed above), such that any customer-focused activity, including keeping a watchful eye on customers who are not in immediate need of service or assisting other servers with running food to another table, ought to qualify as tip-producing work, even though the server is not actively engaged in service to the server’s own customers.

Employers will need to figure out some way to track “directly supporting” work time. The DOL makes it sound so easy – just assign “directly supporting” work in chunks of time and keep track of that. The DOL has basically said employers should not allow tipped employees to pivot back and forth between tip-producing and “directly supporting” work. Much easier said than done, but the bottom line is that employers will need to determine some means of compliance.

Employers should take steps to avoid performance of work by tipped employees in the third category that is neither tip-producing nor “directly supporting.” According to the DOL, any time in that category, no matter how small, must be paid at full minimum wage. There are approaches to methods and rates of pay that employers can implement to help minimize risk in this area. Employers are encouraged to consult with counsel to explore options.

Finally, employers 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.

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