Appeals Court Strikes Down Onerous 80/20/30 Tip Credit Rule: 7 Things Hospitality Employers Should Know About This Win

Insights
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A federal appeals court just delivered some good news to hospitality employers by blocking the Department of Labor's infamous 80/20/30 rule, providing immediate relief to employers around the country by vacating the regulations in question. The DOL's rule — which creates time-keeping and other compliance nightmares — applies to employers that take the tip credit toward their minimum wage obligation under federal wage and hour law. But the 5th U.S. Circuit Court of Appeals said the DOL's interpretation doesn't align with the Fair Labor Standards Act's text or the intent of Congress. The August 23 decision cites to the Supreme Court's recent blockbuster ruling that reined in federal agency power. What does the most recent ruling mean for hospitality employers? Here are the answers to your top seven questions about the 80/20/30 rule and what you should consider doing now.

1. What is the Tip Credit?

The FLSA allows employers to take a so-called "tip credit" and pay employees who traditionally receive tips – such as servers and bartenders – as little as $2.13 an hour, so long as they make at least the standard minimum wage ($7.25 an hour) when tips are factored in. The idea behind this practice is that these employees generally make the majority of their income through gratuities.

2. Who is Considered a Tipped Employee?

The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." That's it. There is no cumbersome analysis of how much time an employee spends performing one job duty or another. Whether an employee may be properly treated as a "tipped employee" is tied solely to their "occupation" and whether it is one in which the employee "regularly receives more than $30 month in tips."

3. What is the 80/20/30 Rule?

The DOL's Wage and Hour Division reinstated the infamous "80/20" Rule in December 2021, amending the tip provisions of the FLSA regarding when hospitality employers with tipped employees may take a tip credit and modifying the definition of work that is considered part of a tipped occupation. Under the 80/20/30 rule, employers lose the tip credit for the time spent

tipped occupation. Under the 80/20/30 rule, employers lose the tip credit for the time spent performing "directly supporting work" — which means side work like rolling silverware into napkins, cleaning and setting tables, and making coffee — that exceeds 20% of their total hours worked at the tipped rate.

The DOL also added a provision that raises more challenges for employers: an employer loses the tip credit for the time a tipped employee performs directly supporting work for a continuous period that exceeds 30 minutes. This is true even if the continuous time spent on this work amounts to less than 20% of the employee's total work for the week. You can read our detailed Insights about the DOL's 80/20/30 rule here and here.

4. Did the DOL Overstep?

Several restaurant industry groups sought to halt the rule on the grounds that it is "arbitrary, capricious, contrary to the FLSA, promulgated in violation of the Administrative Procedures Act, and a violation of separation of powers." A lower federal court ultimately sided with the DOL and denied the industry groups' request. Notably, that court decision relied on the *Chevron* doctrine, which required courts to defer to a federal agency's position on the law when a statute is open to interpretation.

Since then, however, the Supreme Court tossed out that standard and told judges they must interpret regulations without giving this heightened deference to the agencies' interpretation. This has enabled courts to strike down agency rules much more easily and has given employers a powerful tool to fight back against regulatory overreach. You can learn more about this landmark decision by visiting our Post-*Chevron* Employers' Resource Center.

The restaurant groups appealed the district court's ruling, and the 5th Circuit reviewed the DOL's 80/20/30 rule in light of the recent SCOTUS ruling and under the Administrative Procedures Act's "arbitrary and capricious" standard.

5. How Did the Appeals Court Rule?

The 5th Circuit struck down the DOL's 80/20/30 rule on August 23, finding no basis for the rule in the FLSA's text and arbitrary and capricious. Here are the appeals court's key finding:

- The FLSA is clear: an employer may claim the tip credit for any employee who — when "engaged in" their given occupation — customarily and regularly receives more than $30 a month in tips.
- The FLSA does not ask whether duties composing that given occupation are themselves each individually tip producing.
- The DOL's interpretation threatened to turn the $30 threshold requirement into a nullity by focusing instead on individual tasks.
- If a core duty of a server is bussing and setting up tables, the server is undoubtedly engaged in their occupation. It does not matter whether they are tipped or not for those duties.

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- This decision does not impact the DOL's "dual jobs" regulation.

"The Final Rule fails under the Administrative Procedure Act twice over," the 5th Circuit concluded. "Because the Final Rule is contrary to the Fair Labor Standards Act's clear statutory text, it is not in accordance with law. And because it imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious."

6. Who Does This Ruling Apply To?

The 5th Circuit vacated the rule, meaning they intend for their ruling to impact the regulation on a nationwide basis. Although other appeals courts may rule that the 5th Circuit did not have authority to impact the rule on a nationwide basis, that argument will have to be saved for another day. In short, employers nationwide now have a new tool to argue that the 80/20/30 rule is no longer in place. We expect cases making similar arguments and relying upon this decision to crop up in district courts around the country.

7. Does the Ruling Impact the "Dual Jobs" Regulation?

No. The 5th Circuit was clear on this point, stating "As a final point, in no way does our holding bear on the validity of the dual-jobs regulation, which is not challenged here."

What is a "dual job"? The example provided in the regulation is an employee who works both as a maintenance person and a server for a hotel and earns at least $30 in tips per month. This worker is only deemed a "tipped employee" during the time they work in the server position. So, the employer may not take the tip credit (and must directly pay the full minimum wage) for the hours the employee spends working in maintenance. According to the DOL, the employee in this example works in two different occupations for their employer – one as a tipped server, and one as an un-tipped maintenance person.

The dual jobs regulation focuses on "whether the employee performs tasks unrelated to his or her tipped occupation, not the amount of time spent on untipped tasks," the 5th Circuit said.

What Should You Do Now?

Consider taking these steps to reduce your risk:

- **Pay Minimum Wage:** Although there are no perfect solutions, and the law does not require this, paying the full minimum wage reduces your potential risk and can simplify your compliance strategy.
- **Evaluate Your Business:** For those employers who rely heavily on the tip credit, management of the process is key to avoiding compliance issues. Evaluate your business and consider the best practices and potential problem areas and put a process in to automatically manage the potential issue.

issue.

- **Conduct Regular Training:** Train managers on evolving rules relating to tipped employees.
- **Review State Law:** Many states have minimum wage rates that are higher than the federal level. Additionally, some states have different requirements relating specifically to tips – with some prohibiting use of the tip credit altogether – so always check state law before doing anything else.

Conclusion

If you have any doubt as to whether you are compliant with the applicable wage and hour rules, reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Hospitality Industry Team or in our Wage and Hour Practice Group. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information, as we will continue to monitor this situation and provide updates as appropriate.

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