

## The 80/20 Rule and Its Impact on the Restaurant Industry

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The restaurant industry is a major target of Fair Labor Standards Act collective and class action litigation. Employers are experiencing an increase in lawsuits related to the 80/20 “rule” for servers’ duties and how it affects the tip credit.

Under the FLSA, if a tipped employee performs two or more jobs, one that generates tips and one that does not generate tips, an employer may not take a tip credit for the non-tipped work and must pay the employee minimum wage. See 29 C.F.R. § 531.56(e). Tip-related job duties, such as “a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses,” do not constitute a dual job and the employee is not entitled to earn minimum wage for those tip-related duties. Accordingly, an employer may claim a tip credit for the tip-related duties, even though all of the duties do not produce tips, without violating the FLSA. Tip-related duties are called “side work.”

The side work rule is subject to two limitations. First, if the side work is not incidental to the employee’s tipped work, the employee must be paid minimum wage for that work. Incidental work could consist of, for example, a server rolling silverware, filling salt and pepper shakers, cleaning tables, and making coffee. Non-incidental work includes, for example, sweeping the parking lot, taking out trash, and dusting the restaurant, and this sort of work is subject to payment of minimum wage.

Second, if the side work, even though tip related, occupies more than 20 percent of the employee’s workweek, the employee must earn minimum wage for that work. This is known as the “80/20 rule.” Examples of side work for restaurant servers that fall under the 20 percent of the 80/20 Rule include, but are not limited to: filling bins with lettuce, tomatoes, condiments, and sauces; cutting lemons; setting up dishes and glassware at bar; slicing garnishes for the bar; lining baskets with wax paper for hamburgers; assembling stacks of sliced tomatoes, pickles, onions; breaking down sheets of prepared desserts into smaller pieces; stocking server stations with plates, glasses, silverware; rolling silverware; sweeping and mopping floors; stocking “to-go” containers; dusting window blinds and sills; cleaning and breaking down expeditor’s line, soup stations, and salad areas; taking out the garbage; breaking down and cleaning tea, coffee, and soda stations.

Interestingly, the 80/20 rule is not found in a binding regulation but, rather, is found in the U.S. Department of Labor’s (“DOL”) Field Operations Handbook. Jurisdictions are split as to whether an 80/20 rule violation is a valid FLSA cause of action.

The 8th and 7th Circuits have given the DOL's Field Operations Handbook deference and held that servers have a cause of action for wages under the 80/20 rule. However, that idea has been challenged by the District of Arizona, which rejected that the FLSA's regulations (rather than the Field Operations Handbook) provided that *all* "related" un-tipped work exceeding 20 percent must be paid at the minimum wage. Rather, the court found the server occupation "inherently includes side work" and thus the defendant employer was "entitled to take the tip credit for the entirety of the tipped server occupation" whether the duties being performed were actually being tipped or not.

Because of this split in the Circuits, restaurants should be aware of the 80/20 rule and whether it has been held a valid cause of action in their applicable jurisdiction. Restaurants in jurisdictions where the 80/20 rule is applicable should audit the duties performed by their servers and track how much time they spend on side work to determine that their pay practices are compliant with the FLSA.

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