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## U.S. Department of Labor Updates Its Guidance on “Side Work” and the FLSA’s Tip Credit

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Friday, February 15, 2019

As we previously shared in [this blog](#), the U.S. Department of Labor’s Wage and Hour Division (“WHD”) issued an [opinion letter](#) in November 2018 changing the Department’s position regarding whether and when an employer with tipped employees, such as a restaurant, can pay an employee a tipped wage less than the federal minimum wage.

The issue was whether an employer must pay a tipped employee the full minimum wage for time spent performing what the industry calls “side work”: tasks such as clearing tables or filling salt and pepper shakers that do not immediately generate tips.

The Department concluded that, under federal law, there is no limit on the amount of time a tipped employee can spend on side work while still receiving a tipped wage so long as the employee also performs the normal tip-generating activities of the role at or around the same time. The Department indicated that the opinion letter supersedes the Department’s prior guidance on the topic, contained in section 30d00(f) of the WHD Field Operations Handbook (“FOH”), and that “[a] revised FOH statement will be forthcoming.”

On February 15, 2019, the Department issued two new guidance documents reflecting the Department’s updated enforcement position:

- First, a [revised FOH section 30d00\(f\)](#) consistent with the November 2018 opinion letter now appears on WHD’s website.
- Second, Acting WHD Administrator Keith Sonderling issued [Field Assistance Bulletin No. 2019-2](#) explaining the reasons for the change in policy, including noting that the Department’s “prior interpretation created confusion for the public about whether” the law “requires certain, non-tipped duties to be excluded from the tip credit.” This bulletin instructs WHD’s staff to apply the revised FOH principles not only to work performed after the issuance of the opinion letter but also “in any open or new investigation concerning work performed **prior to** the issuance of WHD Opinion Letter FLSA2018-27 on November 8, 23018.” (Emphasis added.)

This new guidance finishes what the November 2018 opinion letter set in motion—removing the prior interpretation from the FOH, promulgating the current interpretation, and declaring that the current position applies both prospectively and retroactively.

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