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Department of Labor Says Employers Are Not Required to Pay Tipped Employees the Full Minimum Wage for Non-Tipped Activities (US)

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Under the Fair Labor Standards Act ("FLSA"), employers are required to pay non-exempt employees a minimum hourly wage of $7.25. However, employers with "tipped employees" are able to pay such employees a cash wage of $2.13 per hour and take a "tip credit" toward their minimum wage obligation to make up the difference between the cash wage and the federal minimum wage. Importantly, the FLSA differentiates between tipped employees who perform "dual tasks," such as incidental duties that do not produce tips, and employees who have a "dual job," meaning they are employed by the same employer to do both a tipped job and a non-tipped job. The U.S. Department of Labor's Wage and Hour Division ("WHD"), charged with enforcing the FLSA, recently changed its position on when employers must pay employees with "dual tasks" the full minimum wage for time spent on non-tipped activities.

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On November 8, 2018, WHD issued an opinion letter stating that employers are allowed to pay tipped employees a tipped wage less than the federal minimum wage for hours spent on non-tip-producing duties that are incidental to their main job. Previously, the WHD operated under an Obama administration mandate known as the "80/20" rule, which required employers to pay tipped workers the full minimum wage for time spent on side-work duties that do not result in tips (such as filling saltshakers and rolling silverware) when those duties make up at least 20 percent of the worker's weekly hours. WHD's Department's November 2018 opinion letter altered this policy, explaining that employers are not required to pay tipped employees minimum wage for hours spent on non-tip-generating work incidental to their main job.

On February 15, 2019, WHD issued two new guidance documents supporting the position outlined in the November 2018 opinion letter. First, it revised its internal Field Operations Handbook (at section 30d00(f)) and updated its website to be consistent with its new enforcement policy. In addition, it released Field Assistance Bulletin 2019-2, which explains WHD's reasons for the policy change, among them, that the previous policy created confusion regarding whether federal law requires certain related, non-tipped duties to be excluded from the tip credit. Further, the bulletin states that the new interpretation applies to investigations both prospectively and retroactively, meaning that the change could impact ongoing litigation between tipped workers and their employers.

WHD's new policy likely will provide more clarity for employers with tipped workers. However, it is important for these employers to remember that they are still prohibited from keeping tips received by their employees, regardless of whether the employer takes a tip credit under the FLSA. Further, employers are still required to make up the difference if an employee's tips combined with his or her direct (or cash) wages do not add up to the minimum hourly wage of $7.25 per hour. Finally, this policy clarification applies only to interpretations of the FLSA; state minimum wage laws may differ, so employers are encouraged to consult with local counsel to ensure that they are compliant with both federal and state wage payment laws.

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