

USDOL's Wage & Hour Division Issues Internal Guidance Regarding Elimination of the "80/20" Tip Credit Rule

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As confirmed in new Field Assistance Bulletin (FAB) No. 2019-2 (Feb. 15, 2019), "WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties." Reiterating the FLSA amendment passed by Congress last year, however, the FAB notes that regardless of whether an employer takes a tip credit, it may not keep tips received by its employees.

The Bulletin adds that WHD staff should apply the new guidance to all investigations on or after November 8, 2018, and that the DOL will follow the revised guidance in any open or new investigation concerning work prior to the issuance of the November 8, 2018 Opinion Letter. The FAB explains that the prior DOL guidance "created confusion" about what duties requires certain related non-tipped duties to be excluded from the tip credit, and now clarifies that the FLSA and its regulations allow employers to take a tip credit based on whether the employee's *job or occupation* is tipped, and not on whether a particular *duty* is tipped.

FAB No. 2019-2 reaffirms that the WHD will employ the following principles:

- Duties listed as examples in Section 531.56(e) of the Code of Federal Regulations, and duties listed as "core" or supplemental" for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET), will be considered tip-related duties (even though they might not directly generate a tip).
- An employer may take a tip credit for any time spent by the employee on such tip-related duties if they are performed contemporaneously with, or within a reasonable time before or after, direct customer-service duties.
- Employers may not take a tip credit only for time spent performing any tasks that are not contained in 29 CFR 531.56(e), or in the O*NET task list for the employee's tipped occupation. The WHD notes, however, that if the time spent on these duties is small enough, the *de minimis* rule may still apply.

The DOL's abandonment of the 80/20 Rule came as a great relief to restaurant and hospitality industry employers, who routinely struggled to comply with the confusing Rule. A full discussion of the tortured history of the 80/20 Rule may be found [here](#).

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