On June 21, 2021, the Department of Labor (DOL) proposed a new rule to restrict the amount of non-tip-producing work a tipped employee can perform when an employer is taking a tip credit. The proposed rule clarifies that if an employee performs work that directly supports tip-producing work for a substantial amount of time — at least 20 percent of the hours worked in a workweek or at least 30 continuous minutes — the worker must be paid the standard minimum wage. Duties that “directly support” tip-producing activity include: cleaning and setting tables, toasting bread, making coffee, occasionally washing dishes, rolling silverware, filling salt shakers, and other types of daily side work.

Under the Fair Labor Standards Act, employers can claim a tip credit by paying a tipped worker $2.13 per hour in direct wages as long as the worker’s total tips equal the standard minimum wage of $7.25.

The 80/20 rule has been instituted in various forms since 1988, but this will be the first time the regulation has undergone the regulatory notice-and-comment process. If the DOL adopts the regulation after the notice-and-comment process, the regulation may receive greater deference from federal courts.