On June 21, 2021, the U.S. Department of Labor (DOL) announced a new proposed rule related to when an employer may take a tip credit and pay a lower minimum wage to tipped employees performing so-called tipped and non-tipped duties. The proposed rule appeared in the Federal Register on June 23, 2021 and is open for public comment until August 23, 2021. The proposal shows employers the new road that President’s Biden’s administration is paving, which is a sharp turn away from the Trump administration’s approach.

The Fair Labors Standards Act (FLSA) allows employers to pay “tipped employees” a wage of at least $2.13 per hour and to count a portion of the tips as satisfying the
federal minimum wage obligation, known as the “tip credit.” The rules governing when an employer can take a tip credit for time spent on duties that do not directly and immediately generate tips has been the subject of subregulatory guidance for decades, which has evolved under various administrations. In 2018 and 2019, President Trump’s DOL rescinded prior guidance on the issue and issued new interpretive material. The DOL then incorporated that guidance into its December 30, 2020 Final Rule (the 2020 Tip Rule). However, President Biden’s administration delayed implementation of portions of the 2020 Tip Rule until December 31, 2021, including the “dual jobs” portion of the rule addressing application of the tip credit to time spent on tasks that do and do not directly and immediately generate tips.

In the Notice of Proposed Rulemaking (NPRM) published this week, the DOL now proposes withdrawing the “dual jobs” portion of the 2020 Tip Rule and replacing it with a starkly different regulatory standard more in line with how the DOL viewed the issue at various times in the past, including during the Obama years. Specifically, the DOL’s new proposal includes the following key changes and additions:

- **No “Related-Duties” Test**: Under the “related duties” test from the 2020 Tip Rule, employers could take a tip credit for time a tipped employee spent performing related, non-tipped duties, as long as the non-tipped duties were performed contemporaneously with or for a reasonable time immediately before or after tipped duties. The new NPRM would eliminate that test.

- **New Definition of “Tipped Occupation”**: The new proposed regulations would define what it means for an employee to be engaged in a “tipped occupation” for purposes of when an employer may take a tip credit. The proposed rule provides that an employee engages in a “tipped occupation” only when an employee performs work that either: (1) produces tips; or (2) directly supports the tip-producing work, if the non-tipped work is not performed for a substantial amount of time. The proposed regulation describes “tip-producing work” as work that generally requires “direct service to customers” and views work that “directly supports tip-producing work” as activity that does not itself generate tips, but assists a tipped employee to perform the work for which the employee receives tips. For example, the proposed regulations provide that a server’s “tip-producing work” includes waiting on tables, while “work that directly supports the server’s tip-producing work” includes cleaning the tables, folding napkins, preparing silverware, garnishing plates before serving the food, and sweeping under tables in the dining room. Work that is “not part of a server’s occupation” includes food preparation and cleaning bathrooms.

- **New 20% Limitation on Untipped Work**: The NPRM would codify the on-again, off-again 80/20 Rule for the first time. Thus, if a tipped employee spends more than 20% of the workweek performing work that “directly supports . . . tip-producing work[,]” the employer may not take a tip credit for any time that exceeds 20% of the workweek. Instead, the employer must pay the full minimum wage for that time. This standard appears to differ significantly from DOL’s earlier 80/20 concept, insofar as the earlier iteration of 80/20 would have denied the tip credit for *any* time spent on so-called untipped work if that activity exceeded 20% of the workweek. The current proposal, by contrast,
denies the tip credit for only the excess above 20%.

- **New 30 Minute Limitation on Untipped Work:** The NPRM would create a new 30-minute limitation on continuously-performed non-tipped, directly supporting work in order for an employer to take a tip credit. Specifically, if a tipped employee performs non-tipped, directly supporting work for a "continuous period of time that exceeds 30 minutes," the employer may not take a tip credit for any of that time. Instead, under those circumstances, the employer would need to pay the employee the full cash minimum wage for the entire block of time spent on the non-tipped work. Thus, an employer may be able to take a tip credit for a block of time a server performs directly supporting work, such as preparing tables for the next day at the end of a shift, but only if that time does not exceed 30 minutes.

The NPRM is a proposal to amend the tip credit regulations, not a binding standard. The DOL is accepting comments on this proposal until August 23, 2021. After the comment period closes, the DOL may issue a Final Rule, which may adopt the proposed language verbatim or modify the language in one or more significant ways. While the matter remains under consideration at DOL, employers with tipped employees should begin to consider what compliance with the proposed standard might look like. We are at least several months, and perhaps a year or more, away from the effective date of any Final Rule on this topic, and litigation regarding any Final Rule implementing the standard DOL now embraces seems likely. Watch our blog for updates on further developments.

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