On October 28, 2021, the U.S. Department of Labor (DOL) issued its Final Rule on tipped wages. As Presidential administrations have changed through the years, so too has the DOL’s view regarding the circumstances under which employers can pay tipped workers less than the federal minimum wage. [See this 2019 post for the immediately prior administration’s position.] In the latest iteration of DOL policy on this issue – which goes into effect on December 28, 2021 – the Biden administration comes out firmly on the side of tipped employees.

Although the Fair Labor Standards Act (FLSA) generally requires that employers pay workers a minimum wage of $7.25/hour (see 29 U.S.C. § 206(a)), the law permits employers of tipped employees to take a “tip credit,” only paying employees who customarily receive at least $30/month in tips from customers a cash wage as little
as $2.13/hour, as long as the employer ensures that the aggregate of cash wages paid directly by the employer plus tips paid to the worker by customers results in the tipped worker earning at least $7.25/hour (see 29 U.S.C. § 203(m)(2)(A)). However, the long-standing tip credit model presumes that tipped employees receive a steady flow of tips and spend nearly all of their working hours engaged in tip-generating labor, a presumption that does not always align with reality.

Recognizing that many tipped workers are tasked with time-consuming duties for which they are not tipped, under the Final Rule (also known as the “80/20 principle”), employers will be required to pay the full federal minimum wage of $7.25/hour to a tipped worker who spends more than 20% of the workweek on tasks not directly engaged in tip-producing work. For example, if a purportedly tipped worker spends more than 20% of their workweek on tasks such as cleaning, mopping, bookkeeping, or other duties that do not result in payment of tips from customers, the employer will be required to pay that employee at least $7.25/hour. This is true even if the non-tip-producing tasks “directly support[] work” that does produce tips. Furthermore, if an employee performs dual jobs for the same employer – one tipped and one non-tipped – only the hours in which the employee performs their tipped job are considered in the 80/20 analysis. For example, if an employee works 10 hours per week as a non-tipped maintenance worker and 30 hours per week as a tipped server, at least 80% of the 30 hours worked as a server must be spent performing tip-producing work in order for the employer to claim the tip credit for all 30 server hours, or else the employer will be required to pay the minimum wage for all hours worked.

In addition, and expanding the 80/20 principle beyond prior administration’s interpretation, the Final Rule requires employers to pay at least $7.25/hour to tipped workers once they spend more than thirty (30) minutes of uninterrupted time on side work that directly supports tip-producing activity but does not itself generate tips. For instance, even if an employee spends more than 80% of their workweek on tip-producing activity (and is thus properly treated as a tipped worker), if he or she is assigned to wipe down tables and fill salt shakers or vacuum floors for more than thirty (30) continuous minutes, the employer is required to pay the employee $7.25/hour for the time in excess of 30 minutes spent working on the ancillary, tip-supporting-but-not-generating activities. Likewise, if a tipped employee spends thirty (30) or more minutes waiting for a customer to come in, that excess idle time must be compensated at the rate of $7.25/hour, regardless of how the employee spends their time. Employers can avoid this obligation by ensuring that more than half of each working hour is spent on directly tip-earning activity, provided the employee spends at least 80% of the total workweek on tipped work, but as anyone who has operated a restaurant or retail store knows, this requires a level of planning and scheduling precision that is very difficult to achieve. (And if you are thinking that this Rule makes the regular rate calculation for overtime purposes more challenging than ever, you would be correct.)

Although the Final Rule has been applauded by those calling for fairer wages for tipped employees, employers of tipped employees understandably have concerns about the added complexity of timekeeping, scheduling, and exposure to class and collective actions for unpaid and underpaid wages it presents. This is especially true with respect to calculating wages (and overtime wages) during periods in which
an employee qualifies for the tip credit for 30 minutes but does not qualify for the tip
credit for the remaining 30 minutes of a single hour of work. One option is to move to
an hourly rate of pay and discontinue reliance on the tip credit altogether, in which
case employers would only be required to track, record, and pay for time worked as
they do other non-exempt workers. For those employers unwilling to scuttle the tip
credit, they are strongly encouraged to work with legal counsel to ensure they
schedule, track, and compensate hours worked properly, and comply with state or
local laws that may be more onerous than federal law.

© Copyright 2021 Squire Patton Boggs (US) LLP

National Law Review, Volume XI, Number 305

Source URL: https://www.natlawreview.com/article/department-labor-updates-yet-
again-its-rules-paying-tipped-workers-us