



PROGRAM MATERIALS

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DOL Issues New Guidance Rescinding the 20% Rule: What This Means for Managing Tipped Employees

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DOL Issues New Guidance Rescinding the 20% Rule: What This Means for Managing Tipped Employees

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The Tip Credit

- ◆ Under the Fair Labor Standards Act (FLSA), a “tipped employee” may be paid a direct wage of \$2.13 per hour and an employer can take a “credit” for tips received to satisfy the minimum wage obligation.
- ◆ \$7.25 minimum wage; tip credit \$5.12.
- ◆ *Note that under state law, the direct wage to tipped employees may be higher.

Who are “Tipped Employees”

- ◆ A “tipped employee” is anyone who customarily and regularly receives at least \$30 per month in tips
- ◆ Common examples: servers, bartenders, bussers, runners
- ◆ If in a given workweek the direct cash wage and tips received do not equal at least the minimum wage, the employer must make up the difference.

Dual Jobs

- ◆ Tipped Employees may hold two separate jobs.
- ◆ For example, an employee might work as a cook for one shift and a server for a second shift.
- ◆ When an employee performs dual jobs, the \$2.13 tip credit rate applies only when the employee is engaged in the tipped occupation.



Dual Jobs

- ◆ The regulations distinguish workers performing two separate jobs from workers performing one job that contains separate duties, some which generate tips and some which do not, but are related to the tipped work.
 - A “waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses”
 - A “counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group.”

Emergence of the “80/20” or “20%” Rule

- ◆ Added to the DOL’s Field Operations Handbook (FOH) in 1988
 - “[W]here the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” FOH § 30d00(e).
 - FOH focused on dual tasks rather than dual jobs

Emergence of the “80/20” or “20%” Rule

- ◆ Confusion abounds
- ◆ What is tip-generating work and what is not??
 - Filling ketchup bottles, rolling silverware, or wiping down tables while waiting for the next customer to arrive?
 - Retrieving a lemon from the refrigerator and cutting a wedge for a customer?
 - Is it different if a server cuts lemons or fills a jar with packets of sweetener in anticipation of a customer arriving, versus doing so at the request of a customer?

Emergence of the “80/20” or “20%” Rule

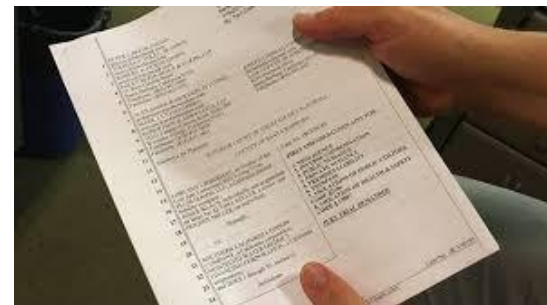
- ◆ DOL reconsiders position, issues opinion letter at tail-end of Bush administration (January 2009) clarifying that FOH was not intended to convert dual jobs regulation into a dual tasks regulation
- ◆ Obama administration withdraws the opinion letter shortly thereafter, doubling down on the 80/20 Rule

Emergence of the “80/20” or “20%” Rule

- ◆ *Fast v. Applebee’s International, Inc.*, 638 F.3d 872 (8th Cir. 2011)
 - DOL cites to the 80/20 Rule in an amicus brief
 - Eighth Circuit holds that FOH is entitled to deference with respect to 80/20 Rule

Emergence of the “80/20” or “20%” Rule

- ◆ Subsequent court decisions varied, but most courts deferred to the 20% Rule.
 - *Pellon v. Business Representation Int'l, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir., Sept. 3, 2008) (arguably rejecting 20% Rule)
- ◆ Lawsuits alleging minimum wage violations based on 80/20 Rule proliferate.
- ◆ Courts begin to focus on “related” vs. “unrelated” duties.



Emergence of the “80/20” or “20%” Rule

- ◆ *Marsh v. J Alexander’s, LLC*, 869 F.3d 1108 (9th Cir. 2017) – three-judge panel holds 80/20 Rule invalid
 - “Because the dual jobs regulation is concerned with when an employee has two jobs, not with differentiating between tasks within a job, the [field operations guidance’s] approach is inapposite and inconsistent with the dual jobs regulation.”

Emergence of the “80/20” or “20%” Rule

- ◆ *Marsh v. J Alexander’s, LLC*, 905 F.3d 610 (9th Cir. 2018) (*en banc*) – full court of appeals concurs with Eighth Circuit, concludes that 80/20 Rule is valid and enforceable
 - “[B]ecause the statute itself does not define “dual jobs,” the Secretary of Labor has the authority to enact regulations to do so. As such, faced with the statute’s ambiguity, the DOL’s 80/20 rule is a permissible interpretation of the dual jobs concept, entitled to deference[.]”

The Demise of the 80/20 Rule?

- ◆ November 8, 2018: DOL formally reissues 2009 opinion letter (now known as FLSA2018-27)
 - “We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met.”
 - “We also believe that guidance is necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act.”
- ◆ January 2019 Buffalo Wild Wings decision.

What are Now Considered Tip-Related Duties?

- ◆ Duties listed as “core” or “supplemental” in the Tasks section of the Details report in the Occupational Information Network (O*NET)
 - <https://www.onetonline.org/link/summary/35-3031.00>



What are Now Considered Tip-Related Duties?

- Take orders from patrons for food or beverages.
- Check with customers to ensure that they are enjoying their meals and take action to correct any problems.
- Check patrons' identification to ensure that they meet minimum age requirements for consumption of alcoholic beverages.
- Collect payments from customers.
- Write patrons' food orders on order slips, memorize orders, or enter orders into computers for transmittal to kitchen staff.
- Prepare checks that itemize and total meal costs and sales taxes.

What are Now Considered Tip-Related Duties?

- Present menus to patrons and answer questions about menu items, making recommendations upon request.
- Remove dishes and glasses from tables or counters and take them to kitchen for cleaning.
- Serve food or beverages to patrons, and prepare or serve specialty dishes at tables as required.
- **Clean tables or counters after patrons have finished dining.**
- **Prepare tables for meals, including setting up items such as linens, silverware, and glassware.**
- Explain how various menu items are prepared, describing ingredients and cooking methods.

What are Now Considered Tip-Related Duties?

- Assist host or hostess by answering phones to take reservations or to-go orders, and by greeting, seating, and thanking guests.
- Escort customers to their tables.
- **Perform cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or *checking and cleaning bathroom*.**
- Inform customers of daily specials.
- Prepare hot, cold, and mixed drinks for patrons, and chill bottles of wine.
- **Roll silverware, set up food stations, or set up dining areas to prepare for the next shift or for large parties.**

What are Now Considered Tip-Related Duties?

- **Stock service areas with supplies such as coffee, food, tableware, and linens.**
- Bring wine selections to tables with appropriate glasses, and pour the wines for customers.
- **Fill salt, pepper, sugar, cream, condiment, and napkin containers.**
- Describe and recommend wines to customers.
- **Perform food preparation duties such as preparing salads, appetizers, and cold dishes, portioning desserts, and brewing coffee.**
- Provide guests with information about local areas, including giving directions.
- **Garnish and decorate dishes in preparation for serving.**

What are Now Considered Tip-Related Duties?

“No limitation shall be placed on the amount of these duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.”

So What are NOT Related Duties?

- ◆ Any tasks *not* contained in the O*NET Task list
- ◆ However, such tasks may still be subject to the *de minimis* rule

Important Note

- ◆ Impact on pending cases related to work performed prior to the issuance of the opinion letter to be determined.
- ◆ Impact on courts' willingness to defer to prior FOH position to be determined.
- ◆ Opinion letter issued as an “official” ruling for purposes of the Portal to Portal Act.

Tips for Compliance

- ◆ Clearly delineate related and unrelated duties between tipped and non-tipped employees, respectively
- ◆ Ensure job description is consistent with core and supplemental tasks identified in O*NET
- ◆ Prohibit tipped workers from performing “side work” for extended periods of time (*i.e.* >1 hour) prior to or after business hours
- ◆ State law may be more restrictive; consult counsel if uncertain

Thank You



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