



THE FIFTH CIRCUIT STRIKES DOWN THE DOL'S FINAL TIP CREDIT RULE

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On August 23, the 5th U.S. Circuit Court of Appeals vacated the Department of Labor's (DOL) interpretation of the tip credit rule, an action which effectively voided the rule nationwide.

The DOL Final Rule

What is a tip credit? An employer claims a tip credit when it counts an employee's tips toward the employer's obligation to pay minimum wage. An employer can pay a worker \$2.13 per hour as opposed to the federal minimum wage of \$7.25 per hour with the expectation that the worker's tips will make up the difference. A tipped employee is one who customarily and regularly receives more than \$30 per month in tips.

The DOL's final rule differentiated a tipped employee's work into three categories: (1) tip producing work, like waiting on tables; (2) work that directly supports tip producing work, like setting tables, bussing tables, etc.; and (3) non-tip producing work, like preparing food or making coffee. The rule included two key points, the 80/20 guidance and the 30-minute requirement. The 80/20 guidance limited an employer to taking a tip credit only if the number of hours an employee spent on work that was not tip-producing was 20% or less of the worker's total hours in a given workweek. The 30-minute requirement limited tipped employees to those spending no more than 30 minutes of continuous time during a shift on work that directly supported tipped work.

The Fifth Circuit's Review of the DOL's Final Rule

The Restaurant Law Center and the Texas Restaurant Association brought a lawsuit in the U.S. District Court for the Western District of Texas seeking to permanently enjoin the enforcement of the DOL's final rule. The district court found that DOL's final rule was a permissible interpretation of the FLSA's tip credit provision.



On appeal, the Fifth Circuit analyzed the DOL's interpretation of what it means for a tipped worker to be "engaged in an occupation" and explained that the DOL's rule was so granular in dividing up an employee's component tasks that a single occupation could quickly break apart into many. The court found the final rule improperly restricted the definition of tipped employees to exclude those who idly stand by for 21% or more of their workweek or for 31 continuous minutes or more during a shift. The Fifth Circuit concluded the DOL's final rule was an arbitrary and capricious interpretation of the law because it drew an impermissible line between tip-producing and tip-supporting work.

What This Means for Employers

The DOL may seek review of the Fifth Circuit's decision by appeal to the U.S. Supreme Court. Further, the upcoming election may impact the DOL's response to the decision.

For now, employers should continue to ensure tipped employees earn at least minimum wage, including at least \$30 a month in tips. Employers should also review state law requirements for taking a tip credit against minimum wage for employees who customarily and regularly earn tips.

Related Practices

Labor and Employment

Practice Area Contact

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