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Client Alert

The U.S. Department of Labor Rescinds "80/20 Rule" for Tipped Employees under the Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA")

November 15, 2018 – On November 8, 2018, the U.S. Department of Labor ("DOL") issued a potentially groundbreaking Opinion Letter (FLSA2018-27, found here) rescinding the so-called "80/20 Rule" for tipped employees, which has been fodder for countless wage and hour lawsuits throughout the country over the years.

By way of background, under the FLSA, employers with tipped employees – most commonly in the restaurant and hospitality industries – are permitted to (i) pay tipped employees at certain threshold levels below minimum wage; and (ii) utilize a "tip credit" to make up the difference between that lower threshold salary and minimum wage.

Prior to the DOL's recent Opinion Letter, however, employers had been subject to the "80/20 Rule," which details that when "tipped employees" spend a substantial amount of time (*i.e.,* in excess of 20 percent of their workday) performing general preparation work or maintenance—as opposed to purely service related work, no tip credit may be taken for the time spent in such duties. *See* Wage and Hour Division, Field Operations Handbook § 30d00(f). Perhaps this concept is best illustrated by an example from the same Field Operations Handbook, which discussed "a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers." *Id*. Under the 80/20 Rule, if these non-tip-generating duties (commonly referred to as "side work") exceeded 20 percent of the employee's working time, the employer was not allowed to avail itself of the tip credit for that employee, and thus must pay the employee no less than the full minimum wage.

Perhaps not surprisingly, the application of this rule resulted in significant confusion for employers who utilized a "tip credit" as part of their routine compensation practices and in potential liability based on conflicting interpretations by courts across the country. Indeed, the recent Opinion Letter issued by the DOL even highlighted the differences in interpretation between one federal court in Missouri and another federal court in Florida, with the latter observing that "nearly every person employed in a tipped occupation could claim a cause of

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action against his employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008). Accordingly, the DOL observed that "[s]uch a situation benefits neither employees nor employers." As an apparent means of clarifying this confusion, the DOL decided to rescind the 80/20 Rule with immediate effect.

Thus, going forward, under the FLSA, there is no time "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." (Emphasis added) More importantly, the Opinion Letter expressly articulated several specific "principles" to assist employers in determining what duties can be considered part of a tipped occupation:

Duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET, found here) shall be considered directly related to the tip-producing duties of that occupation. 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.

Employers may not take a tip credit for time spent performing any tasks not contained in the O*NET task list. [The DOL] note[s], however, that some of the time spent by a tipped employee performing tasks that are not listed in O*NET may be subject to the *de minimis* rule contained in the Wage and Hour's general FLSA regulations at 29 C.F.R. § 785.47.[1]

The DOL also recognized "that there will be certain unique or newly emerging occupations that qualify as tipped occupations under the [FLSA], but for which there is no O*NET description." In those circumstances, "the duties usually and customarily performed by employees in that specific occupation shall be considered 'related duties' so long as they are consistent with the duties performed in similar O*NET occupations." Using the example of Teppanyaki Chefs,[2] the DOL noted that "the related duties would be those that are included in the tasks set out in O*NET for counter attendants in the restaurant industry." Thus, while some uncertainly will remain for these "unique or emerging occupations," most employers with tipped employees certainly can breathe a (modest) sigh of relief in light of the DOL's most recent Opinion Letter rescinding the 80/20 Rule.

The New York Labor Law ("NYLL")

As is often the case, however, state law standards can vary from those imposed under federal law. For example, despite the rescission of the 80/20 Rule under the FLSA, that same rule and accompanying concept remains in existence and subject to enforcement under the NYLL. As a

[1] "In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*."

[2] Chefs practicing a style of Japanese cuisine that utilizes an iron griddle to cook food, commonly occurring in the United States with patrons seated directly around the chef.

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result, New York employers availing themselves of the tip credit should still maintain policies and practices where it is clear that tipped employees are not to perform "side work" in excess of 20 percent of their time on any given shift, and employers should strive to separately track time for non-tip-work (for example, by limiting it to specific short periods of time before and/or after service related work or shifts) in order to avoid potential liability as a result of the continuing claims of violation and enforcement of the 80/20 Rule.

If it is determined by the DOL or a court that an employer improperly utilized a tip credit for an employee who performed more than 20 percent of "side work" on any given shift, the employer could be held liable for the tip credit amounts taken (for the entire shift) as well as liquidated damages and attorneys' fees and costs of legal representatives called upon to enforce service employees' rights. By way of example, the tip credit in 2019 shall be $5.00/hour; thus the amount at issue for an eight hour shift would be $40; liquidated damages equal to 100% of the wages due would amount to an additional $40, plus potential attorneys' fees and costs pursuant to NYLL. Quite naturally, based on the foregoing example, potential liability for New York employers can be substantial and New York employers in the affected industries must remain vigilant as to the application of prevailing New York law even if it runs contrary to federal law.

While some commentators anticipate that the New York Department of Labor will be swift to follow the DOL's lead with respect to the 80/20 Rule, this is not currently the case, and New York employers utilizing a tip credit system for compensating employees thus at present must continue to comply and strictly adhere to the 80/20 Rule.

Finally, we remind New York employers that the minimum wage and tip credit thresholds change and are subject to increase as of the last day of 2018 as follows:

New York City "Large" Employers (11 or More Employees)	**New York City "Small" Employers (10 or Fewer Employees)**	**Remainder of downstate (Nassau, Suffolk and Westchester counties)**	**Remainder of state (outside of New York City, Nassau, Suffolk and Westchester counties)**
Base: $10.00/hour Tip credit: $5.00 Total: $15.00	Base: $9.00/hour Tip credit: $4.50 Total: $13.50	Base: $8.00/hour Tip credit: $4.00 Total: $12.00	Base: $7.50/hour Tip credit $3.60 Total: $11.10

If you require any additional information concerning the 80/20 Rule or tipped employees in general under federal and/or state law, or about any other employment-related issues, please contact:

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