

Employment & Labor Alert



Department of Labor Issues Final Rule on Tipped Duties

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On October 29, 2021, the Department of Labor (“DOL”) published another [final rule](#) regarding wages for [tipped employees](#). Over the years, and through the varying administrations, the agency has adjusted its guidance on when an employer may count an employee’s tips towards the minimum wage obligation (referred to as taking a “tip credit”). This latest pronouncement reinstates, what is commonly referred to as the 80/20 rule, moves away from the DOL’s 2018-2019 tipped-duties guidance through [O*NET](#) and poses other limitations on the tip credit. These changes pose challenges for hospitality industry employers with respect to scheduling, timekeeping, and overtime calculations. This rule will take effect as of December 28, 2021, giving employers time to consult legal counsel to avoid costly class and collective action claims under the Fair Labor Standards Act of 1938 (“FLSA”)

Here is what you need to know about tip credits and the final rule changes:

- **The “tip credit” only applies for tipped employees.** Only employees who customarily and regularly make \$30/month in tips are “tipped employees”. Employers have notice obligations to tipped employees before taking a tip credit and may only apply the tip credit against tips actually received by the employee.
- **Tip credits only apply to tipped jobs.** When a tipped employee performs work that does not produce tips and does not perform work that “directly supports tip-producing work,” the tipped employee is engaged in a dual job (a tipped job and a non-tipped job). You must pay a tipped employee the full minimum wage when they are performing the non-tipped job.
- **Work that “directly supports tip-producing work” in a tipped job must be limited to 20%.** In any workweek where a tipped employee performs more than 20% of their time in the tipped job doing work that “directly supports tip-producing work,” the additional time must be paid at the full minimum wage.
- **Directly supporting tip-producing work cannot exceed 30-minute intervals.** Apart from the 80/20 rule, there is a time limit of 30 consecutive minutes for any work that “directly supports tip-producing work.” If the employee exceeds the time limit, the excess time must be paid at the full minimum wage.
- **Train supervisors with respect to what is “tip-producing work.”** The final rule amends the definition. Tip-producing work is “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.” The DOL clarifies that this is to be “defined broadly to include all aspects of the work that a tipped employee performs that provides service to customers and for which the employee receives tips.” Examples from the final rule can be found [here](#).
- **Train supervisors on what is “directly supporting work.”** “The final rule also amends the definition of ‘directly supporting work’ to explain that this category includes work that is performed by the tipped employee in preparation for or otherwise assists in the provision of tip-producing customer service work....” Examples from the final rule can be found [here](#).

GableGotwals’ [Employment & Labor team](#) is available to help employers review their current policies, procedures, and practices in light of this rule change. Please contact any member of the team for further assistance with your minimum wage obligations.

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