Department of Labor Limits Non-Tipped Work

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On October 28, 2021, the U.S. Department of Labor (DOL) published its Final Rule that limits the amount of time tipped employees can spend in non-tipped activities during periods that an employer utilizes the tip credit. The Rule clarifies that an employer may only take a tip credit for the hours when an employee is doing work that is tip-producing or engaged in tasks that directly support tip producing work.

An employer can take a tip credit only when the tipped employee is performing tip-producing work or when the tipped employee is performing work that directly supports tip-producing work as long as the tipped worker does not spend a substantial amount of time doing tip-supporting work. The Rule defines a substantial amount of time as more than 20% of the hours worked during the employee's workweek or a continuous period of time that exceeds 30 minutes.

The Final Rule becomes effective Dec. 28, 2021.

Background

Under the federal Fair Labor Standards Act, tipped employees are those who customarily and regularly receive more than $30 per month in tips. The FLSA permits employers to take a tip credit equal to the difference between the required tipped cash wage (of at least $2.13) and the federal minimum wage of $7.25 (for a maximum tip credit of $5.12).

The DOL has long recognized through its dual jobs regulation that tipped employees may perform related duties (commonly known as "sidework") that do not directly produce tips. In 1988, however, the DOL decided that, when a tipped employee spends a "substantial amount of time" performing such non-tipped sidework, no tip credit may be taken for that time. This meant the employee was entitled to the full federal minimum wage for that work, rather than the lower tipped wage. Instead of the usual notice-and-comment rulemaking, the DOL divined that 20% constituted a substantial amount of time. Over the last decade, there has been substantial litigation by tipped employees seeking backpay for work that did not involve serving customers, and

courts have invoked this DOL policy as the "80/20 rule," even though it was not an actual rule.

The Final Rule

The Rule creates three categories of work performed by tipped employees and then allows or disallows the tip credit depending on the category in which the work falls: "tip-producing work," "work that is not part of the tipped occupation," and "directly supporting work."

Tip-Producing" Work

The Rule defines tip-producing work to include "all aspects of the work performed by a tipped employee when they are providing service to customers" and for which they are receiving tips. An employer may take the tip credit for all time a tipped employee spends on such work.

The Rule contains a non-exhaustive list of examples of duties that typically are considered tip-producing for servers, bartenders, and bussers. For example, tip-producing duties for servers would include taking orders, making recommendations, and serving food and drink; attending to customer spills; processing payments; and bussing the table during the meal service.

Additionally, whether a duty is tip-producing or, instead, directly-supporting work (see below) depends on when the duty is performed. For example, rolling silverware is tip-producing when done for an existing customer but directly-supporting when waiting for customers to arrive.

Unrelated Work

For "work that is *not* part of the tipped occupation," an employer may not take the tip credit for any of the time spent performing such tasks. This would include, for example, cleaning bathrooms if a server.

Directly-Supporting Work

Directly-supporting work is work "either performed in preparation of or otherwise assists the tip-producing customer service work." According to the DOL, it "is the kind of work that is generally more foreseeable to employers and that employers are more likely to specifically assign." The Rule provides a non-exclusive list of duties performed during customer hours, including rolling silverware, setting tables, and stocking bussing stations; refilling condiments; sweeping or vacuuming the dining area; and setting and bussing tables.

An employer may take the tip credit for *directly-supporting* work only to the extent the work does not last for a "substantial amount of time." An amount of time becomes "substantial" when a tipped employee spends more than 20% of the time during a workweek, or more than 30 consecutive minutes during a shift,

in directly-supporting work. Notably, the 20% 30-minute limits apply only to the time that an employee has been paid at the tip credit rate. The Rule provides that if the employee's work exceeds either the 20% or 30-minute limit, the tip credit is unavailable only for the time that exceeds the 20% or 30 minutes, not the entire shift or workweek.

Idle or down time – the time spent waiting for customers – is considered directly-supporting work, which is subject to the 20% and 30-minute limits. The DOL explains that "the time is being spent in preparation of the customer service, and is therefore properly categorized as directly supporting work."

Conclusion

Employers utilizing the tip credit will need to evaluate their practices and policies to ensure compliance with the Final Rule. Employers also need to be cognizant of state laws that may disallow or further restrict the use of the tip credit. Contact your Vorys lawyer for questions about tip credit compliance under the Final Rule and state laws under which you operate.