

Publications

Department of Labor's Tip Credit Rule Remains Valid – For Now

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A district court recently held that the U.S. Department of Labor's (DOL) "Dual Jobs" Final Rule was a "permissible construction" of the Fair Labor Standards Act's (FLSA) tip credit requirements. In *Restaurant Law Center v. U.S. Department of Labor*, the U.S. district court for the Western District of Texas upheld the Final Rule and denied the Restaurant Law Center's request to enjoin the Final Rule's enforcement.

Background

On October 28, 2021, the DOL published its Final Rule that limits the amount of time tipped employees can spend doing related non-tipped activities during periods that an employer utilizes the tip credit.

The Final 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 became effective on December 28, 2021. Shortly thereafter, the Restaurant Law Center (RLC) filed suit against the DOL to enjoin the Rule from taking effect. The district court denied RLC's motion for preliminary injunction, and the RLC appealed to the Fifth Circuit. In April 2023, the Fifth Circuit reversed the district court's decision, finding that RLC sufficiently showed irreparable harm in terms of compliance costs and directed the district court to consider whether the injunction should be granted. While the preliminary injunction was on appeal, both the RLC and DOL moved for summary judgment. On July 5, 2023, the district court rendered its decision.

The Final Rule is upheld

The district court first determined that the FLSA's tip credit provisions were ambiguous, so the court must defer to the DOL's interpretation so long as it is not arbitrary and capricious. The court explained that "the Rule's explanation of 'engaged' in an 'occupation' that regularly receives tips, supports the statutory structure of the FLSA and is consistent with the tip-related modification of the term 'occupation.'" "This modification includes performance of work that is part of the tipped occupation, including tip-producing work that provides services to customers for which the employee receives tips, as well as work that directly supports tip-producing work, if it does not exceed a certain amount of time." The court also rejected the RLC's assertion that the Final Rule violated the "major questions" doctrine, which requires closer scrutiny by the courts "if an agency claims the power to make decisions of vast economic and political significance." The court found no such considerations here.

Ultimately, the court concluded that the "DOL's decision was permissible construction of the FLSA and is not arbitrary and capricious" and, therefore, upheld the Final Rule. Because the RLC had not shown that it would succeed on the merits of its case, the RLC's motion for a preliminary injunction was denied. The court further denied the RLC's motion for summary judgment and granted the DOL's motion for summary judgment.

What happens next?

The RLC will likely appeal the decision to the Fifth Circuit. Until the Fifth Circuit renders a decision, the Final Rule remains in effect. This means employers must continue to ensure their tipped employees do not spend any time performing non-tipped work and do not spend substantial amount of time doing tip-supporting work, meaning more than 20% of the hours worked during the workweek or a continuous period of time that exceeds 30 minutes. Contact your Vorys lawyer if you have questions about wage-hour compliance for tipped employees.