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# DOL Returns to Prior Dual Jobs Regulation for Tipped Employees

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In August 2024, we reported on the highly anticipated opinion in *Restaurant Law Center v. U.S. Department of Labor*, 115 F.4th 396 (5th Cir. 2024), in which the Fifth Circuit vacated the 2021 Dual Jobs Final Rule as arbitrary, capricious, and contrary to the text of the Fair Labor Standards Act (FLSA). In light of that decision, the U.S. Department of Labor (DOL) recently published a new Final Rule eliminating the 2021 Dual Jobs Final Rule—commonly referred to as the "80/20/30" rule—from the Code of Federal Regulations (CFR). This is a technical amendment that reinstates the DOL's original dual jobs regulation and restores the CFR to its pre-2021 language based on the 1967 dual jobs regulation.

## 2021 Dual Jobs Final Rule

The FLSA permits employers to pay a tipped employee $2.13 per hour (which is below the federal minimum hourly wage of $7.25) and take a "tip credit" for the difference between the employee's base hourly wage and the federal minimum wage, provided that the employee's tips make up the difference.

In December 2021, however, the DOL issued the 2021 Final Rule restricting when an employer could claim a tip credit under the FLSA. First, the Rule codified the DOL's position that in order to be eligible for the tip credit, a tipped employee could spend no more than 20% of his or her workweek on activities that did not directly generate tips. Second, the rule introduced a new limitation prohibiting a tipped employee from performing tip-supporting work for more than 30 minutes at any given time.

Fundamental to the 2021 Final Rule was its distinction between tip-producing work (e.g., a server waiting on tables), work that directly supports tip-producing work (e.g., a server setting and bussing tables), and work that does not support tip-producing work (e.g., a server cleaning the bathroom). An employer could not take a tip credit for time performing tasks "directly supporting" tipped work if the work (1) exceeded 20% of the employee's workweek, or (2) was performed for more than 30 consecutive minutes at any time. Further, an employer could *never* take a tip credit for time spent performing tasks that did not directly support tip-producing work.

## *Restaurant Law Center v. U.S. Department of Labor*

In *Restaurant Law Center*, the Fifth Circuit determined that the 2021 Final Rule constituted an unlawful exercise of administrative rulemaking authority under the Administrative Procedure Act. Specifically, the panel of judges held that the rule was (1) contrary to the text of the FLSA, which does not address whether duties composing a tipped occupation are *individually* tip-producing, and (2) arbitrary and capricious because it drew a line for application of the FLSA's tip credit "based on impermissible considerations and contrary to the statutory scheme enacted by Congress."

The Fifth Circuit's *Restaurant Law Center* decision arrived on the heels of the Supreme Court's decision in *Loper Bright Enterprises et al. v. Raimondo & Relentless, Inc.*, 144 S.Ct. 2244 (2024) which overruled the *Chevron* doctrine and instructed courts to exercise independent judgment when interpreting statutes rather than defer to an agency's interpretation of the law.

## The Fifth Circuit Clarifies Its Decision

In the aftermath of the *Restaurant Law Center* decision, the intended scope of the Fifth Circuit's vacatur remained unclear. Because the 2021 Final Rule had also withdrawn and replaced a 2020 Final Rule that was proposed during the original Trump administration but never went into effect, some questioned whether the Fifth Circuit had intended to resurrect the withdrawn 2020 Trump-era rule.

On October 29, 2024, the Fifth Circuit granted the DOL's petition for a panel rehearing and later issued a revised opinion clarifying that its decision vacated the 2021 Final Rule only insofar as it had modified the underlying 1967 dual jobs regulation. In other words, the Fifth Circuit confirmed that it intended only to reinstate the CFR's pre-2021 language, not to resurrect any other previously proposed rule.

## Looking Ahead

While this technical amendment may seem like a significant victory for employers with tipped employees, the practical long-term effect is unknown. Courts are still required to interpret the 1967 dual jobs regulation, and there is case law in and outside the Fifth Circuit upholding the 80/20 rule as it existed prior to the 2021 Final Rule. Nevertheless, the DOL's position that an employer may not take a tip credit when an employee spends more than 20% of his time during a given workweek on non-tipped producing activities remains subject to challenge, particularly in light of *Loper Bright*.

Additionally, President-elect Trump will resume office later this month. The new administration could propose a new regulation to replace the 1967 dual jobs regulation, such as something similar to its withdrawn 2020 Final Rule which would have permitted an employer to take a tip credit for time during which a tipped employee performed non-tipped duties "contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties." Should that occur, litigation in opposition is likely to follow. Furthermore, President-elect Trump previously expressed a desire to eliminate federal taxes on tips. If he follows through with that intention, wholesale changes through further DOL rulemaking or even an amendment to the FLSA could substantially alter the entire tipped-employee landscape. Thus, the final chapter on this issue has yet to be written.

If you have any questions about the topics discussed in this article, please contact **James P. Looby** at jlooby@vedderprice.com, **Michael D. Considine** at mconsidine@vedderprice.com or any Vedder Price attorney with whom you have worked.