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Department of Labor's Final Rule Changes the Regulation of Tipped Employees

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On December 30, 2020, the U.S. Department of Labor published its Final Rule related to tipped employees. The Final Rule revises the regulations governing the amount of time tipped employees can spend on untipped work, clarifies the untipped duties that a tipped employee may engage in, and establishes rules governing tip pooling. The Final Rule becomes effective on March 1, 2021.

As described below, the extent to which an individual establishment will be able to change their operations in light of the Final Rule will depend to some degree on whether the establishment takes a “tip credit” for its tipped employees. An employer is deemed to have taken a tip credit when it pays tipped employees less than the required minimum wage with the expectation that the difference will be made up by tips the employee receives. Employers who take a tip credit are required to pay any difference in the event that tipped employees’ wages still fall below the minimum wage once tips are included.

Untipped Work by Tipped Employees

Prior DOL guidance provides that, when an employer takes a tip credit, the amount of time that tipped employees can spend on work for which the employee would not customarily receive a tip (such as setting tables, washing dishes, or preparing food and drinks) is limited to 20% of their time at work. This is often referred to as the “80/20 Rule” (even though the DOL never formally adopted such a rule). The Final Rule codifies a recent DOL opinion letter and other DOL guidance eliminating the 80/20 limit and provides a new approach to untipped work by tipped employees.

Under the Final Rule, an employer taking a tip credit may now require tipped employees to perform untipped work that is related to their tipped work when that work is performed “contemporaneously with” or “for a reasonable time immediately before or after” the employee’s tipped duties. This means employers would not need to closely monitor precise amounts of time tipped employees spend on untipped work so long as the untipped work is permissible under the above restrictions.

There is no limit on the precise amount of time that tipped employees can spend on untipped tasks. The Final Rule explains that “an employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties. Rather, such duties are generally properly considered a part of the employee’s tipped occupation, as is consistent with the [FLSA].”

The Final Rule also provides guidance on what sort of tasks are considered to be “related to” the tipped work that tipped servers perform – commonly referred to as “sidework.” The Final Rule specifies that tipped servers may be asked to perform tasks including setting tables, toasting bread, making coffee, or, occasionally, washing dishes and glasses. Similarly, tipped counter attendants may be required to prepare his or her own short orders or take a turn as a short order cook for a group of counter attendants.

In addition to those examples, the Final Rule provides a general reference for employers to use in determining the full list of acceptable tasks that may be assigned to tipped workers. Now, an employer taking a tip credit may assign any untipped task listed in the description of the employee’s occupation in the Occupational Information Network (O*NET) (found at onetonline.org). Tasks that are included in O*NET on the list of duties performed by those in occupations similar to the tipped occupation at issue are also considered to be related to the tipped employment.

As was the case prior to the Final Rule, there are no restrictions on the tasks that an employer can assign employees to whom it pays the full minimum wage before tips are included.

Tip Pooling

The Final Rule also broadens the circumstances under which “tip pooling,” a system where an employer collects all tips received by tipped employees and distributes that money evenly to a group of employees, is permissible. Employers that do not take a tip credit are now permitted to create a tip-pooling system that distributes tips not only to tipped employees but also to untipped workers such as chefs and dishwashers. However, the Final Rule prohibits managers and supervisory employees from participating in a tip pool. Employers that take a tip credit and wish to establish a tip-pooling system are limited to arrangements that only include employees that customarily earn tips. Employers must ensure that all tips are kept by employees who receive them or distributed to a broader group of employees through a permissible tip pool.

Conclusion

It is important to note the Final Rule does not preempt state laws that impose stricter regulations on the employment of tipped employees. Employers will need to review both the Final Rule and the laws in states where they operate to ensure they are in full compliance. It is also worth noting that 19 states’ Attorneys General protested the Final Rule before the DOL, and it is possible a lawsuit may be filed seeking to void it. Contact your Vorys lawyer if you have questions about how the Final Rule may impact your operations.