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Pssst! Tips can still cause headaches when calculating wages owed

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The Fair Labor Standards Act (FLSA) allows "tipped" employees to be paid less than the minimum wage, provided the tips they receive at least make up for the difference between what the employer pays and the legal minimum wage. The Act allows employers to take a tip credit of $3.02 per hour toward the minimum wage. Thus, in Florida, where the minimum rate is now $10 per hour, tipped employees must receive a direct wage of at least $6.98. So far, so good. Now comes the hard part.

80/20 rule explained

Problems arise when tipped employees perform duties unrelated to or only marginally connected with their tipped duties. After all, servers don't spend the entire shift taking orders and delivering food and drinks to their assigned tables. Can the employer take the tip credit for the other duties? What if the server spends a lot of time doing things related to serving customers but not actually serving them?

The U.S. Department of Labor (DOL) has traditionally applied what it calls the 20% (or 80/20) rule: An employer can't take the tip credit for time an employee spent performing duties *unrelated* to the tipped occupation. It can take the credit, however, for work *related* to the tipped occupation, provided the employee didn't spend more than 20% of her working hours on the duties.

Fresh endorsement from 11th Circuit

So why am I writing about the 80/20 rule now? The U.S. 11th Circuit Court of Appeals (which has jurisdiction over Florida) recently rejected a now-dead 2018 DOL standard intended to replace the 20% rule and firmly planted it as the measure to apply for tipped workers.

The 11th Circuit identified related duties for which the employer can take the tip credit, provided they don't exceed 20% of the employee's work hours: setting tables, rolling silverware, toasting bread, making coffee, readying serving items, occasionally washing dishes or glasses, and sweeping under the table to keep the area clean. Janitorial work, regular dishwashing, and food prep are out.

Although the guidance helps, the 11th Circuit emphasized it's the employer's duty to keep track of the employee's wages, hours, and conditions of employment. In other words, the employer has the burden to (1) prove the amount of time the tipped employee spent on various tasks or (2) at least reasonably refute the individual's claims.

Practically speaking, short of following tipped workers around with stopwatches and clipboards, employers will remain susceptible to claims they failed to pay the minimum wage because an individual tipped worker spent too much time on tip-related tasks. *Rafferty v. Denny's, Inc.*

Preventing abuse of 20% rule

None of the options for controlling abuse of the 20% rule is perfect:

- You could remove all tip-related duties and delegate them to employees who receive the full minimum wage. But the downside could be leaving tipped employees with downtime for which you are paying.
- When performing tip-related tasks, tipped employees could use an app that requires them to "clock in and clock out." The system would be dependent, however, on their diligence in accounting for the time.
- You could pay employees the full minimum wage directly, eliminating the tip credit issue entirely, but the approach obviously would add expense and could result in lower total compensation for the workers.
- Or, you can pay tipped employees the full minimum wage for, say, two hours a shift to

cover any tip-related work they might perform during the stint.

Stay tuned

For the time being, the 20% rule is the law of the land in Florida, but the DOL recently issued a notice of proposed rulemaking. The proposed regulation reaffirms the rule but with a wrinkle: Tip-related work would be limited to (1) less than 20% of the employee's hours for the week and (2) no more than 30 continuous minutes. Pass the acetaminophen.

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