Lawyer Insights

Texas federal court upholds DOL rule attacking FLSA tip credit

By Christopher Pardo, Katherine Sandberg and Keenan Judge
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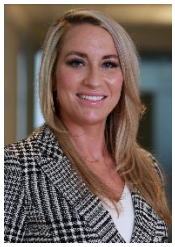


On July 6, 2023, the U.S. District Court for the Western District of Texas issued a decision in Restaurant Law Center, et al. v. U.S. Dep't of Labor that affirmed the validity of a recently promulgated Department of Labor, or DOL, final rule designed to regulate when employers are entitled to take a tip credit to satisfy a portion of tipped employees' wages. The final rule, issued on October 29, 2021, and known as the "Dual Jobs" or "80-20-30" rule, imposes new burdens that lawyers advising employers whose operations include tipped employees should be aware of to ensure their practices comply with the rule.

By way of background, the Fair Labor Standards Act, or FLSA, permits employers to satisfy a portion of their minimum wage obligations (the current federal minimum wage is $7.25 per hour) to tipped employees by allocating a tip credit toward the minimum wage. Accordingly, employers may lawfully pay tipped employees an hourly rate as low as $2.13 per hour as long as the employee's tips make up the difference.

The DOL's 80-20-30 rule, however, seeks to limit the amount of time employers may require tipped employees to perform duties that do not directly produce tips but merely support the employees' tip-producing activities. The context of an employee's role determines what constitutes tip-supporting, as opposed to tip-producing work, but relatively straightforward examples of tip-supporting activities might include a server refilling salt and pepper shakers, rolling silverware, or setting tables. The DOL rule provides that tipped employees may only spend 20% of their time on tip-supporting work, and it further imposes a 30-minute limit on the amount of continuous time a tipped employee may spend performing tip-supporting activities during a single shift.

Shortly before the final rule went into effect, in December 2021, the Restaurant Law Center and the Texas Restaurant Association filed a lawsuit in the U.S. District Court for the Western District of Texas, seeking to enjoin the DOL from enforcing the 80-20-30 rule. The district court originally declined to issue the requested injunction in February 2022, but the U.S. Court of Appeals for the 5th Circuit reversed the court's opinion in May 2023 and remanded the case for further consideration.

On remand, the district court analyzed the 80-20-30 rule under the two-step framework established by the U.S. Supreme Court in Chevron, USA, Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984). Applying the familiar Chevron framework, the district court first held that the DOL possesses congressional authority to implement regulations under the FLSA. The court additionally determined that the definition of "tipped employee" included in the FLSA is ambiguous. The FLSA defines a "tipped employee" as one who is "engaged in an occupation in which he customarily and regularly receives more

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than $30 per month in tips." The district court reasoned that this definition is ambiguous because the statute does not define "engaged in" or "occupation."

The court determined the DOL's 80-20-30 rule provided reasonable interpretations of these ambiguous terms that were neither arbitrary nor capricious. In so doing, the court explained that the DOL rule's explanation of the ambiguous terms "supports the statutory structure of the FLSA and is consistent with the tip-related modification of the term 'occupation.'" The court went on to clarify that this modification "includes performance of work that is part of the tipped occupation, including tip-producing work that provides service 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 Restaurant Law Center and the Texas Restaurant Association filed a notice of appeal to the U.S. Court of Appeals for the 5th Circuit on August 3, 2023, and the appeal is pending. Additionally, the U.S. Supreme Court has indicated that it will be considering in its upcoming term whether Chevron should be overruled or modified. Any such modification would alter the standard governing judicial deference to administrative agencies' authority and could potentially impact future decisions regarding the validity of the DOL's 80-20-30 rule.

For the time being, however, the DOL's 80-20-30 rule remains valid and in effect. The rule poses a potentially significant challenge to employers with tipped employees amidst an employment environment that already consists of high labor costs and frequent legal developments. Specifically, the DOL regulation forces employers to make a choice between (1) developing and implementing practices to monitor employees' activities with a reasonable degree of precision; or (2) paying those that qualify as tipped employees the applicable minimum wage without taking a tip credit. Both of these options may be highly burdensome and/or costly for employers to implement.

Legal counsel should work closely with employers who choose to satisfy applicable minimum wage requirements with earned tips to assess whether the employer's current practices comport with the requirements imposed by the 80-20-30 rule. In some cases, employers may need to rework existing practices or develop and implement entirely new processes to ensure compliance. The failure to take proper preventive action could result in an employer being subject to investigation by the DOL, administrative penalties, and/or costly wage and hour litigation.

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