



Restaurant Industry Alert: DOL Publishes Final Rule for Tipped Employees

November 24, 2021

On October 29, 2021, the U.S. Department of Labor (DOL) published its Final Rule related to tipped employees. It is effective December 28, 2021. DOL had issued a Notice of Proposed Rulemaking (NPRM) on June 21, 2021, proposing limits on the tip credit employers can take during workweeks when tipped employees perform work that directly supports tipped work but does not itself produce tips. (See our prior [Alert](#) discussing the NPRM.)

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The Final Rule defines “directly supporting work” as “work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work.” An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing but directly supports tip-producing work, so long as an employee does not perform that work for a substantial period of time.

Employees have performed directly supporting work for a substantial amount of time if:

1. the directly supporting work exceeds 20 percent of the hours in a workweek for which the employer has taken a tip credit (80/20 rule); or
2. for any continuous period of time the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period exceeding 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent level.

Work that is not part of the tipped occupation is any work that does not provide service to customers for which a tipped employee receives tips and does not directly support tip-producing work. If a tipped

employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time.

Employers' Bottom Line

Employers should anticipate increased litigation and DOL enforcement as consequences of this Final Rule. Employers using the tip credit should implement procedures to help monitor, schedule, and limit non-tipped work by tipped employees and ensure directly supporting work does not exceed the 80/20 rule or 30 co