

Legal Compliance Strategy for Tipped Employees: 80/20 Rule, Tip Shares, Tip Pools and Minimum Wage

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80/20 Rule

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- First appeared in DOL Field Operations Handbook 1988.
- Limited the amount of time tipped employees could spend performing tasks related to their allegedly tip-generating duties while maintaining the tip credit.
- If employee spent >20% of time in non-tip generating duties, then employers were required to pay them the full minimum wage and not take a tip credit.

80/20 Rule

- In December 2020, the DOL issued the Tip Regulations Final Rule seeking to eliminate the 80/20 Rule.
 - Replaced the strict 20% limit with a “reasonable time” standard.
 - Tip credit could be taken for related non-tipped generating duties contemporaneously performed (running side work) with or within a reasonable time before or after the tip duties (starting and ending side work).
- Biden DOL then twice delays the Rule and proposed new Rule.
- Resurrects the 80/20 Rule with some changes:
 - Changes “related, but non-tip generating duties” to “work that directly support tip-producing work”
 - Adds 30-minute limitations on the continuous performance of “work that directly support tip-producing work”
- Comments to proposed Rule due by August 23, 2021

80/20 Rule

- Let's Discuss...
 - What does 80/20 litigation look like?
 - Practical tips to ensure you stay in compliance

Tip Pooling/Sharing

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- Tip Pooling- collection of tips from tipped staff, which is put into a “pool” and distributed to a larger group of employees regardless of foot traffic, party size or total amount of guests
- Tip Sharing (or “Tipping-out”)- involves taking a percentage of the tips from a tip earner and giving it to supporting staff

Tip Pooling/Sharing

- Let's Discuss...
 - Issues that can destroy the tip credit
 - Management keeping any part of the tips no matter the reason
 - Including non-tipped employees or normally tipped employees not performing tipped employee duties
 - Examples of where employers got it wrong with respect to tip pooling/sharing

Minimum Wage and OT Issue Spotting

Calculating Overtime

- Formula for overtime for tipped employees:
 - Minimum wage x 1.5
 - Then, subtract the tip credit to get the general hourly overtime pay rate
 - Determine the number of hours of overtime worked
 - Multiply the number of hours of overtime by the employee's general hourly overtime pay rate
- Example:
 - FL minimum wage ($\$8.65$) x 1.5 = $\$12.97$
 - Minus the tip credit ($\$3.02$)= $\$9.95$
 - Assume employee worked 50 hours in the week, for 10 hours of overtime
 - $10 \times \$9.95 = \99.50

Other Wage and Hour Issues

- Issues the DOL frequently sees:
 - Walkouts
 - Deductions
 - Uniforms, Breakage, missing silverware, wine keys, etc.
 - Drawer shortages
 - Service Charges and Sales Tax
 - Bonuses

Thank you. Questions?