

DOL's New Dual Jobs Regulation Goes Into Effect

By Kevin D. Johnson

Introduction

On December 28, 2021, the Department of Labor's new "dual-jobs" regulation governing tipped employees went into effect. This new regulation affects the ability of employers to assign sidework to tipped employees when the employer is taking a tip credit.

Background

The dual-jobs regulation has long prohibited employers from applying the tip credit to work by an employee in an occupation that does not customarily involve tipped work. In establishing that principle, earlier versions of the regulation distinguished a situation in which a waiter also works as a maintenance man (a true "dual jobs" situation) from a situation in which a waitress spends "part of her time" engaged in "related duties" such as setting tables, making coffee, or "occasionally" washing dishes and glasses.

From that language, DOL developed an interpretive principle commonly known as the "80/20 rule." Under this interpretation, an employer could not claim the tip credit when the employee spent more than 20% of his or her time in a workweek performing "related duties" that were not directed toward producing tips.

This interpretation has been extremely difficult to comply with because DOL has never previously provided a standard by which employers could determine which "related duties" were tip-producing and which were not. Plaintiffs' counsel and many courts have commonly assumed that all sidework duties could be equated with "non-tip-producing related duties," and that by making that leap, the 80/20 rule could be deemed to restrict sidework to no more than 20% of a tipped employee's workweek. The problem with this assumption was that nothing in the statute or the regulation had ever expressly said that all sidework had to be considered non-tip-producing.

The New Rule

In the new rule, the DOL has finally attempted to tackle this problem. The new rule starts by breaking the work in a tipped occupation into two categories:

1. Work that produces tips; and
2. Work that directly supports the tip-producing work, **if the directly supporting work is not performed for a substantial amount of time.**

Tip-producing duties are defined as “all aspects of the service to customers for which the tipped employee receives tips.” Directly-supporting work is defined as “work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work.”

The rule then goes on to provide a much more extensive list of examples of tip-producing duties, followed by a corresponding set of examples of “directly supporting work.” Those examples are summarized in the chart below.

Occupation	Tip-producing duties	“Directly supporting” work
Server	Providing table service, such as taking orders making recommendations, and serving food or drink	Dining room prep work, such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables
Bartender	Making and serving drinks, talking to customers at the bar, and serving food to customers	Slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies, vacuuming under tables in the bar area, cleaning ice coolers and bar mats, making drink mixes, and filling dispensers with drink mixes
Service Bartender	Preparing drinks for table service	Slicing and pitting fruit for drinks, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies
Busser	Assisting servers with their tip-producing work for customers, such as table service, including filling water glasses, clearing dishes from tables, fetching and delivering items to and from tables, and bussing	Pre- and post-table-service prep work such as folding napkins and rolling silverware, stocking the busser station, and vacuuming the dining room, as well as wiping down soda machines, ice dispensers, food warmers, and other equipment in the service alley

	tables, including changing linens and setting tables	
Hotel housekeeper	Cleaning hotel rooms	Stocking the housekeeping cart
Bellhop	Assisting customers with their luggage	Rearranging the luggage storage area, maintaining clean lobbies and entrance areas of the hotel
Counterperson	Preparing and serving food	None specified

The rule makes clear that these examples are intended to be illustrative rather than exhaustive.

The rule then moves on to define the meaning of “substantial amount of time.” According to DOL, the tip credit cannot be applied to directly supporting work if the amount of directly supporting work exceeds one of these two conditions:

1. More than 20% of the hours in the workweek for which the employer plans to take a tip credit.
2. For any continuous period of time spent on directly-supporting duties that exceeds 30 minutes.

If either of those two conditions is breached, the employer cannot claim the tip credit for the amount of work that exceeds those limits. But the employer does not lose the ability to take the tip credit for the portion of that work that would have fallen within those limits.

Of course, the rule continues to provide that employers cannot take the tip credit at all for work that falls completely outside the tipped occupation. DOL defines this work as “work that does not provide service to customers for which the tipped employees receive tips, and does not directly support tip-producing work.”

In adopting this rule, the DOL has still failed to explain how an employer can determine which tasks its customers are actually tipping “for,” even though that is the touchstone of the entire rule. The DOL did note that the National Restaurant Association had argued that “all tasks in a full-service restaurant . . . produce tips.” DOL said that it “does not agree with that assertion,” but did not explain why.

Additional Clarifications

In the comments that accompany the rule, the DOL provided several interesting clarifications:

- “The Department’s long-standing position has been and continues to be that general food preparation, including salad assembly, is not part of the tipped occupation of a server. However, a server’s tip-producing table service may include some work performed in the kitchen for their customer akin to garnishing plates before they are taken out of the kitchen and served, such as toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made soup, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets.”
- “A busser’s tip-producing work includes assisting servers with their customer-service work that produces tips, such as providing table service, just as a barback’s tip-producing work includes assisting bartenders with their customer work that produces tips, such as making and serving drinks. As revised, the definition of tip-producing work clarifies that this category applies to work such as bussing tables performed by tipped employees like bussers who do not directly receive tips from customers, because this work provides service to customers for which the tipped employee (i.e., the busser) receives tips, even though they usually receive the tips from other tipped employees (i.e, the servers).
- A bartender who in the course of providing tip-producing service to customers wipes down the surface of the bar and tables in the bar area where customers are sitting and cleans bar glasses and implements used to make drinks for those customers is performing tip-producing work because she is performing service to customers for which the employee receives tips. If the bartender performs those same tasks before or after the restaurant is open, these same tasks would be directly supporting work because they are not performed as part of service to customers for which the tipped employee receives tips.
- Down time of a server who is waiting for his or her first table at the start of a shift is not tip-producing work, but is considered to be directly-supporting work.

Summary and Recommendations

In short, the dual-jobs regulation has been given a substantive refresh that includes new definitions, new terminology, and a much more extensive list of illustrations. There are many nuances to consider that may necessitate revising sidework policies and even the organization of tasks or labor in the front of the house.

At a minimum, employers should review their sidework policies with employment counsel who are familiar with the new regulation.

Employers may also wish to consider implementing a rule that all sidework or prep work performed when an employee has not yet started to serve customers should be paid at the full minimum wage. Likewise, employers may wish to have employees clock into a full-minimum-wage job code once their active customer service has ceased.

There may be a number of other possible adjustments, but they are beyond the scope of this article. Once again, employers should consult with qualified employment counsel.