

DOL Proposes 30-Minute Cap For Tipped-Wage Side Work

By Jon Steingart

Law360 (June 21, 2021, 12:07 PM EDT) -- The U.S. Department of Labor on Monday proposed scaling back the circumstances under which an employer may pay a lower minimum wage to workers who earn tips.



The DOL proposal would require paying standard minimum wage to workers who spend more than 30 minutes of uninterrupted time on side tasks that "directly support" tip-producing activity. (AP Photo/J. Scott Applewhite, File)

The DOL proposed regulations that would create a new standard that says anybody who spends more than 30 minutes of uninterrupted time on side work that "directly supports" tip-producing activity must be paid standard minimum wage, rather than the lower tipped minimum wage that's allowed for tipped workers.

The regulations would also codify the 80-20 rule, which requires standard minimum wage for a worker who spends more than 20% of their work time on side tasks that aren't directly related to customer service, like setting up before a shift or cleaning up afterward. Democratic presidential administrations over the last few decades have followed the rule as an enforcement guideline, although it has never carried the force of law as a regulation.

The two thresholds work in concert to ensure that a tipped employee who performs a "substantial" amount of untipped work will receive at least standard minimum wage for that period, the DOL said in its proposal.

"If a tipped employee engages in a substantial amount of such nontipped work, that work is no longer incidental to the tipped work," DOL Wage and Hour Division principal deputy administrator Jessica Looman said in the proposed rule. "Thus, the employee is no longer employed in a tipped occupation."

The proposed regulations are part of a notice of proposed rulemaking that would also withdraw a Trump-era plan to ditch the 80-20 rule and codify a "related duties" test.

The "related duties" test, which the DOL under President Joe Biden **froze** before it could take effect, would have let an employer pay tipped minimum wage for time spent on side work if it's done "contemporaneously with tipped duties, or for a reasonable time immediately before or after."

Monday's proposal doesn't address a related portion of the Trump-era rules that spells out what constitutes a willful violation of tipped-worker pay requirements, which would subject an employer to heightened penalties. The civil money penalty rules remain frozen through the end of 2021 while the DOL reevaluates them.

The **Fair Labor Standards Act** ordinarily lets an employer pay a tipped worker as little as \$2.13 per hour as long as tips carry them to standard federal minimum wage, or \$7.25. Many states and local jurisdictions have enacted higher wage floors, and seven states require the same minimum wage for tipped and nontipped workers.

"Tipped workers are among those who continue to be hardest hit as we emerge from the pandemic, and the Wage and Hour Division continues to prioritize protecting these essential front-line workers," Looman said in an emailed statement. "This proposed rule provides more clarity and certainty for employers while better protecting workers. It helps ensure that tipped workers are treated with dignity and respect, and that they receive wages appropriate for the work they perform."

Amanda Fugazy, a partner and head of the labor and employment law group at Ellenoff Grossman & Schole LLP who represents businesses in wage and hour litigation, said restaurant owners as well as employees were battered by the pandemic.

"I think that what they are forgetting is that restaurateurs are among the hardest hit and that we have to figure out an equitable system moving forward," Fugazy said. "That system should involve employees being as flexible as possible in terms of the duties that they can be assigned."

Fugazy wondered whether any job duties that the DOL has previously considered core to a tipped worker's position would be excluded from the proposed time limits. She noted that the DOL has in the past used its Occupational Information Network database to provide guideposts for what counts as tip-producing duties.

O*NET, as it's better known, is a career exploration service that lists characteristics of a wide variety of positions.

Lou Pechman, a worker-side attorney with Pechman Law Group PLLC who specializes in tip credit cases, said the 30-minute limit would enhance wage protections by ensuring that employers do not pay tipped minimum wage when tipped workers are not actually performing tipped work.

"It looks like the 80-20 rule was put on steroids," Pechman told Law360.

--Editing by Vincent Sherry and Haylee Pearl.

Update: This story has been updated with additional information and comments about the proposed rule.