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CLIENT ALERT: Fifth Circuit Strikes Down Department of Labor's "80/20" Tip Credit Rule

On August 23, 2024, the Fifth Circuit, in *Restaurant Law Center v. U.S. Department of Labor*, No. 23-50562 (Aug. 23, 2024), struck down the Department of Labor's ("DOL") 2021 rule restricting an employer's ability to claim tip credit when paying wages to tipped employees, ending the longstanding "80/20" rule.

Currently, under the Fair Labor Standards Act ("FLSA"), employers are required to pay employees minimum wage (currently $7.25/hour for most employees) but are allowed to take what is called a "tip credit" when paying the wages of "tipped employees." The FLSA defines "tipped employees" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Employers may count up to $5.12/hour of a tipped employee's tips against their total minimum wage obligation, resulting in those employees being paid a wage of $2.13/hour.

The tip credit has long been the subject of interpretation, but most recently in 2021, the DOL issued a final rule that codified earlier guidance known as the "80/20" rule ("Final Rule"). The Final Rule provides that "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation" and proceeds to identify three categories of work: (1) directly tip-producing work (i.e., table service), (2) directly supporting work (i.e., setting and bussing tables), and (3) work not tipped (i.e., preparing food). 29 C.F.R. § 531.56(f) (2021). The Final Rule specifies that, if more than 20% of an employee's work week is spent on "directly supporting" work, the employer cannot claim the tip credit for that excess. The Final Rule further specifies that if an employee spends more than 30 minutes on "directly supporting" work, the employer may not claim the tip credit for that excess.

In *Restaurant Law Center*, the Fifth Circuit—which was the first circuit court of appeals to consider the permissibility of the Final Rule under the

FLSA—found that, where the FLSA clearly states that an employer may claim the tip credit for any employee who, when *engaged in* his given occupation, customarily and regularly receives more than $30 a month in tips, the Final Rule is "contrary to the [FLSA's] clear statutory text [and] it is not in accordance with the law." The court explained that the Final Rule "imposes a line-drawing regime" between tip-producing and tip-supporting work, conflicting with the statutory scheme of the FLSA, "twist[ing]" the meaning of *being engaged* in an occupation in which the employee customarily and regularly earns tips, and "create[ing] a paradox that is not obviously capable of resolution." Thus, the Fifth Circuit held the Final Rule is "arbitrary and capricious."

This ruling allows employers to apply the tip credit without a strict obligation to monitor and track an employee's activities throughout a workday or week. The Fifth Circuit was able to avoid its previous, longstanding obligation to defer to federal agencies when it comes to interpreting federal law after the United States Supreme Court overruled the so-called *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (June 28, 2024). Thus, the Fifth Circuit's decision may serve as a basis for challenging past court rulings that relied on deference to DOL guidance. However, because the Fifth Circuit's ruling only addresses federal law, employers should assess state-law requirements for taking tip credit for employees who customarily and regularly earn tips.

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