Employment Law Daily Wrap Up, DOL NEWS—New FLSA opinion letters include an about-face on 80/20 tip rule, (Nov. 8, 2018)

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By Pamela Wolf, J.D.

The Department of Labor on November 8 released four new opinion letters on FLSA compliance. One of those letters put an end to the controversial so-called 80/20 tip rule governing the employer tip credit when employees perform both tipped and non-tipped job duties. The change will have a huge impact on the restaurant industry and currently ongoing litigation.

80/20 rule rolled back. Opinion Letter FLSA2018-27 reinstates virtually verbatim (the minimum wage amount has changed) a 2009 opinion letter addressing the definition of a "tipped employee" for purposes of the tip credit under which employers may pay tipped employees not less than $2.13 per hour and take a "tip credit" for the difference between paid wages and the federal minimum wage.

There has long been substantial confusion over the application of the tip credit when an employee has dual jobs or related duties that include both tipped and non-tipped work. The DOL has at times relied on guidance that would draw the line where an employee's non-tipped work exceeds 20 percent of working time—the so-called 80/20 rule.

The November 8, Opinion Letter nixes the 80/20 rule, as a matter of official Wage and Hour Division policy, and as an official ruling for purposes of the Portal-to-Portal Act, 29 C.F.R. 259.

Restaurant industry impact. Epstein Becker & Green attorney Paul DeCamp shared his insights on this important development. As he sees it, the DOL has a long history of imposing requirements on restaurants concerning tipped employment that have "no basis at all in the Fair Labor Standards Act." The DOL's 80/20 guidance was issued in 1988—one of many examples of the Department exceeding its authority, according to DeCamp. "While perhaps well intentioned, the Department's regulatory and subregulatory excesses have come under increasing scrutiny in recent years," he observed.

"What the 80/20 guidance purported to require was for employers to pay tipped employees full minimum wage, rather than the tipped minimum wage, for time spent on so-called side work—tasks like cleaning, preparing the service area, and the like—if the employees spend more than 20 percent of their working time on side work," DeCamp explained. "Not surprisingly, this guidance led to a huge wave of class actions against restaurant companies across the country."

Guidance ping-pong. Certainly to the chagrin of restaurant employers, the 80/20 rule has a storied history. "The DOL originally rescinded its 80/20 guidance in January of 2009 by issuing the same letter that the Department reissued today," DeCamp noted. "The incoming Obama Administration, however, withdrew that opinion letter just six weeks later." But the 2016 election saw a sharp drop-off in new filings for cases of this type, presumably because the plaintiffs' bar believed that the Trump Administration would reverse 80/20, DeCamp observed.

Courts get into the act. Late in 2017, a three-judge panel of the Ninth Circuit Court of Appeals originally rejected the 80/20 guidance as contrary to the FLSA, DeCamp pointed out. Subsequently, however, an 11-judge *en banc* panel of the same appeals court took a different view, upholding the 80/20 guidance by an 8-3 vote.

Following the Ninth Circuit's *en banc* ruling, and with the 80/20 guidance still on the books at the DOL, the Restaurant Law Center decided to take action, according to DeCamp. "We filed a lawsuit in federal court in Texas challenging 80/20 as unlawful," he said. "The government's response to our complaint is due next week."

Litigation impact. DeCamp said that the DOL's decision to reissue the 2009 opinion letter "eliminates the legal basis for the lawsuits, including numerous class actions, that are still working their way through the courts." Under the DOL's new guidance, "federal law imposes no quantitative limit on the amount of side work that tipped employees can perform at a tipped wage, so long as an employer satisfies all applicable requirements for taking a tip credit," DeCamp explained.

A few words for employers. DeCamp offered a few suggestions related to the change in guidance. "Employers will still want to exercise caution and common sense when it comes to tipped employees," he said. "If employees perform side work, it should be in connection with a shift in which the employees are also performing the core duties of their roles. Assigning a server to spend an entire shift, or a significant portion of a shift, in the kitchen washing dishes can still be problematic. But if employers use good judgment and assign side work in a manner consistent with how the industry has assigned side work for decades, the FLSA should no longer present a threat to that practice."

Other letters. The DOL also issued three other opinion letters. Those letters address:

- Application of section 7(k) to nonprofit, privately-owned volunteer fire departments;
- "Reasonable relationship" between salary paid and actual earnings; and
- Application of section 13(a)(3) to a pool management company.

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