

Servers Can Perform Side Work Without Risking The Tip Credit

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For years the hospitality industry has grappled with complying with a U.S. Department of Labor's (USDOL) enforcement position that a server cannot spend more than 20% of his or her shift performing non-tipped work.

The courts have largely enforced this so-called "20% Rule," but these decisions have not provided clear guidance on how to apply the 20% Rule, with federal appellate courts split on whether the rule is even legitimate. The confusion is now over.

On February 15, 2019, the USDOL issued a Field Assistance Bulletin to its offices directing them that it was abandoning the 20% Rule and revised the Field Operations Manual used by USDOL investigators. The 20% Rule was formally rescinded in an Opinion Letter issued on November 8, 2018 (FLSA2018-27), but the Field Assistance Bulletin provides guidance to its offices when they investigate matters involving tipped employees who perform non-tipped work.

The USDOL advised its offices that it will no longer prohibit employers from taking the tip credit based on the amount of time a tipped employee spends performing "non-tipped duties" (i.e., side work) that is related to a tipped occupation either during their shift or "a reasonable time immediately before or after" their shift.

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According to the Field Assistance Bulletin, tipped employees can perform the following non-tipped duties without losing the tip credit: clearing tables of dishes or glasses, cleaning tables, setting tables, rolling silverware, preparing salads, sweeping and mopping floors, vacuuming, and cleaning a “server station.”

This is a much needed win for the hospitality industry over a vague rule that threatened employers with substantial liability.