

## Ninth Circuit Decision: Employers of Tipped Employees May Want to More Closely Monitor Their Duties

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In a case closely monitored by the hospitality industry, the Ninth Circuit ruled in favor of servers and bartenders who alleged their employers were improperly claiming employees' tips as a credit toward the federal minimum wage. *Marsh v. J. Alexander's LLC*, No. 15-15791 (9th Cir. Sept. 18, 2018). The en banc court reversed a prior panel decision and rejected the employer's arguments that the regulations in question were not entitled to judicial deference. The decision allows hospitality workers to pursue claims that they were owed the full minimum wage for time spent performing non-tipped tasks unrelated to their tipped occupations, as well as tasks related to the tipped occupation if such tasks exceed 20 percent of the workweek.

As a practical matter, the decision increases the importance that employers of tipped employees establish policies that employees' related duties may not exceed 20 percent of their time and, to the extent possible, better track their employees' on-the-job tasks.

### Legal Background

The Fair Labor Standards Act ("FLSA") guarantees non-exempt workers a federal minimum wage of \$7.25 per hour. However, employers may pay a "tipped employee" a reduced hourly wage so long as that hourly wage, plus the tips received by the employee, equal or exceed the federal minimum wage.

In 1967, the Department of Labor ("DOL") promulgated several regulations addressing the treatment of tipped employees under the FLSA. One of these regulations attempts to delineate when an employee is employed in dual jobs, one tipped and one not. According to this dual jobs regulation, if a maintenance man at a hotel also serves as a waiter, he is employed in two occupations, and no tip credit may be taken for his time spent as a maintenance man. The regulation then distinguishes this example from an employee's performance of duties that relate to the tipped occupation but are not themselves directed at producing tips. For example, the regulation provides that a waitress who spends part of her time setting tables or toasting bread is still in a tipped occupation. According to the regulation, the employer may still take the tip credit for all of her time, even if some of her duties are not directed toward producing tips.

The DOL further interpreted this dual jobs regulation in its Field Operations Handbook ("FOH"), designed for use by DOL investigators and staff. The FOH interprets the dual jobs regulation to provide that if an employee spends in excess of 20 percent of the employee's time, which the FOH calls "substantial," performing tasks related to the tipped occupation but not directed toward producing tips, no tip credit may be taken for the time spent in those related duties. Furthermore, according to the FOH, no tip credit can be taken for any time an employee spent performing tasks unrelated to the tipped occupation.

### The case

The lead plaintiff in *Marsh* worked as a server at J. Alexander's, a restaurant in Phoenix. Though only employed as a server, the plaintiff alleged that he was actually working in multiple occupations—one tipped, and the others not—because he was required to complete tasks unrelated to his tipped occupation (e.g., cleaning restrooms), and to spend over 20 percent of his time on tasks related to his occupation that did not in and of themselves produce tips (e.g., brewing coffee). The plaintiff argued these were separate, untipped occupations, and his employer must pay him the full hourly minimum wage for this time.

The employer responded by challenging both the DOL's dual jobs regulation and the FOH interpretation, claiming that neither was entitled to judicial deference under the applicable standard.

The Ninth Circuit's framing of these issues gives a good indication that this case may not go well for employers. The court quotes President Roosevelt's declaration that, "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." *Citing* S. Rep. No. 93-690, at 4 (1974). The court describes what it perceives as abuses by employers and concludes that the DOL foreclosed employers' ability to abuse tipped employees through its promulgation of regulations and the FOH; a discussion of the potential benefits of tipped positions – in many cases, higher income to tipped employees and lower costs to customers – is omitted from the opinion.

Examining the dual jobs regulation first, the court concluded that the FLSA was "silent or ambiguous" with respect to the treatment of tipped employees who may be engaged in multiple occupations. Facing "a gap in the FLSA's coverage of dual job employees," the court held that the DOL reasonably interpreted the statute to ensure "that employees working in tipped and untipped occupations would not be shortchanged by their employers." According to the court, the DOL's dual jobs regulation was a permissible construction of the statute entitled to *Chevron* deference by the court.

Turning next to the FOH, the Ninth Circuit found the DOL's dual jobs regulation itself was also ambiguous. Although the regulation suggested that a person's occupation is tied to his or her duties, it provided little clarity on how to define a worker's "occupation" or how much time an employee could spend on duties merely "related to the tipped occupation" before the employee had effectively begun a second job. It also failed to clearly delineate between duties that were related to the tipped occupation versus duties that were not part of the tipped occupation.

The appeals court concluded that the DOL had issued the FOH to prevent employers from misusing the tip credit and withholding wages from dual job employees, such as those who are titled "servers" or "bartenders," but who "function in actuality as bussers, janitors, and chefs at least part of the time." According to the court, the FOH ensured that the tip remains "a gift to the server, as opposed to a cost-saving benefit to the employer." The court held that the FOH was entitled to *Auer* deference as it was consistent with the dual job regulations and decades of interpretative guidance from the DOL.

Finally, the court rejected the employer's argument that the 20 percent limitation put too great a burden on employers to track the minute-by-minute tasks of their employees. The court noted that employers could simply require workers to use separate time codes, particularly because most incidental tasks occurred at regular periods of the day, such as before or after a restaurant closes.

The plaintiff in *Marsh* can now proceed on the claim that he is entitled to the full hourly minimum wage for the substantial time he spent completing related but untipped tasks, defined as more than

20 percent of his workweek; and second, that he is entitled to the same for time he spent on unrelated tasks.

**What does *Marsh* mean for employers of tipped employees?**

The Ninth Circuit's opinion puts further pressure on the hospitality industry to closely evaluate the actual job duties for all employees where the employer is claiming the tip credit. The job title itself is not controlling, and significant ambiguity remains as to which duties count toward the 20 percent threshold and which duties fall wholly within the purview of a separate occupation. For example, although virtually all servers perform some light cleaning duties, a court applying *Marsh* could interpret the FOH as indicating that some of these duties, including cleaning bathrooms and washing windows, are in fact separate, non-tipped occupations. Employers are thus wise to evaluate applicable policies and all of the duties performed by tipped employees.

For further questions on this case and guidance on application of the rules governing the FLSA tip credit, please contact one of the members of the firm's Wage and Hour Practice Group listed below.