

Laura O'Donnell, Adam Sencenbaugh, Henson Adams in Labor Law Journal: 'Notes On: Night of the Living 20% Rule for Tipped Employees'

March 17, 2021 Laura O'Donnell, Adam Sencenbaugh, Henson Adams

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The so-called “20% Rule” refuses to go away.

In 2018, the Department of Labor (“DOL”) issued a revised opinion letter that abolished the 20% Rule and expanded employers’ ability to claim the tip credit. The 20% Rule had restricted an employer’s ability to claim a tip credit if a tipped employee performed duties that were not tip-producing for more than 20% of the employee’s work time. In practice, determining what tasks were tip-producing and attempting to monitor employee activities for compliance with this 20% cut-off proved challenging for most employers of tipped employees. In removing the 20% Rule, the DOL’s 2018 guidance provided that employers could take a tip credit for time a tipped employee spends on non-tipped duties, provided those duties are related to the tipped occupation and occur contemporaneously with the tipped occupation or a reasonably immediate time before or after. This guidance provided more certainty and was welcome relief for employers of tipped employees.

But the initial relief was short-lived. Since the DOL’s 2018 guidance, some federal courts have continued to apply the 20% Rule, reasoning that the 2018 guidance was not entitled to deference because it significantly conflicted with the longstanding 20% Rule issued by the DOL in guidance three decades earlier. These decisions only created more uncertainty.

Then, on December 22, 2020, the DOL formalized its 2018 guidance and rescinded the “20% Rule” regarding the tip credit through a new Final Rule that revises Fair Labor Standards Act (“FLSA”) regulations. By adopting this Final Rule through formal notice and comment rulemaking, if it goes into effect in its current form, courts should afford the DOL a higher level of deference regarding its revocation of the 20% Rule. This was supposed to be the end for the lingering 20% Rule, and employers again believed more certainty was imminent.

But not so fast. Now, the 20% Rule may survive as the new Biden administration and Congress revisit the Final Rule along with other midnight rules passed by the Trump administration. If the Final Rule is withdrawn, modified, or overturned, then the 20% Rule will likely live on.

Excerpted from *Labor Law Journal*. To read the full article, click on the PDF linked below:

[O'Donnell-Sencenbaugh-Adams-20%-Rule.PDF](#)