

Ninth Circuit Court: Employers taking the tip credit need to re-examine the extent of non-tipped duties to ensure compliance with the FLSA

The Ninth Circuit (en banc) recently ruled on a group of consolidated cases that may have an impact on how the company decides to pay its tipped employees going forward. You may have heard of this decision, as the ruling made mainstream news. If not, I wanted to bring this case to your attention to make sure you are covered.

The lead plaintiff (Marsh) in the main suit worked as a server for J. Alexander's. He alleged that he typically worked around 32 hours per week, but spent almost half of this time on tasks that did not produce tips. Because the employer required him to complete tasks unrelated to his tipped occupation, and to spend more than 20 percent of his time per week on tasks related to his occupation that did not produce tips, he alleged that, pursuant to the DOL's dual jobs regulation, he was a dual jobs employee working in multiple occupations. Thus, he contended, the restaurant was not entitled to continue paying him the tip-credit wage for time spent working in an untipped occupation, and the employer's use of the tip credit violated the FLSA's minimum-wage requirements. While the District Court originally sided with the restaurants, the Ninth Circuit reversed the District Court in favor of the employees.

As you know, the FLSA permits employers to take a tip credit for employees in tipped occupations. The tip credit offsets an employer's obligation to pay the hourly minimum wage. In this consolidated appeal, former servers and bartenders alleged that their employers abused the tip-credit provision by paying them the reduced tip-credit wage and treating them as tipped employees when they engaged in either (1) non-tipped tasks unrelated to serving or bartending; or (2) non-incident tasks related to serving or bartending in excess of 20 percent of the workweek.

As you might imagine, there was some confusion on who qualified as a dual-job employee, and the DOL issued several opinion letters that it summarized in the 1988 Field Operations Handbook for its wage and hour investigators. According to the



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handbook interpretation, employers may take a tip credit for time spent on duties related to the tipped occupation—even though such duties are not by themselves directed toward producing tips—provided they are incidental to the regular duties of the tipped employees and don't make up more than 20% of their work hours. The Ninth Circuit ruled that because the dual jobs regulation was ambiguous, the DOL's interpretive guidance in the handbook was entitled to deference.

What do you need to take from this case? The DOL's interpretive guidance is entitled to deference, so we need to ensure that we are following the guidelines therein with regards to tipped employees. First, employees working as a server and maintenance worker are in dual jobs, and the tip credit may only be taken for the server position. Second, the regulations permit employers to take the tip credit for time spent on "related duties" (up to 20%) of a server, even though those duties are not by themselves directed toward producing tips and those duties are incidental to their regular tipped duties. For example, duties related to the tipped occupation may include a server who does prep work or closing activities, rolls silverware and fills salt/pepper during restaurant hours.

Based on this more employee favorable ruling, the company should take a look at what you are having your tipped employees do in addition to serving guests and let me know if you think we need to change anything.

Be especially wary of tasks regularly assigned at the beginning and end of shifts when no customers are present. These tasks could quickly add up to the 20% depending on the time spent doing pre- and post- shift work (especially when combined with other non-tipped duties). Pay at least the minimum wage for work that is not related to server duties, such as cleaning restrooms. Keep careful track to avoid assigning servers to even service-related tasks that would total more than 20% of any workweek. This could be managed by adding certain programming in POS and training employees on special clock in procedures.