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U.S. Court of Appeals Throws Out and Simplifies Federal Tip Credit Rule

By Barry Y. Freeman & Danielle C. Young

For a generation, one of the most contested FLSA issues was when employers could pay subminimum wages to tipped employees. During Republican administrations, the U.S. Department of Labor issued business-friendly tip-credit regulations, allowing more "side work" at subminimum wage. During Democrat administrations, the DOL issued more worker-friendly regulations, limiting side work to 20% of the workweek and no more than 30 consecutive minutes. (An example of non-tipped side work is a restaurant server filling napkin holders or salt shakers. Another example is a hairstylist sweeping hair off the floor.) Side work is related to customer service, but generally, no tips are collected for it.

Last week, the U.S. Court of Appeals (5th Circuit) held both DOLs were wrong and barred any limit on tip credit for side work. The Court held both DOLs were engaging in policy-making regulations instead of regulations clarifying Congress's statutory intent. The Court held that the FLSA authorizes tip credit for all parts of tip-producing jobs, but not for jobs that don't produce tips. For example, a server can be paid subminimum wage for all server work, even for side work when there are no customers around. But if the server also works as a janitor cleaning bathrooms in the same restaurant, they have to be paid full minimum wage for all janitor work.

The 5th Circuit covers Texas, Mississippi, and Louisiana but invalidated the side work regulation nationwide. Absent a contrary decision from another Court of Appeals or reversal by the Supreme Court, the 5th Circuit ruling will likely apply nationwide. And if Trump defeats Harris, the DOL will probably drop its challenge to the 5th Circuit's decision. The decision is *Restaurant Law Center v. U.S. DOL*, Case 23-50562 (5th Cir. Aug. 23, 2024).

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