



BOUSQUET HOLSTEIN PLLC

# Alert

## Employment & Labor Practice Group

### DEPARTMENT OF LABOR ABANDONS "80/20 RULE" FOR TIPPED EMPLOYEES

Syracuse ♦ Ithaca ♦ New York City

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On February 15, 2019, the U.S. Department of Labor ("DOL") issued a Field Assistance Bulletin abandoning application of the 80/20 rule in enforcement proceedings involving tipped employees. The Bulletin is consistent with an Opinion Letter issued by the DOL in November, 2018 stating that there should be no limit placed on the amount of time a tipped employee can perform indirect duties which do not result in tips so long as the indirect duties:

1. are performed "contemporaneously with" those duties that directly result in tips; or
2. are performed "for a reasonable time immediately before or after" performing the direct tip service duties.

The old rule, known as the 80/20 rule, mandated that an employer could not take a tip credit for work performed by a tipped employee if the employee spent more than 20% of their time performing other jobs, including "indirect duties" relating to the tipped position, but which did not result in the payment of a tip. To comply with the 80/20 rule, employers were expected to ensure that tipped employees spent at least 80% of their time performing direct tip service work. Time spent performing preparatory or closing activities, and time spent performing cleaning or related duties during a shift, could not exceed 20% of the employee's total hours for the shift.

The new guidance also provides clear examples of what the DOL deems to be allowable indirect duties. For example, the guidance now makes clear that a server may perform the following duties without affecting an employer's ability to take a tip credit so long as the work performed meets one of the two above stated criteria: busing tables, cleaning tables or counters, setting up tables with linen, silverware and glassware, performing certain cleaning duties, and stocking service areas. Bartenders may perform the following duties and maintain their status as tipped employees: cleaning glasses and utensils, balancing cash receipts, cleaning the bar and work areas, stocking the bar with beer, wine, liquor and supplies such as ice and glassware, slicing fruit and garnishing drinks, creating drink recipes, and ordering liquor and supplies.

While the new rules make wage and hour requirements much easier for employees to follow, it is critical to note that the rules only affect enforcement of the federal Fair Labor Standards Act. They do not address or modify New York's rules.

Under New York's Hospitality Wage Order, a service employee or food service worker that performs non-tipped duties for two hours or more, or for more than 20% of his or her shift, cannot be subject to a tip credit for that day. There is presently no indication that the U.S. DOL's Opinion Letter will have any impact on New York Law. In fact, pronouncements by Governor Cuomo's office suggests the Governor is interested in eliminating employer use of the tip credit altogether. Regardless, while the federal DOL changes appear to provide welcomed guidance and relief to employers across the country, and may impact the interpretation of similar New York law over time, they do not presently impact New York employers who must comply with the Hospitality Wage Order's separate and distinct 80/20 requirements.

### Bousquet Holstein Employment and Labor Practice

The Employment & Labor Practice Group at Bousquet Holstein PLLC provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment, discrimination, and labor issues before they become problems and we advise our clients in all areas of human relations and human resource practices to satisfy our clients' business objectives. If we can provide you with additional insight and information regarding changes to the law and how they may impact your business, please contact :



**John L. Valentino ♦ 315.701.6308 ♦ JValentino@bhlawpllc.com**