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# Fifth Circuit Strikes the DOL's Rule Prohibiting Employers from Claiming a Tip Credit When an Employee Work on Tasks That are Not Tip-Generating

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The U.S. Court of Appeals for the 5th Circuit recently held that the Department of Labor's 2021 rule setting strict limits on the amount of time tipped employees could spend performing non-tip generating tasks has been struck down as arbitrary and capricious. The 5th Circuit found the rule to be inconsistent with the Fair Labor Standards Act (FLSA), which allows the tip credit for any employee who is engaged in an occupation that customarily and regularly receives tips, regardless of the specific duties of that occupation.

Employers of tip-generating employees no longer have to follow the "80/20" (or "80/20/30") rule prohibiting employers from taking a tip credit if employees spent more than 20% of their hours in a workweek or more than 30 minutes in a shift on tasks that don't directly generate tips, such as cleaning tables or preparing food. The Fifth Circuit's rationale included that the required breakdown of tasks impermissibly deconstructed occupations and required them to be apportioned.

**Takeaway:** While this is a relief for hospitality employers from the federal perspective, employers must still be aware of any state law requirements concerning tip credits. If you require assistance in navigating federal and/or state laws concerning tip credits or any other wage and hour issues, please reach out to Meghan Chrisner-Keefe or any member of the Employment Law Team at Wilentz.

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