DOL Clears the Table: No More '80/20 Rule' for Tipped Employees

by Kevin D. Johnson

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In February 2019, the Department of Labor (DOL) revised its Field Operations Handbook to eliminate an enforcement position that had been the source of significant litigation: the so-called "80/20 rule."[1] The elimination of this rule from the handbook has the potential to alter the course of litigation between employees who are paid the subminimum "tip-credit" wage and their employers.

Many employees in the hospitality industry are paid using a subminimum wage, with the employer relying on a credit against the tips that the employee has received to make up the difference between that subminimum wage and the full minimum wage required by the Fair Labor Standards Act. Use of this "tip credit" is authorized by § 203(m) of the FLSA and is limited to employees who are working in "tipped occupations."[2]

The DOL has placed limits on when the tip-credit wage can be paid. One such limit is found in 29 C.F.R. § 531.56(e): the so-called "dual jobs" regulation.[3] That regulation identifies the possibility that an employer may employ an employee in two separate jobs—one in a tipped occupation and the other in a non-tipped occupation (for example, a server who is also employed as a maintenance worker). The dual-jobs regulation prohibits the employer from paying the tip-credit wage to the employee for work in the non-tipped occupation.[4]

At some point in the mid-1980s, the DOL set out to explain the dual-jobs regulation to its investigators by including a section on the regulation in its Field Operations Handbook. The Field Operations Handbook is "an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance." The DOL expressly states that the handbook "is not used as a device for establishing interpretative policy."[5]

Despite this, the handbook's explication of the dual-jobs regulation became the genesis of an entirely new rule. Rather than teaching investigators to focus on whether an employee was simultaneously working in a second non-tipped occupation, the DOL explained to its investigators that there was another rule lurking within the language of the dual-jobs regulation. That rule has become known as the "80/20 rule."

The DOL derived this rule from an example in the dual-jobs regulation that involved a maintenance man. That example noted that the maintenance man's occupation was "distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips."[6]

From this language, the DOL concluded that the FLSA must impose an upper limit on the amount of time that a tipped employee could spend performing certain duties related to his or her tipped occupation. The handbook instructed its investigators to check whether employees in tipped occupations were spending more than 20 percent of their time on duties that—while related to the tipped occupation—were "not by themselves directed toward producing tips." If the 20 percent threshold was exceeded, then the employer would lose the ability to claim the tip credit.

This test, although contained in a handbook that disclaimed any intention of "establishing interpretive policy," became over time the official interpretive policy of the DOL and culminated in its submission of an amicus brief to the Eighth Circuit in *Fast v. Applebee's* that expressly adopted this language as the official position of the agency.[7]

Both the Eighth Circuit in *Fast* and the Ninth Circuit in *Marsh v. J. Alexander's* have followed this policy and upheld claims based on a theory that a violation of the 80/20 rule could cost an employer the right to rely on the tip credit.[8] In doing so, both the Eighth and Ninth Circuit relied on *Auer* deference to support their holdings. In *Auer v. Robbins*, the Supreme Court instructed courts to defer to an agency's interpretive

position when the agency is interpreting regulatory language that the agency itself has written.[9] In applying *Auer* deference, both the *Fast* and *J. Alexander's* courts reasoned that the 80/20 rule represented the DOL's attempt to explain language in a regulation (the dual-jobs regulation) that the DOL itself had authored.[10]

On the other hand, the Eleventh Circuit has upheld a district court ruling that rejected application of the 80/20 rule. In *Pellon v. Business Representation International Inc.*, the Eleventh Circuit affirmed a trial court order that identified a number of practical concerns about the 80/20 rule, including the question of how employers would be able to track time as employees in tipped occupations moved rapidly from "tip-producing" to "non-tip-producing" duties during their shifts.[11]

Among the fundamental issues that have divided litigants and puzzled courts was the fact that the handbook itself did not explain how the DOL would distinguish between those duties of a tipped employee that were "directed toward producing tips" and those that were not. Nor had the DOL ever provided any other regulatory definition of which duties would be considered "tip-producing" and which would not.

In late 2018, the DOL reversed course on the 80/20 rule. It began by reissuing an opinion letter that it had initially drafted during the waning days of the administration of President George W. Bush, but which had been immediately revoked by President Barack Obama's secretary of labor.[12] That opinion letter disavowed any instructions that the agency had given in the past that required employers to differentiate between various related duties within a tipped occupation based on whether they were tip-producing.

And in February 2019, the DOL released a revised section of the Field Operations Handbook dealing with tipped employees.[13] The new section supported the opinion letter by rejecting any notion of distinguishing between related duties based on their tip-producing status. The key language in the new section provides as follows: "An employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless whether those duties involve direct customer service."[14] The effect of this new language is to eliminate concerns over "related" duties and to refocus the inquiry on whether the employee in question had actually performed "unrelated" duties in a second occupation.

Consistent with the opinion letter, the new section in the Field Operations Handbook refers investigators and employers to a database known as the Occupational Information Network (O*NET), which is administered jointly by the DOL and several research partners including North Carolina State University.[15] O*NET summarizes survey information collected by the DOL about the duties that are reported by employers to be intrinsic to the performance of a given occupation. If the duties performed by a server match the O*NET duties listed for the occupation of server, then the DOL will conclude that the employer's reliance on the tip credit to pay that employee does not violate the dual-jobs regulation.

Thus, the 80/20 rule is no longer a part of the DOL's Field Operations Handbook. But what does this mean for the continued viability of the *Fast* and *J. Alexander's* opinions? Both expressly relied on the Field Operations Handbook to reach their holdings. Does the DOL's reversal mean that they are no longer good law?

Employee advocates will certainly argue that the DOL's change in position should be given less weight in light of the agency's prior advocacy for the rule. Nonetheless, there are reasons to believe that the rewrite of the handbook section that had previously endorsed the 80/20 rule will end up influencing courts.

Notably, both *Fast* and *J. Alexander's* depended heavily on *Auer* deference in affording significant weight to the handbook's analysis of the dual-jobs regulation.[16] Because the dual-jobs regulation itself does not mention a 20 percent limitation on related duties, these opinions imported that limitation from the prior version of the handbook in reliance on *Auer*. As of the date this article was written, the U.S. Supreme Court had granted certiorari in *Kisor v. Wilkie*, a case that presents the Court with the opportunity to revisit and possibly reverse *Auer*.[17] If the Court eliminates or curtails *Auer* deference during this term, that will likely cast even further doubt on the rationale of *Fast* and *J. Alexander's*.

But even if *Auer* remains good law, its focus on the views of the agency that authored the underlying regulation means that courts grappling with the 80/20 rule will likely have to give substantial weight to the DOL's revised view. And since the DOL's revised view is that the dual-jobs regulation neither requires nor permits a court to divvy up "related tasks" in a tipped occupation into tip-producing and non-tip-producing varieties, it seems that both *Fast* and *J. Alexander's* are on shaky ground. ⊙

Endnotes

[1]U.S. Dep't of Labor, Field Operations Handbook (FOH) § 30d00(f) (updated Aug. 31, 2017), https://www.dol.gov/whd/FOH.
[2]29 U.S.C. § 203(m).
[3]29 C.F.R. § 531.56(e).
[4]*Id.*
[5]FOH, *supra* note 1.
[6]29 C.F.R. § 531.56(e).
[7]Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 12-13, *Fast v. Applebee's Int'l Inc.*, 638 F.3d. 872 (8th Cir. 2011) (Nos. 10-1725/26).
[8]*Fast*, 638 F.3d at 877-78; *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018).
[9]*Auer v. Robbins*, 519 U.S. 452, 461 (1997).
[10]*See Fast*, 638 F.3d at 881; *J. Alexander's*, 905 F.3d at 627.
[11]291 F. Appx 310 (11th Cir. 2008).
[12]U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2018-27 (Nov. 8, 2018).
[13]*See* FOH, *supra* note 1.
[14]*Id.* at § 30d00(f)(3)(a).
[15]*Id*.
[16]*See Fast*, 638 F.3d at 879; *J. Alexander's*, 905 F.3d at 631-32.
[17]*Kisor v. Wilkie*, 139 S.Ct. 657 (2018).