

For: LeClairRyan, Alexandria, Va.
From: Parness & Associates, Aberdeen, N.J.

FOR IMMEDIATE RELEASE

**New Federal DOL Tip Guidance Provides Flexibility
For Hospitality, Other Employers, Says LeClairRyan Attorney**

--But state and local application remains a question mark, Ashleigh R. Eames cautions

ALEXANDRIA, Va. (12/6/18)— Recent guidance from the U.S. Department of Labor (DOL) provides restaurant and other hospitality employers with updated information on structuring payment strategies for tipped employees, but some questions remain, according to Ashleigh R. Eames, an associate in national law firm LeClairRyan’s Alexandria and Washington, D.C., offices.

“In the new Opinion Letter, the DOL overruled the 80/20 rule, and now states that there is no limit to the amount of related side work that a tipped employee may perform, as long as such work is performed contemporaneously or immediately before or after direct tipped work,” she explains. “The DOL’s [Opinion Letter FLSA2018-27](#) provides welcome guidance and flexibility to hospitality employers. However, it remains to be seen how the new guidance will be applied in different jurisdictions.”

The Fair Labor Standards Act allows employers to pay tipped employees — ones that customarily and regularly receive more than \$30 per month in tips — an hourly rate that is lower than the regular minimum wage, Eames wrote in a post, [DOL Issues New Guidance for Hospitality Employers on Tipped Employees](#), which appears in the firm’s [Workplace Defender](#) blog.

“Employers can generally pay tipped employees the lower tipped minimum wage and use the amount an employee receives in tips as a credit against the employer’s minimum wage obligation to the employee,” she notes. This “tip credit” makes up the difference between the regular minimum wage and the lower tipped minimum wage. For example, using the current federal minimum wage of \$7.25 per hour and federal tipped minimum wage of \$2.13 per hour, an employer could take a tip credit up to \$5.12 per hour. “It is also important to note that, under the Fair Labor Standards Act, where a state or local jurisdiction has a higher minimum or tipped wage than federal law requires, an employee must be paid whichever is higher,” Eames adds. [See 29 U.S.C. § 218(a).]

Under the DOL’s previous guidance, when an employee spent more than 20% of his or her time on non-tipped side work — like rolling silverware, cleaning and setting tables, making coffee — the employee had to be paid the regular minimum wage rate and the employer could not take a tip credit for that time. This became known as the “80/20 rule” and required restaurant and other hospitality employers to constantly monitor employees’ activities and time to the minute.

The new Opinion Letter overrules the 80/20 rule, stating that there is no limit to the amount of related “side work”—as defined on the [Occupational Information Network](#) (O*NET), a database with occupational definitions, job requirements, and other information — that a tipped employee may perform, as long as such work is performed contemporaneously or immediately before or after direct tipped work.

“If a tipped employee spends time on tasks that are not listed on O*NET, the DOL stated that, unless the time spent is de minimus, the employee must be paid the regular minimum wage rate and no tip credit can be taken for such time,” according to Eames. “For new or unique occupations that qualify as tipped jobs but are not included on O*NET, the DOL instructs employers to look to similar occupations on

O*NET. For example, in the case of a teppanyaki [similar to hibachi] chef, the DOL compares the related duties of a counter attendant in the restaurant industry.”

The DOL also clarified the distinction between a tipped employee who performs related side work and one that has a dual job, she writes. “A tipped employee that performs non-tipped work unrelated to their tipped work will be considered to have ‘dual jobs.’ In this case, the employer can take a tip credit and pay the employee the lower tipped wage only for time the employee worked [in the tipped position],” Eames explains. “As an example, for time spent by a server who also works, say as a maintenance man, the employer cannot take a tip credit and must pay the employee the regular minimum wage for time performing maintenance work.”

Because the guidance is new, businesses may wish to consult with their legal advisor to continue to ensure that they are in compliance with current federal, state, and local laws, which often add additional requirements to employers,” Eames advises.

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Press Contacts: At Parness & Associates Public Relations, Bill Parness, (732) 290-0121, bparness@parnesspr.com or Lisa Kreda, lkreda@parnesspr.com