



Restaurant Employers Take Note: DOL Proposes New FLSA Tip Regulations

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In the months since the Supreme Court of the United States [upheld Auer deference](#), courts around the country have consistently declined to afford deference to the U.S. Department of Labor's November 2018 opinion letter which [undercut the so-called "80/20" rule](#). Today, likely in response to the lack of traction its sub-regulatory guidance had gained with courts, the DOL issued proposed rules concerning tipped workers.

The DOL's proposed rules would elevate the [guidance of its November 2018 opinion letter](#). For those employers who do not take a tip credit, the DOL also expanded the universe of those who are eligible to participate in mandatory tip pools.

Among other things, the DOL's notice of proposed rulemaking proposes:

- Explaining that an employer may take a tip credit for any amount of time that a tipped employee performs related non-tipped duties contemporaneously with his or her tipped work, or for a reasonable time immediately before or after performing the tipped duties.
- Removing regulatory language restricting an employer's use of tips when the employer does not take a tip credit, allowing such employers to include back of house workers in a mandatory tip pool.

While these proposed rules are not final, each would represent a welcome

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development for restaurant employers. The plaintiffs' bar has long pursued class and collective action lawsuits alleging one or a combination of 80/20 and improper tip pool claims. Should these proposed rules go into effect, restaurant employers will have a significant new defense to fight back against such claims.

Given the prevalence of 80/20 claims in the service industry, restaurant employers would be well served by taking note of this new proposed rulemaking and its potential as a potent defense against class and collective litigation.

The DOL's proposed rules will be [published on October 8, 2019](#), and will be available for review and comment for 60 days.