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Justices Deny Review of Applebee's Tip Credit Ruling

By Bill Pokorny January 24, 2012

In May, my partner Staci reported on a ruling against Applebee's by the 8th Circuit Court of Appeals, holding that tipped employees who spent more than 20 percent of their working time on nontipped activities like cleaning restrooms were entitled to the federal minimum wage of $7.25 per hour. Applebee's asked the U.S. Supreme Court to review the ruling, arguing that the Eighth Circuit incorrectly deferred to the U.S. Department of Labor's "informal interpretation" of its FLSA regulations in its 1988 Field Operations Handbook, and that as a result it applied an "utterly unworkable standard that has no basis in the text or purpose of the FLSA and that will impose crushing administrative and financial burdens on restaurants and other employers of tipped employees." Last week, the Supreme Court turned down Applebee's petition, leaving the Court of Appeals' ruling intact.

In light of the Supreme Court's decision not to review this ruling, employers can expect the Department of Labor to continue applying the standard set forth in Chapter 30d of its Field Operations Handbook (.pdf):

Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

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- The rule adopted by the DOL and affirmed by the 8th Circuit will continue to be applied for the time being, subject to possible future challenge in the Supreme Court or other federal appellate courts.

- As a result, restaurants and other employers of tipped employees need to be conscious of how much time such employees spend on activities not "directed toward producing tips," such as setup or cleaning tasks. Under the DOL's interpretation, employers will have the burden of proving that time spent on these tasks falls below the 20% threshold.

- If tipped employees spend more than 20% of their time in non-tip-generating activities, the DOL will take the position that these employees should be paid at least the minimum wage for such time.
- However, the employer can still take a tip credit for time spent on duties that are associated with "producing tips," such as serving customers.