



CUT AND PASTE POST JULY 2021

Here We Go Again? FLSA Proposed Rule Making

Tip Credits, the 80/20 Rule, and 30 Minutes. On June 21, 2021, the US Department of Labor (DOL) published a [notice of proposed rulemaking](#) (NRPM) in the Federal Register. In this notice the DOL proposes to withdraw and re-propose the 2020 Tip final rule. Specifically, the DOL is now proposing to amend its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation. Work that is part of the tipped occupation includes work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.

The proposed rule clarifies that if an employee performs work that directly supports tip-producing work for a substantial amount of time — at least 20 percent of the hours worked in a workweek or at least 30 continuous minutes — the worker must be paid the standard minimum wage.

The 80/20 Rule first appeared in a DOL Field Operations Handbook (FOH) in 1988. During the Trump administration, the DOL initially withdrew the 80/20 Rule in a November 2018 Opinion Letter and reaffirmed that withdrawal in a February 2019 FOH amendment, replacing the strict 20% limit with a “reasonable time” standard. In December 2020, the DOL issued the Tip Regulations Final Rule that purported to officially put an end to the 80/20 Rule. The Biden DOL twice delayed the effective date of these provisions and now has proposed a new rule that would:

- reinstate the 80/20 Rule; and
- replace the Trump DOL's Final Rule “reasonable time before and after” standard for engaging in tip-related duties with a strict, 30-minute limitation on continuous performance of such duties.

Professional Pointer: The NPRM only applies to tipped workers, and no tip credit is available in the State of Montana. However, a hundred years ago (give or take 😊), the DOL ‘guidance’ called for overtime pay for otherwise exempt employees who spent more than 20% of their work time performing non-exempt duties. It's not out of the realm of possibility that the re-emergence of the 80/20 provision could be expanded to apply to the exempt employee primary duty test.

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Salary Rule Update on the Horizon?

According to an [article](#) on the SHRM website, employers may soon be seeing an NRPM proposing an increase in the minimum salary required to qualify for an exemption from overtime rules.

Secretary of Labor Marty Walsh, during recent testimony before the House Education and Labor Committee, said the wage level to qualify for the exemption is "definitely" too low, adding that the DOL is reviewing the overtime regulation. Walsh added that he believes there should be automatic and regular updates to the overtime threshold.

Rep. Mark Takano, D-Calif., led the questioning before the Committee, and said he had sent a letter encouraging the DOL to adopt a salary threshold that by 2023 would be around \$85,000 annually. The overtime threshold now is \$35,568 annually or \$684 a week and workers who don't earn at least this amount must be paid overtime, even if they're otherwise qualified as an exempt employee.

Professional Pointer: SHRM recommends that "Employers ... begin planning for potential changes now by looking at those exempt employees who are between the current level of \$35,568, and the Obama-era proposal of \$47,476... and to [s]tart thinking about whether to potentially raise those workers to a higher salary level or convert them to nonexempt status and manage those new overtime costs."

GVHRA is monitoring FLSA-related developments and will keep you updated.

EEOC Extends EEO-1 Deadline

On June 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) [announced](#) that it is extending the July 19, 2021 deadline to submit and certify 2019 and 2020 EEO-1 Component 1 reports to Monday, August 23, 2021. The EEOC still "encourage[s] eligible employers to file the required EEO-1 Component 1 report(s) as soon as possible." A filing portal, support center, and answers to frequently asked questions (FAQs) can be found on the [EEOC's website](#).

On the Lighter Side

The [Summer 2021 Issue](#) (access requires SHRM membership) of the SHRM Magazine includes an article entitled *The Good, the Bad, and the Ugly*. If you haven't read this article, it's a fun read. In social media posts, SHRM asked HR professionals how they would describe what they do at work, without saying they are an HR professional. This article shows the responses received from those HR professionals. I related to this article because, in my heart, I know my parents never really understood what I did for a living, despite numerous efforts to describe the work I did, and the challenges I faced at work.

So, without saying "HR", how would you describe what you do for a living?

Happy July!
Stay **Cool**, and Be Safe!

