



Connecticut Wage Legislation for Tipped Employees

Hinckley Allen Labor & Employment

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On December 18, 2019, the Connecticut General Assembly convened for a one-day special session, during which it passed a new bipartisan wage bill for tipped employees. Governor Ned Lamont has endorsed the legislation and is expected to sign it into law.^[1]

As is common practice in many states, Connecticut permits employers of tipped employees to account for employees' gratuities as part of the fair minimum wage they must pay.^[2] This practice is known as taking a "tip credit" against the statutory minimum wage, and it allows employers to pay tipped servers as little as \$6.38 per hour as long as the minimum wage, currently \$11.00 per hour, is met or exceeded when combined with the gratuities claimed by the server.

Unfortunately, the tip credit rule may have the unintended consequence of incentivizing employers to pay employees the lower rate even when they are performing non-tipped work duties. The nature of much tipped work often combines actions that may be classified as both tip-producing "service activities" with "non-service activities," such as when a waitperson is refilling salt shakers during a shift's downtime versus serving meals during rush hour. Rules have been devised to prevent employers from abusing the tip credit provision, and they vary by jurisdiction. In most, while an employer is entitled to take a tip credit for the amount in gratuities received by the employee against the entire amount of time the employee was on the clock, including the time the employee spent performing non-service duties, employees are protected by the "80/20 Rule." This rule permits an employer to take a tip credit against the employee's time spent performing non-service duties only to the extent that the employee spends at least 80% of their time performing tip-producing service activities.

The Connecticut Department of Labor had gone further and limited employer's ability to

take tip credits by promulgating Section 31-62-E4 (the “Regulation”).^[3] By adopting the Regulation, the Department of Labor not only declined to utilize the 80/20 Rule, but also imposed additional requirements on employers that many found to be onerous. Under that Regulation, if an employee performs both service and non-service duties, the employer must record and document the amount of time the employee spent performing each, and then only take a tip credit for the time their employees spent performing service activities while paying full minimum wage for all of the time they spent performing non-service activities. In addition, if an employer cannot or does not definitively segregate and record their employees’ time, the employer may not take a tip credit at all for the gratuities received by its employees. Confronted with these burdensome requirements, restaurants requested guidance from the Connecticut Department of Labor, which further muddied the issue by advising that despite the Regulation, segregation was unnecessary and following the 80/20 Rule was sufficient so long as non-service duties did not account for more than 20% of their time.

This confusion with the Regulation’s implementation, along with its inherent complexity, gave rise to many class actions by tipped employees against their employers. An employee who is able to prove that her employer took a tip credit on her wages but did not conform with the Regulation’s requirements, is entitled to recover the full minimum wage, less amounts paid by the employer, for all hours worked. In such litigation, an employee is entitled to recover double damages unless the employer can demonstrate that it made a good faith effort to comply with the law.

The General Assembly promulgated Bill 7501 regarding the Regulation of gratuities to confront the substantial burden on businesses posed by the Regulation in two meaningful ways. First, it directed the CTDOL, not later than April 1, 2020, to provide written guidance as to how employers can comply with its record-keeping regulation along the lines of the 80/20 Rule.^[4] The Bill further provides that a showing of good faith includes, but is not limited to, reasonable reliance of the Department of Labor’s written guidance. Second, the General Assembly has prohibited courts from authorizing employees to file class actions for violations of the Regulation unless each employee is able to demonstrate that they performed non-service duties for their employer that were “not incidental” to their service duties.^[5] Finally, in addition to directing the Department of Labor to modify existing law, the General Assembly has also directed the Labor Commissioner to conduct random wage and hour audits of tipped employees in seventy-five or more Connecticut restaurants and prepare a compliance report.^[6] The legislation provides that the Labor Commissioner is to issue that report to the labor committee of the General Assembly one year after the audits begin. The General Assembly has also appropriated funds to the Department of Labor for the purpose of enlisting three wage and hour investigators.^[7]

The General Assembly's new legislation should have a positive impact for businesses employing tipped employees. How the Department of Labor will answer the General Assembly's call to provide written guidance remains to be seen, but employers should be able to rely on such guidance to alleviate the risk of double damage liability for alleged violations. Additionally, going forward, many employers will be protected from having to defend class actions for alleged violations so long as their employees' non-service work is "incidental" to the service work that they perform. Although the statute does not define what constitutes "incidental," the United States Department of Labor has explained that non-service work is considered incidental if it is related to the service work, and either performed contemporaneously or within a reasonable time before or after.^[8] Restaurants which assign "sidework" to their employees will thus be shielded from class actions alleging violations of the Regulation.

We are here to help answer specific questions and offer advice on your options. Feel free to contact [Lisa A. Zaccardelli](#) or any other member of our [Labor & Employment group](#).

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[1] The Office of Governor Ned Lamont, *Governor Lamont Applauds Passage of Legislation Protecting Wages Earned by Restaurant Workers*, (December 18, 2019), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2019/12-2019/Governor-Lamont-Applauds-Passage-of-Legislation-Protecting-Wages-Earned-by-Restaurant-Workers>

[2] Conn. Agencies Regs. § 31-62-E3 (Rev. 2015).

[3] *Id.* at 31-62-E4.

[4] H.R. 7501 Gen. Assemb., Spec. Sess. (Conn. 2019), Sec. 6(a)(2).

[5] *Id.*, Sec. 6(a)(3).

[6] *Id.*, Sec. 6.

[7] *Id.*, Sec. 7.

[8] U.S. Dep't of Labor, Field Assistance Bulletin No. 2019-2 (February 15, 2019).

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