Employer Update

November 2018

U.S. Department of Labor Loosens Restrictions on Calculating Minimum Wage Payments to Tipped Employees*

In This Issue

**Associate Adam Gitlin assisted with the drafting of this article.*

In November 2018, the Wage and Hour Division of the United States Department of Labor issued an Opinion Letter that rolled back its 80/20 Rule and reinstated a 2009 policy that provides businesses that employ tipped workers with greater flexibility to take tip credit for time that their employees engage in side work.[1] The 80/20 Rule limited an employer's ability to take tip credit if an employee spent more than 20 percent of his or her time engaging in non-tip-generating jobs that were incidental to the employee's core job. The new guidance provides employers with relief from the demanding requirements under the now-withdrawn 80/20 Rule to adequately monitor and document employees' daily activities to comply with the FLSA's minimum wage and tip credit regulations.

The FLSA's Tip Credit Regulation

Under the Fair Labor Standards Act (FLSA), an employer is permitted to take a tip credit toward its minimum wage obligation to a tipped employee.[2] Rather than paying an employee the full minimum wage, an employer can pay a tipped employee a smaller amount – though not less than $2.13 – and make up the difference by factoring in the employee's tips.[3] Thus, for example, if an employer pays a tipped employee $2.13, the employer is permitted to take $5.12 in tip credit to reach the federal minimum wage of $7.25.[4] Through this method, an employer fulfills its obligations under the law, while a tipped employee still takes home at least the minimum wage. A tipped employee, meanwhile, is an employee that is engaged in an occupation in which he or she "customarily and regularly" receives more than $30 in monthly tips, such as a restaurant server or a bartender.[5]

Enter 80/20

The 80/20 Rule arose from guidance in the Wage and Hour Division's Field Operations Handbook (FOH) regarding an employer's ability to take tip credit for the time that an employee spends participating in activities that are incidental to a tipped occupation but are not tip-generating themselves (*i.e.*, side work).[6]

The FLSA regulations recognize that on a daily basis an employee often carries out a variety of activities. An employee might engage in both tip-generating activities and non-tip-generating activities, including, for example, where a maintenance worker in a hotel also serves as a waiter in the hotel's restaurant.[7] According to the regulations, under these circumstances, the employee is engaging in "dual jobs" and he or she is only a tipped employee with respect to the tip-generating position.[8] As a result, an employer cannot take a tip credit for the employee's hours of employment in the non-tip-generating activity.[9] Rather, the employer must pay the employee the full minimum wage for his or her time.[10]

The regulations also recognize, though, that even when an employee engages in a strictly tip-generating job, such as working as a server for an entire day, the role often necessitates engaging in "related duties" to the tipped occupation that are not, in and of themselves, directed toward producing tips.[11] For example, when a server spends part of his or her time cleaning tables, making coffee, or washing dishes, the activities are not customer-facing and generally are not directed toward tip generation.[12] In this latter scenario, where an employee engages in side work, the regulations permit an employer to take a tip credit for the employee's time.[13]

The 80/20 Rule, which was originally issued by the Department of Labor in 1988, limited an employer's ability to take tip credit for a tipped employee's "related duties."[14] According to the Rule, employers could take tip credit for the time that an employee spent carrying out side work, but if an employee spent more than 20 percent of his or her time performing such work, the employer could not take a tip credit for that time.[15]

In January 2009, the Department of Labor under the Bush Administration issued an Opinion Letter, which eliminated the 80/20 Rule.[16] Less than two months later, however, that Letter was rescinded by the Obama Administration, which effectively reinstated the 80/20 Rule.[17]

Confusion, Litigation, and Inconsistent Application

According to the November 2018 Opinion Letter, the 80/20 Rule produced "confusion and inconsistent application."[18] The Rule left many employers to speculate about which of its employees' activities were considered side work that was subject to the 20 percent cap. In addition, many employers were compelled to spend time and resources surveilling and meticulously documenting all of their employees' daily activities.[19]

The Rule also spurred widespread litigation. Employers faced allegations that their employees were spending a substantial amount of time participating in non-tipped duties and therefore should have been paid the full minimum wage.[20] Adding to the confusion, courts did not always apply the 80/20 Rule consistently. For example, while some courts endorsed the Rule's 20 percent cap,[21] others strongly cautioned against the feasibility of the Rule because the compliance requirements were "impractical or impossible."[22]

The New Guidance

Recognizing the challenges that employers faced implementing the 80/20 Rule, the Wage and Hour Division's November 2018 Opinion Letter eliminates the restriction on the amount of time that a tipped worker can spend engaging in side work.[23] Under the new guidance, an employer may take tip credit for side work as long as it is "performed contemporaneously with direct customer-service duties" or for a reasonable time immediately before or after performing such direct-service duties.[24] Thus, for example, a waitperson's time spent vacuuming after a restaurant closes is now likely subject to a tip credit, although the inquiry is fact-specific and may be affected by an employer's particular policies and practices.[25]

The new guidance recognizes, however, that there are limits to activities that may be considered "related duties" that might cross the line into the "dual jobs" scenario described above, where an employer cannot take a tip credit. For example, while the vacuuming example above is likely subject to a tip credit, a hotel maintenance worker who also serves as a waiter in the hotel's restaurant is undertaking dual jobs.[26] The Letter suggests that for purposes of taking a tip credit, employers should consult the Tasks section of the Details report in the Occupational Information Network (O*NET) to help them determine which of their employees' responsibilities constitute core duties as opposed to side work.[27]

The new guidance supersedes any inconsistent provisions in the existing FOH related to tip credit. The Opinion Letter states that a revised FOH statement will be forthcoming.

Outstanding Questions

The reinstated policy and the elimination of the 80/20 Rule should benefit employers because they no longer need to undertake the same types of calculations – or closely monitor their employees' movement between core duties and side work – to ensure that they comply with the FLSA. The policy also provides to employers and employees greater clarity, which will allow employers to more easily comply with the FLSA, ensure that workers receive the FLSA's protections, and, possibly, reduce litigation.[28]

Nonetheless, there are outstanding questions related to the reinstated policy. For example, the November 2018 Opinion Letter states that employers may not take tip credit for time spent performing tasks that are not listed in the O*NET task list.[29] However, the Letter clarifies that some time spent performing tasks that are not on the task list could be subject to the de minimis rule contained in the FLSA's general regulations.[30] Employers, therefore, might still have to make judgment calls about their employees' duties for compliance purposes.

Similarly, the Letter outlines a new standard for side work; namely, as noted above, that it must occur contemporaneously or within a reasonable time immediately before or after performing tip-producing activities.[31] Moving forward, employers may have to make decisions regarding their employees' job responsibilities and whether they fall within the new standard.

Recommendations for Employers

With the Wage and Hour Division's issuance of the new Opinion Letter and elimination of the 80/20 Rule, employers would be prudent to reevaluate their tipped positions to determine whether they all qualify for a tip credit under the FLSA. In doing so, employers should keep in mind that the Opinion Letter does not carry the force of law, but it is simply the Wage and Hour Division's interpretation of the law, which has not yet been tested in the courts. Additionally, employers should continue to monitor developments in both federal and state labor and employment law. Many states have wage and hour laws that are more restrictive than the FLSA and therefore employers may have additional compliance responsibilities beyond those described in this article. Lastly, as the repeated changes to the validity of the 80/20 Rule demonstrate, the FLSA, its implementing regulations, and government agencies' interpretive documents are subject to change. Thus, employers should regularly review all of their policies to ensure that they are compliant with all aspects of the law.

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[1] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-27 (Nov. 8, 2018) [hereinafter 2018 Opinion Letter].

[2] *See* 29 U.S.C. § 203(m)(2)(A).

[3] *See id.*

[4] *See* 29 U.S.C. § 206(a)(1).

[5] 29 U.S.C. § 203(t).

[6] *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(f) (2016) [hereinafter FOH]; *see also Chhab v. Darden Restaurants, Inc.*, No. 11 Civ. 8345 NRB, 2013 WL 5308004, at *3 (S.D.N.Y. Sept. 20, 2013) (explaining the nature of "side work," including "setting and clearing tables . . . that is related to their tipped occupation but does not itself generate tips").

[7] *See* 29 C.F.R. § 531.56(e).

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *Id.*

[12] *See id.*

[13] *See id.*

[14] FOH § 30d00(f)(3).

[15] *See id*.

[16] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2009-23 (Jan. 16, 2009).

[17] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter Withdrawing Opinion Letter FLSA2009-23 (Mar. 2, 2009).

[18] *See* 2018 Opinion Letter at 2.

[19] *Cf. Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1313–14 (S.D. Fla. 2007), *aff'd*, 291 F. App'x 310 (11th Cir. 2008) (noting that "dividing [employees'] workday among the various tasks they perform is impractical or impossible").

[20] *See, e.g.*, *Robbins v. Blazin Wings, Inc.*, No. 15 Civ. 6340 (CJS), 2016 WL 1068201, at *1 (W.D.N.Y. Mar. 18, 2016) (granting a motion for a conditional certification of a nationwide FLSA collective action for alleged 80/20 Rule violations and to provide notice of the action to all of the restaurant's current and former tipped employees for the last three years); *Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572, 584–85 (S.D.N.Y. 2015) (concluding that former tipped restaurant employees stated a plausible FLSA minimum wage claim based on alleged violations of the 80/20 Rule in that the employees allegedly spent hours every day engaging in non-tipped activities).

[21] *See, e.g.*, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 881 (8th Cir. 2011) ("The 20 percent threshold used by the DOL in [the FOH] is not inconsistent with § 531.56(e) and is a reasonable interpretation of the terms 'part of [the] time' and 'occasionally' used in that regulation."); *Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572, 583 (S.D.N.Y. 2015) (collecting cases and noting that "courts in the Southern District of New York have consistently endorsed the twenty percent rule").

[22] *Pellon*, 528 F. Supp. 2d at 1314 (S.D. Fla. 2007).

[23] *See* 2018 Opinion Letter at 3–4.

[24] *See id.*

[25] *See id.*

[26] *See* 29 C.F.R. § 531.56(e).

[27] *See* 2018 Opinion Letter at 3.

[28] *See id.* at 2 (noting that the goals of the guidance are to "ensure[] not only consistent application of the Act and a level of clarity that will allow employers to determine up front whether their actions are in compliance with the [FLSA], but also the paramount goal that all affected workers receive the full protections of the [FLSA]").

[29] *See id.* at 4.

[30] *See id.* (citing 29 C.F.R. § 785.47).

[31] *See id.*

UK Employment Law Update

By David Palmer and Max Gordon

Case 1: Directors Can Be Personally Liable For Dismissing Whistleblowers

In *Timis and another v Osipov* [2018] EWCA Civ 2321 the Court of Appeal (CoA) upheld a decision that individual co-workers, in this case two non-executive directors (NEDs), can be personally liable for being a party to the decision to dismiss an employee who has made a protected disclosure. Further, the claimant employee can recover losses from that co-worker flowing from the dismissal. This decision clarifies the law relating to co-worker liability under the whistleblowing legislation, and confirms that this protection is as effective as the scheme of protection for victims of other kinds of discrimination. The decision reinforces the need for employers in the UK to ensure that whistleblowing is treated with care and in line with good practice and internal procedures, and should consider training for senior managers and directors.

Background

In the UK, workers (an intermediate category of individual between and employee and a self-employed consultant) are protected under Part V of the Employment Rights Act 1996 (ERA) from being subjected to detriment by their employer and individual co-workers, where such detriment results from making a protected disclosure (whistleblowing). Where the detriment is occasioned by a co-worker, the whistleblower worker can also claim against the employer on the ground that it is vicariously liable for the acts of the co-worker. However, Part V also states that a detriment claim is not permitted if the whistleblower is an *employee* and the detriment 'amounts to a dismissal,' as employees have an automatic claim for unfair dismissal (under Part X of the ERA) if they are dismissed for the principal reason of making a protected disclosure. The main differences between protections under Part V and Part X are that:

1. Part V (regarding detriment) allows claims for damages for injury to feelings, whereas Part X (regarding dismissal) does not; and
2. Part V requires the protected disclosure to be a 'material influence' on a detriment, whereas Part X has a higher causation threshold such that the protected disclosure must be the 'sole or principal' reason for dismissal.

Mr. Osipov was employed by International Petroleum Limited (IP Limited) as CEO. During his tenure, he made four protected disclosures regarding governance and compliance with foreign law. Mr. Osipov alleged that he was then subjected to detriments by two NEDs, and was dismissed by one of the NEDs acting on the instructions of the other, shortly after the final protected disclosure was made. The Employment Tribunal (ET) found that Mr. Osipov had been unfairly dismissed by IP Limited on the basis that the protected disclosures he made were the principal reason for his dismissal. However, as IP Limited had become insolvent, Mr. Osipov had to show that the NEDs were personally liable in order to be awarded adequate compensation. The ET held that the two NEDs were jointly and severally liable with IP Limited to compensate Mr. Osipov for the losses he suffered as a result of his dismissal (with the exception of the basic award for unfair dismissal, which only IP Limited was required to pay), as they had subjected him to detriments on account of his protected disclosures. The Employment Appeal Tribunal dismissed an appeal by the two NEDs, in which they argued that their liability was restricted to detriments prior to dismissal, on the basis that the ERA implemented a framework for individual co-worker liability 'without restriction' such that detriments amounting to dismissal are not excluded.

The CoA dismissed the NEDs' appeal, holding that the exclusion of a detriment amounting to a dismissal under Part V applies only to a claim against the employer, and not to claims against individual co-workers. Mr. Osipov was therefore able to claim against the NEDs for subjecting him to the detriment of dismissal, in that the NEDs were party to the decision to dismiss him, and against IP Limited under a claim of vicarious liability. The CoA stated that to rule otherwise would lead to incoherent results, given that a co-worker would be liable where they subjected an employee to detriments short of dismissal but not in respect of the decision to dismiss itself, and disparities in treatment depending upon whether the claimant was a worker or an employee. Moreover, the CoA did not accept that the distinction between Part X of the ERA, dealing with dismissal, and Part V of the ERA, dealing with detriments other than dismissal, evidenced a statutory intention to regard dismissal and detriment as fundamentally differing concepts. In respect of compensation, the CoA held that the exclusion in Part V where the detriment 'amounts to a dismissal' does not preclude recovery of compensation for losses which flow from a dismissal caused by a prior act of whistleblowing detriment, subject to the usual rules regarding remoteness and quantification of loss.

Key Implications

The CoA's judgment touches on a complex area of the law. However, the implications of the judgment are important. The award of compensation in this case was approximately £1,745,000, which the NEDs were individually liable for.

The CoA's judgment clarifies that individual co-workers, in addition to the employer, can be held personally liable for their actions towards whistleblowers, and be liable to compensate whistleblowers for losses flowing from dismissal. Employees who have been dismissed on account of making a protected disclosure may potentially bring both:

1. a claim against their employer for unfair dismissal, benefitting from the basic unfair dismissal award; and
2. a claim of vicarious liability against their employer, if the detriment of dismissal was caused by an individual co-worker allowing them to seek damages for injury to feelings.

The personal liability of individual co-workers provides whistleblowing employees with an additional route to pursue compensation in scenarios where the employer is insolvent, as was the case with IP Limited, and where the employer has limited funds, as may be the case for many fledgling businesses. Directors and executives are at risk of exposure, particularly if they are not insured against such claims.

It is being reported at the time of writing that there will be no further appeal in this case to the Supreme Court.

Practical Tips for Employers

Disciplinary proceedings or management decisions regarding an employee should be documented and conducted in accordance with relevant procedures, to ensure evidence can be produced that any alleged detrimental action is unrelated to any protected disclosures. This is because an employer may not be held liable where they are able to show that reasonable steps, such as ensuring awareness of the required treatment of an employee who has made a protected disclosure, have been taken to prevent detriment to a whistleblower. Employers should have a whistleblowing policy in place, along with appropriate training, to make employees aware of the consequences of victimizing a whistleblower on account of their disclosure.

In addition, employers may wish to advise that their directors obtain directors' liability insurance providing a sufficient level of cover to mitigate the potential exposure arising from this decision.

Case 2: Employer Vicariously Liable For Employee's Deliberate Disclosure Of Personal Data

In *Wm Morrison Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339 the CoA upheld a decision of the High Court that an employer could be vicariously liable for its employee's unauthorized deliberate disclosure of employees' personal data to third parties. This decision confirms that the potential for vicarious liability remains even where the employer otherwise complies with data protection laws, and where the employee's motive for disclosure was to harm the interests of the employer. The CoA also highlighted that employers should use insurance to limit their exposure to the potential increase in claims that this well publicized decision may precipitate.

Background

In the UK, the personal data of individuals is protected from disclosure under statute, common law and equity. The *Morrisons* case was decided under the Data Protection Act 1998 (DPA), which has subsequently been superseded by the General Data Protection Regulation (GDPR), and also concerned the equitable action for breach of confidence and the common law action in tort for wrongful disclosure of private information. Employers can be vicariously liable for the tortious actions of an employee where there is a sufficiently close connection between the tortious action and the employment for the imposition of liability on the employer to be just and reasonable.

Mr. Skelton, the employee responsible for the unauthorized data disclosure, was employed by Wm Morrison Supermarkets Plc (WMMS) as an internal IT auditor. He was aggrieved after receiving a verbal warning from his employer in relation to a disciplinary matter. Mr. Skelton then downloaded employee data that he was tasked with sending to KPMG for external auditing purposes onto his personal USB stick. The personal data included payroll data for a large number of WMMS' employees. The employee posted the data onto a file-sharing website under the name of one of his colleagues, and was subsequently charged and convicted of fraud under the DPA. A group of 5,518 employees, whose personal data was disclosed in the data breach, brought actions against WMMS – for breach of statutory duty under the DPA, in equity for breach of confidence and under the common law for wrongful disclosure of private information – claiming that the company had both primary liability for its own acts and vicarious liability for the acts of the rogue employee.

The High Court found that WMMS did not bear primary liability in respect of the DPA, as its failure to adhere to the statutory data protection requirements did not cause or contribute to the employee's unlawful disclosure, or in respect of the other grounds as the company did not directly misuse, or permit such misuse, of the claimants' personal data. However, the High Court found that potential claims for vicarious liability were not excluded by the DPA. Given that the employee received the data in the course of his employment, and the fact that the unauthorized disclosure was, aside from disclosing to the public, similar to the task he had been asked to perform, there was a continuous sequence of events linking Mr. Skelton's employment to the disclosure. This conclusion was not prevented by the fact that the disclosure was made on a non-working day from the employee's home rather than the workplace. Moreover, it was irrelevant that the employee's motive was to harm WMMS – even though the harm to WMMS would be increased by finding it was vicariously liable for the breach. For these reasons, WMMS was found to be vicariously liable.

WMMS appealed this decision on the grounds that:

1. the DPA excluded the possibility of vicarious liability under the common law and equitable regimes; and
2. even if this was not the case, the unauthorised disclosure did not occur during the course of Mr. Skelton's employment.

The CoA did not accept the argument that vicarious liability was excluded by the DPA. In respect of the connection between the unauthorized disclosure and employment, the CoA agreed with the ruling of the High Court that there was sufficient connection on account of the continuous sequence of events from work matters to the unauthorized disclosure. Moreover, the CoA decided that vicarious liability could be found despite the fact that, by the CoA doing so, it was furthering the aim of the employee (to harm his employer). However, a decision that WMMS was not liable would leave those affected by the disclosure with a remedy against only the rogue employee (whose pockets will not be as deep as his employer). The risk of employers being subject to significant liability as a result of the decision could, in the CoA's view, be mitigated by insurance against the unauthorized actions of employees.

Key Implications

Despite bringing clarity to the relationship between data protection law and vicarious liability, this decision – the first class action brought in respect of an unauthorized disclosure of data in the UK – has significant financial implications. Employers are exposed to potential claims of vicarious liability regardless of their compliance with their primary duties under data protection legislation and regardless of the motive of any rogue employee responsible for a data breach. The CoA acknowledged that the quantum of such claims could extend to 'potentially ruinous amounts.'

In addition to the increased liability, employers may suffer reputational damage and the consequent effect on share price. This was the case for WMMS, as the unauthorized disclosure occurred just before its announcement of financial results.

WMMS has indicated that it will seek to appeal to the Supreme Court.

Practical Tips for Employers

The decision of the CoA demonstrates that it is virtually impossible for most employers to completely avoid the risk of vicarious liability for data breaches caused by their employees.

The CoA suggested that the increased exposure to such claims could be mitigated by insurance, for example under a bespoke policy or public liability policy. This will be especially important given that damages calculated under the GDPR are likely to be much higher than those which may be awarded in the *Morrisons* case (which will be calculated under the DPA) due to the possibility of compensation for non-material damage such as distress. The GDPR also increases the scope for class actions given the expansion in data subject rights, compounding the effect of increased public awareness of data protection rights.

Employers should consider amending any relevant insurance policies they hold to account for this increased exposure, or take out specific policies in light of this decision. However, the cyber insurance industry is still developing, and we query the extent to which employers will be able to procure full cover against such claims. Employers should also be cognizant of any exclusions or policy limits introduced by insurers to reduce exposure to claims by employers in respect of employee class actions. Of course, there is no effective insurance against the reputational harm a data breach can cause, and this underlines the need for employers to ensure that their organizational procedures regarding access to confidential information are of a high standard and are continually monitored. Employees should be given training to raise their awareness of the requirements of the GDPR and also to help them spot potentially suspicious activity by colleagues and third parties who have access to their employer's data.

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