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## **Tip Credits: Twenty Percent Rule For Non-Tipped Duties Adopted**

By [Staci Ketay Rotman](#) on May 27, 2011



Recently, the Eighth Circuit Court of Appeals ruled that tipped employees who spend more than 20 percent of their time on non-tip-producing “related duties” must be paid at least the minimum wage for that time. [Fast v. Applebee's](#). This decision marks the first time an appellate court has expressly adopted the Department of Labor’s 20 percent rule – that employer’s may not pay subminimum wage for time spent on non-tipped related duties that exceeds 20 percent of an employee’s working time.

In *Fast*, the plaintiffs’ claimed that Applebee’s improperly paid servers and bartenders the tip-credit rate for all hours worked, which included time spent performing non-tip producing work, such as taking inventory, stocking serving areas, or rolling silverware. While the FLSA regulations governing “dual jobs” refer to certain terms and concepts, they do not explicitly define when an employee is engaged in a tipped job or related duties.

Due to the lack of specificity in the regulations, the court gave controlling deference to the DOL’s Field Operations Handbook, which states that the 20 percent limit applies to general preparation work or maintenance. While the Eighth Circuit adopted the DOL’s interpretation, the court declined to address what duties would be properly included in the 20 percent to allow use of the tip credit. As a result, the question still remains as to what non-tipped duties fall under this category of “general preparation work or maintenance.”

While other courts have rejected the 20 percent rule, the issue is clearly ripe for further litigation. If an employer loses the ability to take a tip credit for work performed by tipped employees, this would result in a substantial increase in wage costs. In order to minimize their risk, employers should consider taking the following steps:

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- Ensure that tipped employees spend no more than 20 percent of their time on non-tip-producing duties.
- Spread the non-tip-producing duties among all tipped employees; do not assign these duties to just a few tipped employees exclusively.
- To the extent possible, assign non-tip-producing duties to non-tipped employees.
- Keep accurate records of hours worked and time that tipped employees spend on non-tip-producing duties.

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