Separate Pay for Restaurant "Side Work?" Maybe.

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Anyone who has ever worked in the restaurant industry is familiar with the term "side work." For most servers, side work, typically consisting of folding napkins, setting tables, restocking, and other maintenance tasks, often make up a significant portion of their work hours. This is especially true when the restaurant is slow and there isn't much for servers to do.

Side work, which is untipped work, is typically regarded as undesirable grunt work that is a necessary evil of waiting tables. Often, since restaurant owners can reduce servers' hourly rates well below the minimum wage to account for tips, employees are making as little as $2.13 per hour. However, a rule proposed by the DOL is seeking to change the way employees are paid for their side work, creating a dual approach where employees are paid at one rate when completing tip-producing duties and another when completing other tasks.

Under the proposed rule, individuals who spend a "substantial amount of time" on untipped side work would be entitled to the full minimum wage for certain hours worked. The DOL defines a "substantial amount of time" as (a) spending more than 20% of their hours worked in a workweek on side work (otherwise known as the 80/20 rule), or (b) spending more than 30 minutes of uninterrupted time on side work must be paid standard minimum wage. Thus, per the proposed rule, if an employee spends a substantial amount of time on untipped work, the employer will not take a tip credit and lower the employee's minimum wage for the time the employee spends on untipped work.

The comment period for the DOL's proposed tipped rule closes on August 23, 2021. If it is adapted, restaurants will need to shift from simply tracking the hours employees work to documenting what employees are doing during those hours.