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Another Court Declines To Defer To DOL Guidance On 20 Percent Rule

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The emerging trend of courts declining to defer to the U.S. Department of Labor (DOL)'s [recent guidance](#) on the so-called “20% rule” and the Dual Jobs regulation continues. The U.S. District Court for the Eastern District of Pennsylvania recently joined the growing number of courts [declining to afford Auer deference](#) (or *Skidmore* deference) to the DOL's recent interpretations.

In [Belt, et al., v. P.F. Chang's China Bistro, Inc.](#), a potential class and collective of servers raised a dual jobs claim based on allegedly excessive time spent performing both untipped work related to their duties as servers (side work) and untipped work unrelated to their duties as servers.

The defendant moved for judgment on the pleadings. The defendant argued that the FLSA's definition of “tipped employee” is unambiguous, and thus that the court did need not refer to DOL regulations at all. The court rejected the defendant's argument, and afforded *Chevron* deference to the DOL's Dual Jobs regulation.

Interestingly, the defendant did not argue in favor of *Auer* or *Skidmore* deference to the DOL's current interpretation. Rather, “[b]oth parties agree[d] that the current DOL interpretation of the Dual Jobs regulation does not warrant deference.” According to the court, “it is obvious why: the current interpretation is unreasonable and does not reflect the DOL's fair and considered judgment.” And despite the parties' agreement, the court went on to independently determine that neither *Auer* deference nor *Skidmore*

deference were warranted.

According to the court, the current DOL interpretation is unreasonable in part because it is internally inconsistent; it lacks clarity as to whether there is any limit on the amount of related untipped work an employee may be required to work. And the court explained that if there is no limit on untipped work, that interpretation would be inconsistent with the Dual Jobs regulation.

The court also explained its position that the current interpretation does not reflect the DOL's fair and considered judgment, in part because "[a]s both parties recognize, the DOL's current interpretation of the Dual Jobs regulation is an express reversal of its prior position, the 80/20 Rule." According to the court, the DOL's "recent abandonment of the 80/20 Rule is an 'unfair surprise,'" and "fails to acknowledge the subsequent decade of case law consistently deferring to the 80/20 Rule, and the DOL's consistent support of the 80/20 Rule in amicus briefs."

Having rejected *Auer* deference, the court explained that "*Skidmore* deference to the DOL's interpretation of the Dual Jobs regulation is unwarranted for many of the same reasons that *Auer* deference is inappropriate."

The court's decision in *Belt* continues an emerging trend of substantial importance to employers with tipped employees facing "20% rule" and "dual jobs" claims. This growing body of case law suggests that plaintiff employees may well have continued success resisting arguments based on the DOL's recent interpretations of the Dual Jobs regulation.