IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RANDY SICKLESMITH, on behalf of himself and similarly situated employees,	:	
	:	Civil Action No. 1:19-cv-01675
Plaintiffs	:	
	:	The Honorable John E. Jones, III
v.	:	
	:	[Electronically Filed]
HERSHEY ENTERTAINMENT & RESORTS COMPANY,	:	
Defendant	:	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Hershey Entertainment & Resorts Company hereby moves to dismiss the Complaint, (Doc. 1), filed by Plaintiff, Randy Sicklesmith, in its entirety. For the reasons more fully set forth in the accompanying Brief, Defendant requests that the Court grant its Motion.

SAXTON & STUMP, LLC

Date: December 2, 2019

By: */s/ Richard L. Hackman*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 2nd day of December 2019, Defendant served a true and correct copy of the foregoing Motion to Dismiss and it is available for viewing and downloading on the Court's CM/ECF system:

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Defendant	:	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Upon consideration of the Motion To Dismiss filed by Defendant, Hershey Entertainment & Resorts Company, (Doc. 8), it is **ORDERED** the Motion is **GRANTED**.

Plaintiff's Complaint, (Doc. 1), is hereby **DISMISSED with prejudice**.

The Clerk of Court is directed to **CLOSE** this case.

BY THE COURT:

Date: _____

_____
JOHN E. JONES III

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Defendant	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

SAXTON & STUMP, LLC

Date: December 2, 2019

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I. INTRODUCTION.

Plaintiff's Complaint is predicated upon alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq., and Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Stat. Ann. § 333.103,[1] as it relates to employees who receive tips in the course of their occupation.[2] Section 3(m) of the FLSA provides that an Pennsylvania employer can compensate a tipped employee at a rate of $2.83 per hour and take a tip credit toward its minimum wage obligation based on the tips the employee actually received. 29 U.S.C. § 203(m). To satisfy its obligation to pay minimum wage, the employer's tip credit must equal the difference between the employee's hourly rate and the federal minimum wage. *Id.*

Plaintiff admits Defendant complied with this provision and accurately calculated the tip credit. (Doc. 1, Compl., ¶¶ 10-11.) However, Plaintiff claims that Defendant improperly utilized the tip credit to pay him for associated non-tip-generating tasks. (Id. at ¶¶ 12, 26, 30.) Plaintiff's claims are based upon a misunderstanding of the FLSA and a rejection of all current Department of Labor ("DOL") authority.

[1] "Because the PMWA substantially parallels the FLSA, federal courts are directed to interpretation of the FLSA when analyzing claims under the PMWA." *Razak v. Uber Techs.*, 2016 U.S. Dist. LEXIS 139668, 2016 WL 5874822, *7 (E.D. Pa. Oct. 7, 2016).

[2] The FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Plaintiff does not allege he was improperly classified as a "tipped employee."

On November 8, 2018, the DOL issued an official statement of policy and ruling expressly rejecting the precise interpretation of the FLSA upon which Plaintiff bases his claims. FLSA 2018-27, 2018 DOLWH LEXIS 29 (Dep't of Labor Wage & Hour Div. Nov. 8, 2018) ("Current Opinion Letter").[3] On February 15, 2019, the DOL revised the Field Operations Handbook, reflecting the same position. U.S. Dep't of Labor, Wage & Hour Div. Field Operations Handbook, § 30d00(f)(1)-(4) (rev. Feb. 15, 2019) ("Current Field Operations Handbook").[4] The same day, the DOL issued a Field Assistance Bulletin, confirming the same position. U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019) ("Current Field Assistance Bulletin").[5] As a result, all current guidance and authority from the DOL makes clear an employer may take a tip credit for any amount of time a tipped employee spends on related non-tipped duties, provided the non-tipped duties are in fact related and performed contemporaneously with or immediately before or after the employee performs the tipped duties. The legal basis for Plaintiff's claims has been expressly rejected.

[3] A copy of the Current Opinion Letter is attached for the Court's convenience at Exhibit 1.

[4] A copy of the relevant provision of the Current Field Operations Handbook is attached for the Court's convenience at Exhibit 2 and available through the DOL's website at https://www.dol.gov/whd/FOH/ (last accessed Dec. 1, 2019).

[5] A copy of the Current Field Assistance Bulletin is attached for the Court's convenience at Exhibit 3 and available through the DOL's website at https://www.dol.gov/whd/FieldBulletins/fab2019_2.htm (last accessed Dec. 1, 2019).

For the following reasons, this Court should grant Defendant's Motion To Dismiss because, as a matter of law, Plaintiff has not and cannot state a claim upon which relief can be granted when:

- Plaintiff is a "tipped employee," as defined by the FLSA, 29 U.S.C. § 203(t);
- Defendant utilized a tip credit, as permitted by the FLSA, 29 U.S.C. § 203(m);
- Plaintiff does not hold a "dual job," as defined by the regulations accompanying the FLSA, 29 C.F.R. § 531.56(e);
- The regulations accompanying the FLSA do not restrict an employer from utilizing a tip credit for servers performing non-tipped duties related to their occupation, 29 C.F.R. § 531.56;
- The DOL's official statement and policy does not limit the amount of time servers may perform non-tipped duties related to their occupation, FLSA 2018-27, 2018 DOLWH LEXIS 29 at *8; and
- Each non-tip-producing duty cited by Plaintiff is expressly considered "directly related to the tip-producing duties of [a server]," Id. at *8 (incorporating Occupational Information Network (O*NET) http://online.onetcenter.org and 29 CFR § 531.56(e)).

II. BACKGROUND.

Defendant owns and operates the "Houlihan's" restaurant located within the Middle District of Pennsylvania ("the Restaurant"). (Doc. 1, ¶ 7.) Plaintiff was employed by Defendant as a server at the Restaurant from approximately January 2017 until September 2019. (Id. at ¶ 8.)

As part of his occupation at the Restaurant, Plaintiff and "other servers" perform non-tip-producing duties. (Id. at ¶¶ 12, 13.) The non-tip-producing duties are related to the server's ability to generate tips from providing customer service,

and include rolling silverware, setting up drink stations, cleaning the soda machine, filing sauce containers, setting-up the salad cooler, preparing food, slicing fruit, sorting silverware and ramekins, and cleaning the Restaurant. (Id. at ¶ 12.) Plaintiff estimates "at least 30% of [the servers'] working hours" involved non-tip-producing work, which occurred approximately: (a) one hour before the Restaurant opened to customers; and (b) 30 minutes before the end of the servers' shifts. (Id. at ¶ 14.)

Defendant paid Plaintiff and other servers an hourly wage of $2.83 plus tips from customers of the Restaurant. (Id. at ¶ 10.) According to Plaintiff, "[i]n seeking to comply with the FLSA and PMWA mandate that employees receive a minimum wage of $7.25 per hour," Defendant utilizes a "tip credit" in the amount of $4.42 ($7.25 - $2.83) for each hour worked by Plaintiff. (Id. at ¶ 11.) There is no allegation the tip credit was improperly calculated.

Despite Defendant's efforts "in seeking to comply" with federal and state wage and hour law, (see id.), Plaintiff filed this Complaint contending Defendant "willfully violated" the FLSA and PMWA by utilizing the tip credit to pay Plaintiff for time associated with non-tip-generating tasks. (Id. at ¶¶ 26, 30.) Defendant now timely files this Motion to Dismiss.

III. STATEMENT OF QUESTION INVOLVED.

A. Whether Plaintiff's claim must be dismissed as a matter of law because it is based upon an invalid and rejected interpretation of the FLSA?

[***Suggested answer in the affirmative***.]

IV. LEGAL STANDARD.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint to determine whether a plaintiff has properly stated a claim. See Fed. R. Civ. P. 12(b)(6). To determine the sufficiency of a complaint, the court must view the stated facts in favor of the plaintiff, disregard any legal conclusions, and not credit any formulaic recitations of the elements. See Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal v. Ashcroft, 556 U.S. 662, 675, 679 (2009)). Thus, to survive a motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, 'to state a claim for the requested relief that is plausible on its face.'" Iqbal, 556 U.S. at 678. Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This determination is a "context specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679.

This Motion asks the Court to dismiss Plaintiff's Complaint wherein he alleges that he is entitled to be paid $7.25 per hour for performing "non-tip-producing work" in conjunction with performance of his tipped duties. Even assuming the allegations of the Complaint are true, he cannot show an entitlement to relief.

V. ARGUMENT.

Plaintiff's claims are based on an erroneous and, at best, outdated interpretation of the FLSA. This Court should disregard Plaintiff's interpretations of non-binding authority and apply the FLSA, accompanying regulations, and current official authority and guidance from the DOL.

A. Plaintiff is a tipped employee for whom a tip credit can be applied.

The FLSA and the PMWA require employers to pay their covered employees a minimum wage of $7.25 per hour for all hours worked in a workweek. 29 U.S.C. § 206(a)(1)(C); 43 P.S. § 333.104. The FLSA and PMWA permit an employer to take a "tip credit" toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage and the federal minimum wage. 29 U.S.C. § 203(m)(2); 34 Pa. Code § 231.101(b)(2). The FLSA defines "tipped employee" as any employee engaged in an occupation which he customarily and regularly receives not less than $30 per month in tips. 29 U.S.C. § 203(t); 29 C.F.R. § 531.59; see also 34 Pa. Code § 213.101. The regulations accompanying the FLSA identify a server as an occupation that qualifies as a tipped employee. 29 C.F.R. § 531.57. Here, Plaintiff admits he was employed as a server at the Restaurant. (Doc.1, ¶ 9.) Therefore, Defendant is authorized to apply the tip credit toward its minimum wage obligation to Plaintiff.

B. Defendant properly calculated the tip credit under federal and state law.

The required cash wage in Pennsylvania for tipped employees is $2.83 per hour. 34 Pa. Code § 231.101(b). Thus, the maximum tip credit that an employer can currently claim is $4.42 per hour (the minimum wage of $7.25 minus the Pennsylvania minimum required cash wage of $2.83). If an employee does not earn enough in tips to bring his total compensation up to at least the full minimum wage of $7.25 an hour, the employer must make up the difference. 34 Pa. Code § 231.101(b)(1). Here, Plaintiff acknowledges that Defendant "utilized a tip credit in the amount of $4.42 for each hour worked by Plaintiff and other servers." (Doc.1, ¶ 11.) Therefore, Defendant properly calculated the tip credit applied to Plaintiff.

C. Plaintiff does not hold "dual jobs."

Plaintiff does not allege he held dual jobs during his employment at the Restaurant. (See generally Doc. 1.) To address tipped employees who have more than one occupation, *i.e.*, both tipped and non-tipped occupations or "dual jobs," the regulations provide that the tip credit may only be applied with respect to the time spent in the tipped occupation:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is

> employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man.

29 C.F.R. § 531.56(e). Plaintiff does not allege he was employed in two distinct jobs, *i.e.,* one that customarily receives tips and one that does not. (See generally Doc. 1.)

Although included under the "Dual Jobs" subsection, the regulations also account for the fact that some tipped occupations, such as serving, require both tip-generating and non-tip generating duties as part of a single job:

> Such a situation [*i.e.*, one involving a dual job] is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. ***Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips***.

Id. (emphasis supplied) Therefore, that a tipped employee may be required to perform some non-tipped duties related to the tipped portion of his job does not split the single job into two, *i.e.*, create "dual jobs."

D. The DOL's Current Opinion Letter, Current Field Bulletin, Current Field Operations Handbook, and current official interpretation of the Regulations confirm Plaintiff cannot state a claim upon which relief can be granted.

No DOL regulation has ever placed a limitation on the amount of non-tip-generating duties related to a tip-generating occupation that may be performed while

preserving the employer's ability to take the tip credit. Rather, the percentage cited by Plaintiff is based upon an outdated, 30-year old iteration of a DOL Field Operations Handbook, which suggested a 20% threshold could apply to non-tipped duties to preserve the tip credit. See U.S. Dep't of Labor, Field Operations Handbook § 30d00(f)(1)-(4) (rev. Dec. 15, 2016). Although Field Operations Handbooks are not binding regulations and are "not [to be] used as a device for establishing interpretative policy,"[6] the 20% figure spawned, in the absence of an official policy, what had become known as the "80/20 Rule" and was provided deference by the courts.

The DOL issued an Opinion Letter in 2009 stating that the Handbook's "20% rule" had created "confusion and inconsistent application." FLSA 2009-23, 2009 DOLWH LEXIS 27 (Jan. 16, 2009) ("2009 Opinion Letter"). In the 2009 Opinion Letter, the DOL explained that the 20% limitation did ***not*** apply to related duties of a server, and that:

> We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed …. No limitation shall be placed on the amount of these duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service

[6] Department of Labor, Field Operations Handbook (FOH), Preface, available at https://www.dol.gov/whd/FOH/ (last visited Dec. 1, 2019). The Field Operations Handbook is, according to the DOL, an operations manual that provides Wage and Hour Division investigators and staff with guidance to conduct investigations.

> to customers or for a reasonable time immediately before or after performing such direct-service duties.

Id. at *7-8 (emphasis supplied). Six weeks later, the DOL withdrew its 2009 Opinion Letter for "further consideration." See id.

On November 8, 2018, the DOL issued the Current Opinion Letter. FLSA 2018-27, 2018 DOLWH LEXIS 29. The Current Opinion Letter was issued due to "confusion" resulting from the 1988 Field Operation Handbook's creation of a percentage suggestion that was absent in the regulations and need to provide guidance to employers to comply with the FLSA. Id. at *5-7. To avoid any doubt, the Current Opinion Letter explicitly stated that it constitutes "an ***official statement*** of WHD [(Wage and Hour Division)] policy and an ***official ruling*** for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259[7]." Id. at *1 (emphasis supplied). The plain text of the Current Opinion Letter, which has not been withdrawn and remains the agency's "official policy" more than a year after it was issued, aligns the DOL's official policy with the plain text of the regulations and rejects the outdated 80/20 suggestion embodied in the 1988 Field Operations Handbook that read into the FLSA and accompanying regulations a percentage threshold that simply had never existed.

[7] 29 U.S.C. § 259 provides a defense to liability under the FLSA provided the "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the Administrator of the Wage and Hour Division of the Department of Labor."

First, the Current Opinion Letter interpreted the purpose of the Dual Jobs subsection of the Regulations. Id. Provided the other requirements of the FLSA are met, the Current Opinion Letter clarified the types of duties that are considered related for purposes of 29 C.F.R. § 531.56(e):

> Duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) ***shall be considered directly related to the tip-producing duties of that occupation***.

FLSA 2018-27, 2018 DOLWH LEXIS 29 at *8 (emphasis supplied).

As applied to servers, the Current Opinion Letter makes clear that related duties to the tipped occupation include: rolling silverware; setting up food and drink stations; cleaning server stations; filling condiment containers; stocking service areas; preparing food, drinks, salads, appetizers, cold dishes, and desserts; performing cleaning duties; preparing tables for meals; garnishing and decorating dishes; preparing checks; escorting customers to tables; brewing coffee; providing guests with local information; answering phones to take reservations or take-out orders; and removing dishes and glasses from tables or counters. Occupational Information Network, Summary Report for Waiters and Waitresses, *available at* https://www.onetonline.org/link/summary/35-3031.00 (last accessed Dec. 2, 2019). Here, Plaintiff acknowledges that the "non-tip producing work" he has been required to perform is included within the list of "Related Tasks" to the tip-producing

occupation. (Doc. 1, ¶ 12.) Indeed, everything that Plaintiff alleges to be non-tipped "side tasks" is listed on O*NET and considered to be directly related to tip-producing customer service. The fact Plaintiff was required to perform these tasks related to his ability to perform his tip-generating occupation does not constitute a "Dual Job" to which the tip credit can only apply to a portion.

Second, the Current Opinion Letter addressed the source of confusion as it pertained to the amount of time an employer can require a tipped employee to perform related duties. In that regard, the DOL explained, in no uncertain terms, as follows:

> ***No limitation shall be placed on the amount of these duties that may be performed***, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.

2018 DOL WH LEXIS 29 at *8 (emphasis supplied).

According to the plain text of the DOL's interpretation of its regulation, the "time" requirement relates exclusively to ***when*** the related task occurs (*i.e.*, contemporaneously with or immediately before or after performing direct-service duties), not the amount of time it takes to perform the duties. In this case, Plaintiff acknowledges that the "non-tip producing work" he has been required to perform occurred during the hour before the start of his direct-service duties began and a half-hour after his direct-service duties ended. (Doc. 1, ¶ 14.) The fact Plaintiff was

required to perform these non-tip-generating tasks within a reasonable time immediately before or after performing direct service duties does not establish he has a "Dual Job" to which the tip credit can only apply to a portion.

The DOL's elimination of the "80/20 rule" in the Current Opinion Letter is clear: "***We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed***." FLSA 2018-27, 2018 DOLWH LEXIS 29 at *7. The DOL expressly stated "[t]hese principles supersede our statements in [the Field Operations Handbook § 30d00(e))]," which was the exclusive source of the "80/20 rule." Id. at *9. Finally, the DOL emphasized that its elimination of the "80/20 rule" is an "official statement" of policy and an "official ruling." Id. at *1. As a result, a tipped-employee's ability to perform non-tipped duties is restricted by: (a) the duties being "directly related" to the tip-producing duties; and (b) the related non-tip-producing duties being performed "contemporaneously with or for a reasonable time immediately before or after" the tip-producing duties. Simply stated, the "80/20 rule," a construct at odds with the regulations, no longer exists and can provide Plaintiff no right to relief. Plaintiff's allegations cannot state a claim, and Defendant's Motion To Dismiss should be granted.

E. This Court should afford deference to the Current Opinion Letter.

As a matter of law, Plaintiff's factual allegations, even taken as true for purposes of this Motion, establish Defendant fully complied with its minimum wage obligations to Plaintiff and demonstrate Plaintiff is not entitled to relief. Despite the Current Opinion Letter confirming Defendant's practices are and have been lawful, Plaintiff nevertheless initiated this action. Defendant assumes Plaintiff will oppose this Motion by arguing 29 C.F.R. § 531.56(e) is ambiguous and that the Court should disregard the Current Opinion Letter expressing the DOL's official position, policy, and ruling on the issue and give deference to the outdated and expressly rejected "80/20 rule" in the 1988 Field Operations Handbook. Such an argument should be flatly rejected.

First, even to the extent 29 C.F.R. § 531.56(e) is considered ambiguous, an agency's interpretations of its own ambiguous regulations are entitled to deference so long as they are not plainly erroneous or inconsistent with the regulation. Auer v. Robbins, 519 U.S. 452, 461 (1997). Here, nothing in the Current Opinion Letter is plainly erroneous or inconsistent with 29 C.F.R. 531.56(e). To the contrary, both the Current Opinion Letter and the Dual Jobs subsection permit a tipped employee to perform non-tip-generating duties directly related to the tipped occupation. Therefore, either the regulation is not ambiguous, and Plaintiff's claim fails as a matter of law because it does not impose a percentage limit on non-tip-generating

duties, or it is ambiguous, and Plaintiff's claim fails as a matter of law because the agency has unequivocally interpreted its own regulation as not imposing a percentage limit on non-tip-generating duties.

Second, the fact the Current Opinion Letter is a departure from the 1988 Field Operations Handbook provides no relief to Plaintiff. The preface to the 1988 Field Operations Handbook states it "is not [to be] used as a device for establishing interpretative policy." (*See supra* Part V.D., p. 9 n.6); see also, e.g., Chavez v. T&B Mgmt., 2017 U.S. Dist. LEXIS 79992, *11 (M.D. N.C. 2017) (noting the non-interpretative disclaimers would be "strange caveats to add to documents intended to be interpretative guidance."); Probert v. Family Centered Servs. of Alaska, 651 F.3d 1007, 1012 (9th Cir. 2011) (holding the Handbook is not a "proper source of interpretative guidance"). The Current Opinion Letter, on the other hand, expressly provides it constitutes the agency's official position, policy, and ruling on the issue. FLSA 2018-27, 2018 DOLWH LEXIS 29 at *1.

Third, even if the Court finds both the expressly non-interpretative 1988 Field Operations Handbook and expressly interpretative 2018 Current Opinion Letter should be entitled to deference, the current version should control when in conflict. Indeed, it is well established an agency many change its interpretation of a regulation provided it has a "reasoned explanation" for its change in position. FCC v. Fox TV Stations, 556 U.S. 502, 515 (2009). As the Supreme Court has made clear, the

agency "need not demonstrate to the court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." Id.

Here, the DOL identified the "80/20 rule" previously imposed was unworkable and created confusion in need of clarification and remedy. FLSA 2018-27, 2018 DOLWH LEXIS 29 at *6. The DOL recognized that application of the "80/20 rule" would require "employers to keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts, which benefitted neither employees nor employers." Id. at *7. Instead of the arbitrary percentage division imposed in 1988, the agency opted for a more streamlined and workable interpretation replete with a clear list of "related duties" (that were absent from the prior interpretation), which would permit employers, on the front end, to determine which "duties are related to a tip-producing occupation so that it can take necessary steps to comply with the [FLSA]." Id. at *7-8. As the DOL recognized, the current framework aligns with the Dual Jobs subsection and creates a workable method for employers and employees to follow to ensure compliance. The "80/20 rule" did not.

F. Belt should not guide disposition of this Motion.

Finally, considering a citation to the case appears in the Complaint, Defendants anticipate Plaintiff will rely heavily on Belt v. P.F. Chang's China Bistro,[8] a non-binding decision that declined to afford the Current Opinion Letter the deference it deserves. Belt should not guide this Court's analysis.

Initially, Belt is factually inapposite. Belt was initiated on July 11, 2018, more than four months ***before*** the Current Opinion Letter was issued. Therefore, the Current Opinion Letter expressing the DOL's official position, policy, and ruling, which was intended to provide guidance and eliminate liability for compliance had no application. While the Belt court determined the Current Opinion Letter "unfair[ly] surprise[d]" regulated parties (in that case the plaintiffs),[9] rejecting an official interpretation in effect for nearly a year before this action was initiated would cause the same effect on Defendant.

Moreover, the Belt court misapplied the law in declining to extend deference to the Current Opinion Letter. As the Supreme Court has made clear, there are at least three conditions that must be met to afford deference to an agency's interpretation of its own regulation. First, "the regulatory interpretation must be one actually made by the agency" and "must be the agency's 'authoritative' or 'official

[8] 2019 U.S. Dist. LEXIS 138003 (E.D. Pa. Aug. 15, 2019).
[9] As the Belt Court emphasized, "As Plaintiffs correctly point out, ***when they filed their complaint***, the validity of the 80/20 rule was 'beyond serious challenge.'" The same cannot be said here.

position,' rather than any more ad hoc statement not reflecting the agency's views." Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019). Here, that requirement is satisfied by the express text of the Current Opinion Letter, which unambiguously confirms it constitutes "an official statement of WHD policy and an official ruling." FLSA 2018-27, 2018 DOLWH LEXIS 29 at *1.

Second, the agency's interpretation must "reflect fair and considered judgment." Kisor, 139 S. Ct. at 2417. Here, that requirement is satisfied by the framework provided in the Current Opinion Letter, which opted for a workable paradigm with a newly formulated concrete list of duties considered "related" to tip-generating occupations rather than an arbitrary percentage-based approach that created confusion among employers and required posing "relatedness" to the jury. FLSA 2018-27, 2018 DOLWH LEXIS 29 at *6. Moreover, the "unclarity" expressed in Belt through questioning the existence of "some limit on the ***amount*** of related and untipped work a tipped employee can perform," Belt, 2019 U.S. Dist. LEXIS 138003 at *33-34, is unfounded, as the DOL's only "official statement" on WHD policy answers the question. Pursuant to that official statement, the focus is ***when*** the related non-tip-generating work occurs (*i.e.*, contemporaneously or reasonably before or after), not the ***frequency*** it occurs.

Third, the agency's interpretation must in "some way implicate its substantive expertise." Kisor, 139 S. Ct. at 2417. Here, it cannot be reasonably argued that the

Wage and Hour Division of the Department of Labor overstepped its expertise by interpreting the Fair Labor Standards Act. Indeed, the Current Opinion Letter expressly states the policy is intended to provide necessary guidance for employers to "determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the [FLSA]," FLSA 2018-27, 2018 DOLWH LEXIS 29 at *7, an Act the DOL has the duty to enforce, 29 U.S.C. § 204.

Finally, notwithstanding the foregoing, the Belt Court denied deference to the DOL and, instead, read the Dual Jobs subsection as "plac[ing] a twenty percent limit on untipped related work." Such a limit is not found in either the FLSA or the regulations.[10] Moreover, the court rested on the stated purpose of the FLSA, which is to ensure all able-bodied working men and women a "fair day's pay for a fair day's work." Belt, 2019 U.S. Dist. LEXIS 138003 at *45. The FLSA does not require the court create a percentage-based standard that does not exist, as protections from abuse of the Dual Jobs subsection are already imposed into the FLSA in at least two provisions: (i) if the employee does not earn sufficient tips to bring his or her earnings to minimum wage, the employer must make up the difference, 29 U.S.C. §

[10] Notwithstanding its continued application of the officially rejected "80/20 rule," the Belt Court expressly acknowledged that "the Dual Jobs regulation could reasonably be interpreted to impose temporal limits other than twenty percent." Belt, 2019 U.S. Dist. LEXIS 138003 at *45. Defendant respectfully submits the temporal limits based upon ***when*** the related non-tip-generating work occurs, expressly embodied with the DOL's official statement of policy and ruling, is a more reasonable and appropriate interpretation of the DOL's regulation. The Current Opinion Letter does precisely what the Belt Court sought to create.

203(m); and (ii) an employee cannot be classified as a "tipped employee" if he or she earns less than $30 per month in tips. 29 U.S.C. § 203(t). These regulations ensure employers pay employees a "fair day's pay," as required by the FLSA. Providing employers the ability to take the tip credit for activities performed by the tipped employee related and necessary to the ability to generate tips, so long as such actions occur contemporaneously with or reasonably before or after the tipped work, fulfills the purpose of the FLSA. An arbitrary 20-percent limit is unnecessary.

V. CONCLUSION.

Neither the FLSA, the applicable regulations, nor current official policy statement or ruling of the administering agency provide Plaintiff a plausible entitlement to relief, even assuming all the facts alleged are true. For the foregoing reasons and considering the FLSA and PMWA are interpreted and applied identically by federal courts, Defendant respectfully requests this Honorable Court grant its Motion and dismiss the entirety of Plaintiff's Complaint, with prejudice.

Respectfully submitted:

SAXTON & STUMP, LLC

Date: December 2, 2019.

By: */s/Richard L. Hackman*

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Counsel for Defendant Hershey Entertainment & Resorts Company

CERTIFICATION OF WORD COUNT COMPLIANCE

I hereby certify that Defendant's Brief In Support of its Motion To Dismiss complies with the word court restriction set forth in Local Rule 7.8(b). The instant document contains 4,898 words, exclusive of the Table of Contents and Table of Authorities.

By: */s/ Harlan W. Glasser*
Harlan W. Glasser, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2019, I served a true and correct copy of the foregoing Defendant's Brief In Support of its Motion To Dismiss and it is available for viewing and downloading on the Court's CM/ECF system:

Peter Winebrake, Esquire
R. Andrew Santillo, Esquire
Mark J. Gottesfeld, Esquire
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Dresher, PA 19025

Counsel for Plaintiff

By: */s/ Harlan W. Glasser*
Harlan W. Glasser, Esquire

EXHIBIT 1

2018 DOLWH LEXIS 29

U.S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.c. 20210U.S. Department of Labor , Employment Standards Administration , Wage and Hour Division , Washington, D.C. 20210

Reporter
2018 DOLWH LEXIS 29 *

FLSA2018-27

November 08, 2018

Core Terms

tip, occupation, opinion letter, time spent, waiter, dual

Panel: Alexander J. Passantino, Acting Administrator

Opinion

[*1]

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-23. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-23. From today forward, this letter, which is designated FLSA2018-27 and reproduces below the verbatim text of Opinion Letter FLSA2009-23, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. Please note, however, that since the letter was originally issued in 2009, (1) the applicable federal minimum wage has increased to $ 7.25 per hour, (2) the website cited in the letter is now available at https://www.onetonline.org/link/summary/35-3031.00, and (3) then-section 30d00(e) of the Field Operations Handbook is now section 30d00(f), and the language therein was modified.

I thank you for your inquiry.

[*2] Bryan L. Jarrett

Acting Administrator

Dear **Name***:

This is in response to your request that we clarify our Field Operations Handbook (FOH) section 30d00(e), [1] which explains the Wage and Hour regulation at 29 C.F.R. § 531.56(e) interpreting the definition of a "tipped employee" in

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[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at ww.wagehour.dol.gov.

section 3(t) of the Fair Labor Standards Act, 29 U.S.C. § 203(t). We agree that the current FOH sections addressing the tip credit have resulted in some confusion and inconsistent application and, as a result, may require clarification. It is our intent that FOH § 30d00(e) be construed in a manner that ensures 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 Act, but also the paramount goal that all affected workers receive the full protections of the Act.

[*3]

The tip credit provision in section 3(m) of the FLSA, 29 C.F.R. § 203(m), permits an employer to pay its tipped employees not less than $ 2.13 per hour in cash wages and take a "tip credit" equal to the difference between the cash wages paid and the federal minimum wage, which is currently $ 6.55 per hour. The tip credit may not exceed the amount of tips actually received and under the current minimum wage may not exceed $ 4.42 per hour ($ 6.55 ? $ 2.13). [2] A "tipped employee" is defined in FLSA section 3(t) as any employee engaged in an *occupation* in which he or she customarily and regularly receives not less than $ 30 a month in tips (emphasis added).

Recognizing that there are situations in which employees have more than one occupation, some of which may meet the tip credit **[*4]** requirements and some of which may not, the regulations provide that in such "dual jobs," the tip credit may only be applied with respect to the time spent in the tipped job.

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $ 20 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man.

29 C.F.R. § 531.56. The regulations further recognize that some occupations require both tip-generating and non-tip-generating duties, but do not constitute a dual job that necessitates the allocation of the tip credit to the tipped occupation only.

> Such a situation [i.e. one involving a dual job] is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from **[*5]** the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

Id.

The dividing line between "dual job" and "related duties" is not always clear, however. To give enforcement guidance on this issue, we issued FOH § 30d00(e), which states:

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend **[*6]** a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Section 30d00(e) attempts to ensure that employers do not evade the minimum wage requirements of the Act simply by having tipped employees perform a myriad of nontipped work that would otherwise be done by non-tipped employees. Admittedly, however, it has created some confusion. For instance, in Fast v. Applebee's Int'l, Inc., 502

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[2] Section 3(m) also requires that an employer that elects the tip credit (1) inform its tipped employees of the tip credit provisions in FLSA section 3(m), and (2) that all tips received by such employees be retained by the employees.

F.Supp.2d 996 (W.D. Mo. 2007), the court construed § 30d00(e) to not only prohibit the taking of a tip credit for duties unrelated to the tip producing occupation, but also to prohibit the taking of a tip credit for duties related to the tip producing occupation if they exceed 20 percent of the employee's working time. Moreover, the court determined that what constitutes a related and non-related duty is a jury determination.

In contrast, in Pellon v. Business Representation Int'l, Inc., 528 F.Supp.2d 1306 (S.D. Fla. 2007),*aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the court rejected the **[*7]** *Fast* court's reading of FOH § 30d00(e), holding, in part, that the 20 percent limitation does not apply to related duties. The court further held that under the *Fast* ruling, "nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon*, at 1314. Such a situation benefits neither employees nor employers.

We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met. We also believe that guidance is necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act. Accordingly, we believe that the determination that a particular duty is part of a tipped occupation should be made based on the following principles:

. Duties listed as core or supplemental for the appropriate **[*8]** tip-producing occupation in the in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation. [3] No limitation shall be placed on the amount of these duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties. [4]

. Employers may not take a tip credit for time spent performing any tasks not contained in the O*NET task list. We note, however, that some of the time spent by a tipped employee performing tasks that are not listed in O*NET may be subject to the de minimis rule contained in Wage and Hour's general FLSA regulations at 29 C.F.R. § 785.47.

These principles supersede our statements in FOH § 30d00(e). A revised FOH statement will be forthcoming.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client **[*10]** or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

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[3] WHD recognizes that there will be certain unique or newly emerging occupations that qualify as tipped occupations under the Act, but for which there is no O*NET description. *See e.g.*, Wage and Hour Opinion Letter FLSA2008-18 (Dec. 19, 2009) (itamae-sushi chefs and teppanyaki chefs). For such tipped occupations for which there is no O*NET description, the duties usually and customarily performed by employees in that specific occupation shall be considered "related duties" so long as they are consistent with the duties performed in similar O*NET occupations. For example, in the case of unique occupations such as teppanyaki chefs, the related duties would be those that are included in the tasks set out in O*NET for counter attendants in the restaurant industry.

[4] *See* Wage and Hour Opinion Letter WH-502 (Mar. 28, 1980) (concluding that a waitperson's time spent performing related duties (vacuuming) after restaurant was closed was subject to tip credit).

Sincerely,

Alexander J. Passantino

Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

Load Date: 2018-11-11

End of Document

EXHIBIT 2

b. Non-3(m) deductions when the employer does not claim an FLSA 3(m) tip credit

Non-3(m) deductions may only be made from a tipped employee's wages when the employer does not claim an FLSA 3(m) tip credit *and* pays a direct wage in excess of the minimum wage. For example, if an employee receives $10.00 per hour in cash wages, the employer cannot claim an FLSA 3(m) tip credit, and the employer may take up to $2.75 ($10.00 - $7.25 = $2.75) in non-3(m) deductions from the employee's hourly wage. *See* 29 CFR 531.37.

(5) *Other laws*

Where the FLSA and a state or local law regulating wages for tipped employees are concurrently applicable, it is the employer's responsibility to comply with the more protective wage standard.

(f) Dual jobs

(1) When an individual is employed in a tipped occupation and a non-tipped occupation—for example, as a server and janitor (*i.e.*, dual jobs)—the tip credit is available only for the hours the employee spends working in the tipped occupation, provided the employee customarily and regularly receives more than $30.00 a month in tips. *See* 29 CFR 531.56(e).

(2) 29 CFR 531.56(e) permits the employer to take a tip credit for any time the employee spends in duties related to the tipped occupation, even though such duties are not themselves directed toward producing tips.

(3) WHD staff will consult the Occupational Information Network (O*NET), an online source of occupational information, and 29 CFR 531.56(e) to determine whether duties are related or unrelated to the tip-producing occupation. Duties will be considered related to the tipped occupation when listed as "core" or "supplemental" under the "Tasks" section of the "Details" tab for the appropriate tip-producing occupation in O*NET.

a. An employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless whether those duties involve direct customer service. *See* WHD Opinion Letter WH-502 (March 28, 1980), which concludes that a server's time spent performing related duties (*e.g.*, vacuuming) after restaurant closing is subject to a tip credit. For example, the core tasks currently listed in O*NET for waiters and waitresses (*see* the O*NET Summary Report for waiters and waitresses) include: cleaning tables or counters after patrons have finished dining; preparing tables for meals, which encompasses setting up items such as linens, silverware, and glassware; and stocking service areas with supplies such as coffee, food, tableware, and linens. In addition, O*NET lists garnishing and decorating dishes in preparation for serving as a supplemental task for waiters and waitresses. An employer may take a tip credit for any amount of time a

waiter or waitress who is a tipped employee spends performing these related duties.

b. The WHD recognizes that there will be unique or newly emerging occupations that qualify as tipped occupations under the FLSA for which there is no O*NET description. *See, e.g.,* WHD Opinion Letter FLSA2008-18 (December 19, 2008) regarding itamae-sushi chefs and teppanyaki chefs. For such tipped occupations, the duties usually and customarily performed by employees in that specific occupation shall be considered related duties as long as they are consistent with the related duties performed in similar O*NET occupations. For example, in the case of unique occupations such as teppanyaki chefs, the related duties would be those that are included in the tasks set out in O*NET for counter attendants in the restaurant industry.

(4) An employer may not take a tip credit for the time an employee spends performing any tasks not contained in 29 CFR 531.56(e), or in the O*NET task list for the employee's tipped occupation, or—for a new occupation without an O*NET description—in the O*NET task list for a similar occupation. Some of the time spent by a tipped employee performing tasks that are not related to a tipped occupation, however, may be subject to the *de minimis* rule in 29 CFR 785.47.

See WHD Opinion Letter FLSA2018-27 (November 8, 2018).

[12/15/2016, 02/15/2019]

30d01 Retention of tips by employee.

(a) General

As noted above, tips are the property of the tipped employee who receives them, regardless of whether or not the employer claims a tip credit. All tips received (*i.e.*, given to or designated for the employee by a patron) by a tipped employee must be retained by the employee, and the employer may only utilize the employee's tips as a partial credit against its wage payment obligations or in furtherance of a valid pooling arrangement. An employer and employee cannot agree to waive such employee's right to retain all tips received. An employer's use of an employee's tips for any other purpose will be treated as a deduction from the employee's wages and would be an FLSA violation to the extent that it reduces total compensation below what the Act requires. *See* WHD Opinion Letter FLSA (October 26, 1989).

Tips in excess of the FLSA 3(m) tip credit may not be credited toward an employer's minimum wage obligations. Where an employer has claimed an FLSA 3(m) tip credit, it has paid the employee only the federal minimum wage for any hours in a non-overtime workweek, regardless of the amount of tips received by the employee in excess of the tip credit amount.

(b) 3(m) requirements not observed

Where an employer does not strictly observe the provisions of section 3(m) (the employer fails to provide adequate notice of the use of the tip credit, the employer does not pay a cash or direct wage of at least $2.13 per hour, the tips received by the employee are less than the amount of tip credit claimed and the employer does not make up the difference during the pay

EXHIBIT 3

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

February 15, 2019

FIELD ASSISTANCE BULLETIN No. 2019-2

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Keith E. Sonderling
Acting Administrator

SUBJECT: Dual jobs and related duties under Section 3(m) of the Fair Labor Standards Act (FLSA)

This Field Assistance Bulletin (FAB) provides guidance on a recent change to Field Operations Handbook (FOH) 30d00(f), which contains the Wage and Hour Division's (WHD) interpretation concerning whether tipped employees are working "dual jobs." Specifically, this FAB explains that, consistent with WHD Opinion Letter FLSA2018-27 (Nov. 8, 2018), WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties. Employers remain prohibited from keeping tips received by their employees, regardless of whether the employer takes a tip credit under the FLSA. In addition, employers electing to use the tip credit provision must ensure tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employee's direct (or cash) wages do not equal the minimum hourly wage of $7.25 per hour, the employer must continue to make up the difference. WHD has updated FOH 30d00(f) accordingly.

Background

The FLSA generally requires covered employers to pay employees at least a federal minimum wage, which is currently $7.25 per hour. *See* 29 U.S.C. § 206(a)(1). Under Section 3(m) of the Act, an employer may pay a tipped employee[1] a lower direct cash wage and count a limited amount of the employee's tips as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage (known as a "tip credit"). *See* 29 U.S.C. § 203(m)(2)(A).

When an employer employs a worker in both a tipped and non-tipped occupation, such as a server job and a maintenance job, the tip credit is available only for the hours the employee works in the tipped occupation. In this dual job scenario, the employer may take a tip credit for the time that the tipped

[1] The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t).

employee spends performing duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a server who also cleans and sets tables, makes coffee, and occasionally washes dishes or glasses is engaged in duties related to a tipped occupation, even though the server is not tipped for these related duties. *See* 29 C.F.R. § 531.56(e).

Revisions to FOH 30d00(f)

Section 531.56(e), and 29 U.S.C. § 203(m), which it interprets, allow employers to take a tip credit based on whether the employee's "job" or "occupation" is tipped. However, WHD's previous interpretation of § 531.56(e) in FOH 30d00(f) focused on whether the employee's "duties" were tipped. The previous FOH 30d00(f) excluded from the tip credit any time that an employee in a tipped occupation spent performing related, non-tipped duties in excess of 20 percent in the workweek. This prior interpretation created confusion for the public about whether § 531.56(e) requires certain related, non-tipped duties to be excluded from the tip credit. In fact, § 531.56(e) includes non-tipped duties in the tip credit unless they are unrelated to the tipped occupation or part of a separate, non-tipped occupation in a "dual job" scenario.

Accordingly, an employer may take a tip credit for any duties that an employee performs in a tipped occupation that are related to that occupation and either performed contemporaneous with the tip-producing activities or for a reasonable time immediately before or after the tipped activities. To clarify this, the Department has issued WHD Opinion Letter FLSA2018-27—formally rescinding its previous interpretation setting a 20 percent limit on related, non-tipped duties—and revised FOH 30d00(f) to reflect WHD's interpretation of 29 C.F.R. § 531.56(e) as provided in the opinion letter.

Under the revised FOH 30d00(f), WHD staff will determine whether a tipped employee's non-tipped duties are related to the tipped occupation by using the following principles:

- Non-tipped duties listed as examples in 29 C.F.R. § 531.56(e), and non-tipped duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) [https://www.onetonline.org/], are related duties.[2]

[2] Some newly emerging occupations will qualify as tipped occupations under the Act but will not have an O*NET description. *See, e.g.*, WHD Opinion Letter FLSA2008-18 (Dec. 19, 2008) (itamae-sushi chefs and teppanyaki chefs). For such occupations, duties usually and customarily performed by employees are "related duties" as long as they are included in the list of duties performed in similar O*NET occupations. For example, in the case of teppanyaki chefs, related duties would be those duties included in O*NET's list of core and supplemental tasks for counter attendants in the restaurant industry.

- An employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless whether those duties involve direct customer service.[3]
- Employers may not take a tip credit for time spent performing any tasks that are not contained in 29 C.F.R. 531.56(e), or in the O*NET task list for the employee's tipped occupation, or—for a new occupation without an O*NET description—in the O*NET task list for a similar occupation. We note, however, that some of the time that a tipped employee spends performing these tasks—which are unrelated to the employee's tipped occupation—may be subject to the *de minimis* rule in 29 C.F.R. § 785.47.

The revised FOH 30d00(f) incorporates these principles. WHD staff should apply them in investigations involving non-tipped duties performed by tipped employees on or after November 8, 2018. As a matter of enforcement policy, WHD staff should also follow the revised guidance in FOH 30d00(f) in any open or new investigation concerning work performed prior to the issuance of WHD Opinion Letter FLSA2018-27 on November 8, 2018.[4]

[3] *See* WHD Opinion Letter WH-502 (Mar. 28, 1980) (concluding that a server's time spent performing related duties (*e.g.*, vacuuming) after restaurant closing is subject to the tip credit).
[4] WHD will update its website and other materials to reflect the information above. Questions should be directed to the Division of Enforcement Policy and Procedures, FLSA / Child Labor Branch, through regular channels.