IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

AMANDA FOSTER, on behalf of herself and similarly situated employees, Plaintiff, v. NEW APPLE INC., d/b/a Apple Gold Group, Defendant.	:	CIVIL ACTION No.: 0:16-cv-3705-BHH

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Defendant New Apple Inc. ("Defendant") has filed a Rule 12(b)(6) motion asking this Court to hold that under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, corporate restaurants (such as Defendant) are allowed to pay their servers only $2.13 per hour regardless of the amount of non-tip producing side work they perform in a shift. *See* Doc. 13 ("Motion"). Notably absent from Defendant's Motion is any mention of this Court's decision in *Irvine v. Destination Wild Dunes Management*, 106 F. Supp. 3d 729 (D.S.C. 2015), in which Judge Richard Gergel denied a similar Rule 12(b)(6) motion filed by the same lawyers who represent Defendant here.

In *Irvine*, Judge Gergel held that servers could assert a colorable FLSA claim when they allege (as Plaintiff does here) that they spent more than 20% of their time performing non-tip producing sidework (the "20% Rule") but were only paid the tipped minimum wage of $2.13 per hour. *Id.* Defendant's omission of *Irvine* is not surprising since Judge Gergel rejected each of the arguments that Defendant rehashes now in support of its Motion.

In addition to Judge Gergel, Judge J. Michelle Childs of this Court also recognized the

20% Rule when she conditionally certified a collective action on behalf of servers at various restaurants asserting similar FLSA claims to Plaintiff here. *See Walter v. Buffets Inc.*, 2015 U.S. Dist. LEXIS 82507, *9 (D.S.C. June 25, 2015).

Judge Gergel and Judge Childs are not alone. Two federal appellate courts and the overwhelming majority of district courts that have been confronted with this very issue have likewise recognized the validity of the 20% Rule. *See, e.g.*, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011); *Driver v. AppleIllinois, LLC*, 739 F.3d 1073 (7th Cir. 2014); *Flood v. Carlson Rests., Inc.*, 94 F. Supp. 3d 572 (S.D.N.Y. 2015); *Ide v. Neighborhood Rest. Partners, LLC*, 32 F. Supp. 3d 1285 (N.D. Ga. 2014); *White v. NIF Corp.*, 2017 U.S. Dist. LEXIS 6703 (S.D. Ala. Jan. 18, 2017); *Bowe v. HHJJ, LLC*, 2016 U.S. Dist. LEXIS 181000 (M.D. Fla. Dec. 13, 2016) *adopted by* 2017 U.S. Dist. LEXIS 1216 (M.D. Fla. Jan. 5, 2017); *Mooney v. Domino's Pizza, Inc.*, 2016 U.S. Dist. LEXIS 118193 (D. Mass. Sep. 1, 2016); *Knox v. Jones Group*, 2016 U.S. Dist. LEXIS 110377 (S.D. Ind. Aug. 15, 2016); *McLamb v. High 5 Hospitality*, 2016 U.S. Dist. LEXIS 89985 (D. Del. July 12, 2016); *Cope v. Let's Eat Out, Inc.*, 2016 U.S. Dist. LEXIS 88154 (W.D. Mo. June 21, 2016); *Volz v. Tricorp Management Co.*, 2016 U.S. Dist. LEXIS 4133 (S.D. Ill. Jan. 13, 2016); *Hart v. Crab Addison, Inc.*, 2014 U.S. Dist. LEXIS 152590 (W.D.N.Y. Oct. 28, 2014); *Mendez v. Int'l Food House Inc.*, 2014 U.S. Dist. LEXIS 121158 (S.D.N.Y. Aug. 28, 2014); *Schamis v. Josef's Table, LLC*, 2014 U.S. Dist. LEXIS 51942 (S.D. Fla. Apr. 15, 2014); *Chhab v. Darden Restaurants, Inc.*, 2013 U.S. Dist. LEXIS 135926 (S.D.N.Y. Sept. 20, 2013).

As discussed below, Defendant's Motion should fail because, as all of the federal courts cited above have found, the 20% Rule represents a reasonable interpretation of the FLSA and its regulations that has been consistently recognized by the U.S. Department of Labor since 1988.

II. PLAINTIFF'S CLAIMS AS A TIPPED EMPLOYEE UNDER THE FLSA

The FLSA requires employers to pay employees a minimum wage of $7.25/hour. *See* 29 U.S.C. § 206(a)(1)(C). However, in determining the minimum wage owed to a "tipped employee," the FLSA contains a "tip credit" provision that enables an employer to pay the tipped employee as little as $2.13/hour so long as the employee's additional tip payments bring her total pay above the $7.25/hour threshold. *See* 29 U.S.C. § 203(m); 29 C.F.R. § 531.50(a). As this Court previously observed, "an employer can save $5.12 per hour per employee in decreased wages by classifying a worker as a 'tipped employee.'" *Irvine*, 106 F. Supp. 3d at 731.

The FLSA does not allow an employer automatically to take advantage of this 70% reduction in hourly labor costs. The FLSA defines a "tipped employee" for purposes of § 203(m) as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *See* 29 U.S.C. § 203(t). Thus, "an employee is a tipped employee if two things occur: 1) he is engaged in an occupation, and 2) the occupation is one in which he regularly and customarily receives at least $30 in tips per month." *Fast*, 638 F.3d at 876.

Congress did not define the term "occupation" when Sub-sections 203(m) and 203(t) were enacted in 1966. *Fast*, 638 F.3d at 878. In response, the U.S. Department of Labor ("DOL") promulgated a regulation one year later explaining the application of the term by adding subsection (e) to 29 C.F.R. § 531.56.[1] *Id.* "Pursuant to 29 C.F.R. § 531.56(e), … 'if a

[1] 29 C.F.R. § 531.56(e) states: "***Dual jobs.*** 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. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and

tipped employee works two jobs, one in which his work customarily and regularly produces tips and one in which it does not' (*e.g.*, where a maintenance man in a hotel also serves as a waiter), 'the employee is considered employed in dual occupations, and the tip credit may not be taken for any hours worked in the non-tip-producing occupation.' The regulation distinguishes this situation from 'a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses,' noting that '[s]uch related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.'" *Flood*, 94 F. Supp. 3d at 581 (internal citations omitted).

In 1988, the DOL elaborated on 29 C.F.R. § 531.56(e) in its Field Operations Handbook ("FOH"),[2] stating:

> 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 tables, 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 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.***

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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."

[2] As Judge Gergel observed: "According to the DOL, the FOH is an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations and general administrative guidance. The FOH 'was developed by the WHD under the general authority to administer laws that the agency is charged with enforcing. The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretative policy.'" *Irvine*, 106 F. Supp. 3d at 732.

U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook at § 30d00(e) (Dec. 9, 1988) (attached at Doc. 13-5) (emphasis supplied); *accord* U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook at § 30d00(f)(3) (Dec. 1, 2016) ("[W]here the facts indicate that tipped employees spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.") (attached as Exhibit A); U.S. Department of Labor, Wage & Hour Division, Fact Sheet #15: Tipped Employees under the Fair Labor Standards Act (FLSA) (Dec. 2016) ("[W]here a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties.") (attached as Exhibit B).

The FOH is consistent with an opinion letter that was issued by the DOL's Wage and Hour Division just three years prior. *See* U.S. DOL Opinion Letter, Dec. 20, 1985, 1985 DOLWH LEXIS 9 (Doc. 13-7). Therein, the DOL stated "where the facts indicate that specific employees are routinely assigned to maintenance-type work or that tipped employees spend a substantial amount of time in performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities." *Id.* at *5

Limiting an employers' ability to take advantage of the 70% reduction in wages through the tip credit is important. As many commentators have observed, waiters and waitresses at corporate restaurants are some of the most vulnerable employees in today's economy. *See, e.g.*, Saru Jayaraman, *Why Tipping is Wrong*, THE NEW YORK TIMES, Oct. 15, 2015, *available at* https://www.nytimes.com/2015/10/16/opinion/why-tipping-is-wrong.html (last accessed Jan. 22, 2017). As the Fourth Circuit stated just last week, when construing the FLSA with respect to

such workers, courts "are guided by the Supreme Court's direction that the FLSA must not be interpreted or applied in a narrow, grudging manner. Rather, because the Act is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals." *See Salinas v. Commercial Interiors, Inc.*, __ F. 3d. __, 2017 U.S. App. LEXIS 1321, at *27 (4th Cir. Jan. 25, 2017) (internal citations and quotations omitted).

In this case, Plaintiff's FLSA claim specifically alleges that Defendant – having benefited from the tip credit in satisfying its minimum wage obligations to Plaintiff and other Servers – has violated the FLSA's minimum wage mandate by requiring its Servers to spend more than 20% of their time performing non-tip producing work (or "side work") such as, *inter alia*, washing dishes, stocking condiments, rolling silverware, and cleaning the restaurant. *See* Amended Complaint (Doc. 5) at ¶¶ 11-18.

Defendant's Motion does not challenge Plaintiff's factual assertions that she and other Servers were paid only $2.13 an hour and were required to perform a substantial amount of side work. *See* Doc. 13. Rather, Defendant merely argues that the 20% Rule is not valid. *Id.*

III. APPLICABLE STANDARD

This Court recently described the Rule 12(b)(6) standard of review in *Fejzulai v. Sam's W., Inc.*, 2016 U.S. Dist. LEXIS 120559 (D.S.C. Sep. 7, 2016) (Hendricks, J.):

> A plaintiff's complaint should set forth "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility 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.* (quoting *Twombly*, 550 U.S. at 556). In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court "accepts all

> well-pled facts as true and construes these facts in the light most favorable to the plaintiff . . . ." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). A court should grant a Rule 12(b)(6) motion if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

Id. at *3-4.

IV. DEFENDANT'S ARGUMENTS AGAINST THE 20% RULE SHOULD BE REJECTED

Defendant's Motion consists entirely of legal arguments that were previously rejected by this Court in *Irvine* and at least thirteen other federal courts that have recognized the validity of the 20% Rule. As discussed below, the Court should follow this authority and deny Defendant's Motion.

A. The DOL has consistently recognized and applied the 20% Rule.

The majority of arguments in Defendant's Motion are dependent on Defendant's assertion that the DOL has been inconsistent in its recognition of the 20% Rule. *See* Def. Br. (Doc. 13-1) at pp. 18-20, 22-24. However, this characterization of the DOL's position is not accurate. For the last 29 years, the DOL has repeatedly stated that the 20% Rule is an appropriate guideline for related but non-tip producing tasks performed by servers paid under the tip credit. *See* pp. 4-5, *supra*. This consistent recognition of the 20% Rule by the DOL disposes of Defendant's arguments, which require a gateway determination that the DOL has inconsistently applied the 20% Rule.

The only occasion in which the DOL has even come close to deviating from its endorsement of the 20% Rule was a January 16, 2009 opinion letter ("2009 Letter") by an acting administrator in the waning days of an outgoing administration. *See* U.S. DOL Opinion Letter,

Jan. 16, 2009, 2009 DOLWH LEXIS 27 (attached as Exhibit C). The 2009 Letter was never mailed and was quickly withdrawn by the DOL. *Id.* at *1.

Defendant pounces on the 2009 Letter as proof of the DOL's purported "dizzying inconsistency" and "Shifting Positions" on the 20% Rule. Def. Br. (Doc. 13-1) at pp. 2, 9.[3] However, as Judge Gergel observed when Defendant's counsel made this same argument unsuccessfully in *Irvine*, the 2009 Letter does no such thing:

> Although the DOL has not adopted and promulgated the 20% rule as a codified regulation, its use of the rule has not been "dizzyingly inconsisten[t]," as Defendants claim (Dkt. No. 11-1 at 7). ***The DOL has had a constant position that 20% is the appropriate guideline for related but non-tipped tasks since at least 1988, when the FOH was updated to include § 30d00(e).*** (*See* Dkt. No. 11-1 at 15). Three years before, it had already issued an opinion letter addressing a situation where a server spent 30-40% of their shift in prep work (DOL Opinion Letter, FLSA 854, Dec. 20, 1985, explaining that the employer there was not eligible for the tip credit). And in 2009 it reaffirmed the rule in its published FAQ's. *See* "Fact Sheet # 15: Tipped Employees Under the Fair Labor Standards Act," *available at* http://wwwv.dol.gov/whd/regs/compliance/whdfs15.pdf, revised July 2013.[4] The only instance where DOL considered ending reliance on the twenty percent rule was when (under the guidance of an interim administrator) it issued and simultaneously withdrew an opinion letter that would have "superseded" § 30d00(e). (Dkt. No. 14-4). Ultimately, this letter, which would have shifted the DOL's position that would rely on the O*NET, discussed further below, was never adopted or relied upon by the DOL.

106 F. Supp. 3d at 733 (emphasis supplied). Other district courts agree with Judge Gergel. *See, e.g.*, *McLamb*, 2016 U.S. Dist. LEXIS 89985, at *15 ("[Defendant] offers no compelling proof that the substantial work interpretation has been inconsistently applied since its creation in 1988. The unpublished [2009 Letter] on which it relies rejected the sub-regulation, but also declared that the FOH would soon be revised to remove the 20% provision. Yet, this letter was neither

[3] Defendant also cites to a 1980 opinion letter, *see* Def. Br. (Doc. 13-1) at pp. 10, 13, but the DOL's position on the 20% Rule *prior* to issuing the FOH in 1988 is not considered as part of this analysis. *See McLamb*, 2016 U.S. Dist. LEXIS 89985, at *15.

[4] The December 2016 version of Fact Sheet #15 is attached as Exhibit B.

published nor 'adopted or relied on' by the DOL.") (internal citations omitted); *Bowe*, 2016 U.S. Dist. LEXIS 181000, at * 15-16 ("Because the [2009 Letter] was never adopted or relied upon by the DOL, its existence does not prevent the Court from deferring to the 20% rule.").

Moreover, in the nearly eight years since the 2009 Letter was withdrawn, the DOL has issued and regularly updated Fact Sheet #15 which explicitly recognizes the 20% Rule. *See* U.S. Department of Labor, Wage & Hour Division, Fact Sheet #15: Tipped Employees under the Fair Labor Standards Act (FLSA) (Dec. 2016), at p. 2 ("[W]here a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties.") (attached at Exhibit C).

B. The DOL's FOH is entitled to Auer Deference.

Defendant also argues that the FOH and the subsequent pronouncements by the DOL recognizing the 20% Rule are unsupported by the FLSA and are not entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[5] *See* Def. Br. (Doc. 13-1) at pp. 20-22. However, the overwhelming majority of federal courts that have addressed this issue have held that the FOH is entitled to *Auer* deference as a reasonable interpretation of the DOL's ambiguous dual jobs regulation at 29 C.F. R. § 531.56(e).

The most notable of these decisions is the Eighth Circuit's opinion in *Fast v. Applebee's Int'l, Inc.*, 638 F. 3d 872 (8th Cir. 2011). There, the court observed:

> The regulation at issue in *Auer* adopted a salary basis test to interpret 29 U.S.C. § 213(a)(1) for purposes of the FLSA's overtime pay requirements. *See Auer*, 519 U.S. at 456-57. Likewise, the regulation here created the dual jobs test to further interpret § 203(t), a statute which the Department of Labor is "charged with enforcing," and the regulation "reflect[s] the considerable experience and expertise

[5] Under *Auer*, when a rule or test "is a creature of the Secretary's own regulations, his interpretation of it is, under [Supreme Court] jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. However, the language of the regulation must be ambiguous to warrant *Auer* deference. *Fast*, 638 F. 3d at 878.

the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales* [*v. Oregon*, 546 U.S. 243, 256-57 (2006)]. Section 203(t) of the FLSA does not define when an employee is "engaged in an occupation," and the DOL promulgated the dual jobs regulation to further clarify that phrase. The regulation is not a mere recitation of the words used by Congress in the statute, which itself does not even recognize the possibility of an employee performing more than one occupation for the same employer, let alone during the same shift. Thus, the dual jobs test set forth in the regulation is "a creature of the [DOL's] own regulations." *Auer*, 519 U.S. at 461 (internal marks omitted). Section 531.56(e) is itself ambiguous because it does not address an employee performing related duties more than "part of [the] time" or more than "occasionally," which further supports granting *Auer* deference to the agency's interpretation. *See Christensen* [*v. Harris County*, 529 U.S. 576, 588 (2000)]. The DOL's interpretation of § 531.56(e) is therefore "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal marks omitted).

Applebee's argues that neither the statute nor the regulation places a quantitative limit on the amount of time a tipped employee can spend performing duties related to her tipped occupation (but not themselves tip producing) as long as the total tips received plus the cash wages equal or exceed the minimum wage. The regulation, to which we owe *Chevron* deference, makes a distinction between an employee performing two distinct jobs, one tipped and one not, and an employee performing related duties within an occupation "part of [the] time" and "occasionally." § 531.56(e). By using the terms "part of [the] time" and "occasionally," the regulation clearly places a temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation. "Occasionally" is defined as "now and then; here and there; sometimes." *Webster's Third New Int'l Unabridged Dictionary* 1560 (1986); *see also United States v. Hackman*, 630 F.3d 1078, 1083 (8th Cir. 2011) (using dictionary to determine ordinary meaning of a term used in the commentary to the United States Sentencing Guidelines). The term "occasional" is also used in other contexts within the FLSA, such as in § 207, which allows a government employee to work "on an occasional or sporadic basis" in a different capacity from his regular employment without the occasional work hours being added to the regular work hours for calculating overtime compensation. *See* 29 U.S.C. § 207(p)(2). The DOL's regulation defines occasional or sporadic to mean "infrequent, irregular, or occurring in scattered instances." 29 C.F.R. § 553.30(b)(1). Thus, the DOL's regulations consistently place temporal limits on regulations dealing with the term "occasional."

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Because the regulations do not define "occasionally" or "part of [the] time" for purposes of § 531.56(e), the regulation is ambiguous, and the ambiguity supports the DOL's attempt to further interpret the regulation. *See Auer*, 519 U.S. at 461.

> ***We believe that the DOL's interpretation contained in the [FOH]—which concludes that employees who spend "substantial time" (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of the regulation. It certainly is not "clearly erroneous or inconsistent with the regulation."*** *Id.* The regulation places a temporal limit on the amount of related nontipped work an employee can do and still be considered to be performing a tipped occupation.

638 F.3d at 879-81 (emphasis supplied);[6] *see also Knox*, 2016 U.S. Dist. LEXIS 110377, at *24 ("The 20 percent threshold established in the [FOH] reasonably quantifies the temporal limitations placed on the performance of related duties by the dual-jobs regulation. … In fact, we note that such a threshold is found elsewhere in defining the term 'substantial' with regard to the performance of certain duties under the FLSA.") (*citing* 29 U.S.C. §§ 213(a)(12), (15); 29 C.F.R. §§ 552.6, 553.212(a), 783.37.); *accord Irvine*, 106 F. Supp. at 733; *Bowe*, 2016 U.S. Dist. LEXIS 181000, at *14-15; *McLamb*, 2016 U.S. Dist. LEXIS 89985, at *13-14.

Defendant asks this Court (as its counsel did in *Irvine*) to reject the Eighth Circuit's reasoning in *Fast* because, according to Defendant, both the FOH and the regulation it is based upon (§ 531.56(e)) were not subject to notice and comment prior to enactment. *See* Def. Br. (Doc. 13-1) at pp. 21-22 (*citing* 32 Fed. Reg. 13575 (Sept. 28, 1967)).[7] According to Defendant,

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[6] Defendant's Motion also suggests that the weight of the *Fast* decision is somehow diminished by the Supreme Court's subsequent decision in *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, 132 S. Ct. 2156 (2012) which "refine[d]" *Auer* deference and "reject[ed] deference where DOL has been inconsistent, as here." *See* Def. Br. (Doc. 13-1), at p. 19 n.16. Much like Defendant's other arguments, this is also premised on the incorrect notion that the DOL has been inconsistent in its application and recognition of the 20% Rule. *See Flood*, 94 F. Supp. 3d at 583 n.9 ("the Supreme Court's ruling that *Auer* deference might be unwarranted 'when the agency's interpretation conflicts with a prior interpretation,' *SmithKline*, 132 S. Ct. at 2166, would not have affected the Eight Circuit's decision in *Fast*, as the DOL's interpretation of § 531.56(e) has been consistent."); *McLamb*, 2016 U.S. Dist. LEXIS 89985, at *14 ("The majority's reasoning in *Christopher* is consistent with the approach taken by *Fast*.").

[7] These arguments sound eerily similar to those previously advanced by Defendant's counsel and ultimately rejected in *Irvine*. *See* 106 F. Supp. 3d at 733 ("The gravamen of Defendants' position is that because the FOH provision dealing with related, untipped work was not adopted

this prevents a court from granting *Chevron* deference to § 531.56(e), which in turn precludes *Auer* deference to the FOH as a subregulation. *Id.*

However, as the Southern District of New York recognized in *Flood*, the flaw in this argument is that § 531.56(e) ***was*** part of the notice and comment process and entitled to *Chevron* deference. *See* 94 F. Supp. 3d at 583 n.9 (*quoting* 23 Fed. Reg. 13575 (Sept. 28, 1967) ("After consideration of all responsive matter presented, the revision as proposed is hereby adopted, subject to the following changes: . . . A new § 531.56(e) is added.")).[8] "Moreover, an agency's notice-and-comment rulemaking is sufficient where, as here, the final rule is a 'logical outgrowth of the rule proposed.'" *Id.*; *accord Irvine*, 106 F. Supp. 3d at 733 n.3.

C. There is no conflict in the case law examining the 20% Rule.

As discussed above, two federal appellate courts and the overwhelming majority of district courts (including the District of South Carolina on two occasions) have recognized the validity of the 20% Rule. *See* pp. 1-2, *supra* (citing cases).

Defendant attempts to manufacture a conflict in support of its Motion by arguing that "a number of courts have rejected the 20% [R]ule." *See* Def. Br. (Doc. 13-1) at pp. 15-18. However, upon closer inspection, Defendant overstates the authority it relies upon in support of this purported split.

1. <u>The Eleventh Circuit did not "reject" the 20% Rule in *Pellon*.</u>

Defendant's Motion asserts that the two-page unpublished opinion by the "Eleventh Circuit in *Pellon v. Business Representation International, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff'd.*, 291 F. App'x 310 (11th Cir. 2008), ***rejected*** the 20% [R]ule as unworkable and

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through notice and comment rulemaking, section 30d00(e) is not entitled to deference upon court review, and it is therefore impossible to state a claim pursuant to the twenty percent rule.").

[8] This is attached to Defendant's Motion as Exhibit 3 (Doc. 13-4).

inappropriate." Def. Br. (Doc. 13-1) at p. 15 (emphasis supplied). However, as this Court previously observed: "Defendants' assertion that the Eleventh Circuit ***rejected*** the twenty percent rule in *Pellon* [] is ***an overstatement***." *Irvine*, 106 F. Supp. 3d at 733 (emphasis supplied).

Consistent with *Irvine*, Magistrate Judge Karla Spaulding of the Middle District of Florida detailed how Defendant's characterization of *Pellon* is incorrect:

> Even setting aside the non-binding character of the *Pellon* opinion, Defendant's suggestion that the Eleventh Circuit rejected the 20% rule is much too strong. As explained above, in *Pellon*, the court granted a motion for summary judgment because there was no evidence that plaintiffs spent more than 20% of their time on non-tipped tasks. Thus, its discussion of the 20% rule was *dicta*. The Eleventh Circuit's opinion in *Pellon* makes no reference to the 20% rule and simply states that it is affirming the district court's "well-reasoned" opinion, thereby stopping far short of an endorsement of the district court's rejection of the 20% rule. The *Pellon* district court also did not confront the question of *Auer* deference, making it impossible to predict how the Eleventh Circuit would rule if it were confronted with the argument that presents itself to the Court in this case. Finally, any suggestion that the Eleventh Circuit intended to adopt the *Pellon* district court's rejection of the 20% rule is further undermined by a more recent unpublished opinion in which the Eleventh Circuit affirmed a district court opinion which explicitly determined that "a tip credit employee can spend up to 20 percent of his work time performing non-tip related duties without losing his exemption from the full minimum wage compensation." *Ide v. Neighborhood Rest. Partners, LLC*, 32 F. Supp. 3d 1285 (N.D. Ga. 2014),[9] *aff'd* F. App'x , No. 15-11820, 2016 U.S. App. LEXIS 12143, 2016 WL 3564379 (11th Cir. July 1, 2016).

Bowe v. HHJJ, LLC, 2016 U.S. Dist. LEXIS 181000, *12 n.6 (M.D. Fla. Dec. 13, 2016), *adopted by* 2017 U.S. Dist. LEXIS 1216 (M.D. Fla. Jan. 5, 2017); *accord Flood*, 94 F. Supp. 3d. at 582 n.7 ("Defendants' assertion that the Eleventh Circuit rejected the twenty percent rule in *Pellon* [] is incorrect."); *White*, 2017 U.S. Dist. LEXIS 6703, at *13 (The reality is that *Pellon* [] did not reject the 20% rule").

[9] In its summary judgment opinion, the district court in *Ide* held that "[A] reasonable interpretation of § 531.56(e) is that Ide ***would be*** entitled to minimum wage if she spends more than twenty percent of her time performing related but non-tipped duties." *Ide v. Neighborhood Rest. Partners, LLC*, 2015 U.S. Dist. LEXIS 181149, *17 (N.D. Ga. Mar. 26, 2015) (emphasis supplied), *aff'd* 2016 U.S. App. LEXIS 12143 (11th Cir. July 1, 2016).

Consistent with the authority cited above, this Court should reject Defendant's overstatement of the *Pellon* opinion here.

2. <u>The District of Arizona's rejection of the 20% Rule represents the minority position.</u>

In its supporting Brief, Defendant also quotes extensively from four separate opinions issued by the District of Arizona. *See* Def. Br. (Doc. 13-1) at pp. 15-18 (discussing *Schaefer v. P.F. Chang China Bistro, Inc.*, 2014 U.S. Dist. LEXIS 105444 (D. Ariz. Aug. 1, 2014); *Richardson v. Mountain Range Rests. LLC*, 2015 U.S. Dist. LEXIS 35008, 2015 WL 1279237 (D. Ariz. Mar. 20, 2015); *Montijo v. Romulus Inc.*, 2015 U.S. dist. LEXIS 41848 (D. Ariz. Mar. 30, 2015); and *Kirchgessner v. CHLN, Inc.*, 2016 U.S. Dist. LEXIS 1337 (D. Ariz. Jan, 4, 2016)).[10]

What Defendant fails to mention is that each of these four opinions were written by a single district court judge – Judge Stephen McNamee. Moreover, while Judge McNamee did accept many of the arguments proffered by Defendant here, multiple district courts have observed that his opinions represent the minority view on the 20% Rule and have refused to adopt his reasoning. *See, e.g.*, *Flood*, 94 F. Supp. 3d at 584; *Bowe*, 2016 U.S. Dist. LEXIS 181000 at *13-18; *McLamb*, 2016 U.S. Dist. LEXIS 89985 at *14-15.

D. The 20% Rule is not impractical to apply.

Defendant also argues that the 20% Rule is "impractical and will impose endless burdens on employers" because they will have to monitor each employee's tip-producing and non-tip-producing tasks. *See* Def. Br. (Doc. 13-1) at pp. 24-27. Defendant's counsel made this same

[10] Defendant also states that the magistrate judge in *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293 (N.D. Ill. 2010) "first rejected the 80/20 rule." *See* Def. Br. (Doc. 13-1) at p.14. However, that *Driver* opinion concerned class certification and did not address whether a valid claim for minimum wages could be pled based on the 20% Rule.

argument in *Irvine*. *See* 106 F. Supp. 3d at 734. As Judge Gergel observed, requiring a company to manage the tasks its employees perform is not an onerous obligation considering the more than 70% reduction in labor costs that the tip credit provides:

> Defendants' position is that the FLSA and its implementing regulations do not "impose" upon employers the "impossible task of categorizing and recording the countless duties servers and other tipped employees perform as either tip-generating or not." (*e.g.* Dkt. No. 21 at 1). The problem with this stance is that if an employer considers a certain employee a "tipped employee" and therefore decides to exempt an employee from the minimum wage law, it is an inescapable duty on the part of the employer to ensure that the employee is in fact engaged in a tip-producing "occupation." Whether this assurance is established through tracking the employee's time spent on certain duties, or whether it is established through the Defendants' preferred method of analyzing the duties for compliance with the O*NET list, any evaluation of an employee's status as a tipped employee requires a review of their duties before an employer is legally entitled to reduce wages to $2.13 per hour. ***In any case, since employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%.***

Irvine, 106 F. Supp. 3d at 734 (emphasis supplied); *see also Bowe*, 2016 U.S. Dist. LEXIS 181000, at *17 ("Defendant's concerns about the 20% rule being 'impracticable' and 'impossible' to implement also miss the mark."); *Knox*, 2016 U.S. Dist. LEXIS 110377, at *25 (denying motion to dismiss and rejecting employer's argument that the 20% Rule would place a "'monstrous' burden on the restaurant industry."). As in *Irvine*, this Court should similarly reject Defendant's request that it enjoy the substantial monetary benefit of the tip-credit without having to satisfy the minimal burdens that come with it.

V. PLAINTIFF'S UNPAID OVERTIME CLAIMS

Plaintiff agrees that the assertions in her Amended Complaint do not sufficiently allege an overtime claim under Fourth Circuit authority. *See Hall v. DIRECTV, LLC*, __ F. 3d. __, 2017 U.S. App. LEXIS 1320, *39-45 (4th Cir. Jan. 25, 2017). Plaintiff respectfully requests the opportunity to file an amendment to address her FLSA claims concerning unpaid overtime pay.

VI. CONCLUSION

For all the above reasons, Defendant's Motion should be denied with an opportunity to file an Amended Complaint to address her claims for unpaid overtime compensation.

Respectfully submitted,

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Attorneys for Plaintiff

February 3, 2017

Greenville, SC.

Exhibit A

(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 (dual jobs), the tip credit is available only for the hours spent in the tipped occupation, provided such 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 time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses.

(3) However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.

(4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (*e.g.*, cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

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

Exhibit B

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised December 2016)

Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the FLSA to employees who receive tips.

Characteristics

Tipped employees are those who customarily and regularly receive more than $30 per month in tips. Tips are the property of the employee. The employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum wage obligation to the employee ("tip credit") or in furtherance of a valid tip pool. Only tips actually received by the employee may be counted in determining whether the employee is a tipped employee and in applying the tip credit.

Tip Credit: Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA section 3(m) is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13). Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations.

Tip Pool: The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. A valid tip pool may not include employees who do not customarily and regularly received tips, such as dishwashers, cooks, chefs, and janitors.

Requirements

The employer must provide the following information to a tipped employee before the employer may use the FLSA 3(m) tip credit:

1) the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2) the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);

3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4) that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The employer may provide oral or written notice to its tipped employees informing them of items 1-5 above. An employer who fails to provide the required information cannot use the section 3(m) tip credit and therefore must pay the tipped employee at least $7.25 per hour in wages and allow the tipped employee to keep all tips received.

Employers electing to use the tip credit provision must be able to show that 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 employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

Retention of Tips: A tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit. [1] The FLSA prohibits any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. For example, even where a tipped employee receives at least $7.25 per hour in wages directly from the employer, the employee may not be required to turn over his or her tips to the employer.

Tip Pooling: As noted above, the requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips. The FLSA does not impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each tipped employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

Dual Jobs: When an employee is employed by one employer in both a tipped and a non-tipped occupation, such as an employee employed both as a maintenance person and a waitperson, the tip credit is available only for the hours spent by the employee in the tipped occupation. The FLSA permits an employer to take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a waitperson who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties.

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1 In *Oregon Restaurant and Lodging Ass'n et al. v. Solis*, 948 F. Supp. 2d 1217 (D. Or. 2013), the U.S. District Court for the District of Oregon declared the Department's 2011 regulations that limit an employer's use of its employees' tips when the employer has not taken a tip credit against its minimum wage obligations to be invalid, and imposed injunctive relief. On February 23, 2016, the Court of Appeals for the Ninth Circuit reversed the judgment entered by the district court. See *Oregon Restaurant and Lodging Ass'n et al. v. Perez*, 816 F.3d 1080 (2016), *pet. for reh'g and reh'g en banc denied* (Sept. 6, 2016). Notwithstanding the Ninth Circuit's decision, the Department continues to be constrained by the injunctive relief entered by the district court until the Ninth Circuit issues its mandate, which formally notifies the district court of the court of appeals' decision. On September 13, 2016, the Ninth Circuit issued a Stay of the Mandate "until final disposition [of this litigation] by the Supreme Court." *Oregon Restaurant and Lodging Ass'n et al. v. Perez*, No. 13-35765 (9th Cir., Sept. 13, 2016).

For these reasons, the Department is currently prohibited from enforcing its tip retention requirements against the Oregon Restaurant and Lodging Association plaintiffs (which include several associations, one restaurant, and one individual) and members of the plaintiff associations that can demonstrate that they were a member on June 24, 2013. The plaintiff associations in the Oregon litigation were the National Restaurant Association, Washington Restaurant Association, Oregon Restaurant and Lodging Association, and Alaska Cabaret, Hotel, Restaurant, and Retailer Association. As a matter of enforcement policy, the Department decided that while the injunction is in place it will not enforce its tip retention requirements against any employer that has not taken a tip credit in jurisdictions within the Ninth Circuit. The Ninth Circuit has appellate jurisdiction over the states of California, Nevada, Washington, Oregon, Alaska, Idaho, Montana, Hawaii, and Arizona; Guam; and the Northern Mariana Islands.

Service Charges: A compulsory charge for service, for example, 15 percent of the bill, is not a tip. Such charges are part of the employer's gross receipts. Sums distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Credit Cards: Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage. For example, where a credit card company charges an employer 3 percent on all sales charged to its credit service, the employer may pay the tipped employee 97 percent of the tips without violating the FLSA. However, this charge on the tip may not reduce the employee's wage below the required minimum wage. The amount due the employee must be paid no later than the regular pay day and may not be held while the employer is awaiting reimbursement from the credit card company.

Youth Minimum Wage: The 1996 Amendments to the FLSA allow employers to pay a youth minimum wage of not less than $4.25 per hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment by their employer. The law contains certain protections for employees that prohibit employers from displacing any employee in order to hire someone at the youth minimum wage.

Typical Problems

Minimum Wage Problems:

- Where an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference.
- Where an employee receives tips only and is paid no cash wage, the full minimum wage is owed.
- Where deductions for walk-outs, breakage, or cash register shortages reduce the employee's wages below the minimum wage, such deductions are illegal. When an employer claims an FLSA 3(m) tip credit, the tipped employee is considered to have been paid only the minimum wage for all non-overtime hours worked in a tipped occupation and the employer may not take deductions for walkouts, cash register shortages, breakage, cost of uniforms, etc., because any such deduction would reduce the tipped employee's wages below the minimum wage.
- Where a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed the full $7.25 minimum wage and reimbursement of the amount of tips that were improperly utilized by the employer.

Overtime Problems:

- Where the employer takes the tip credit, overtime is calculated on the full minimum wage, **not** the lower direct (or cash) wage payment. The employer may not take a larger FLSA 3(m) tip credit for an overtime hour than for a straight time hour. Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations.

- Where overtime is not paid based on the regular rate including all service charges, commissions, bonuses, and other remuneration.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

Exhibit C

2009 DOLWH LEXIS 27

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

Reporter
2009 DOLWH LEXIS 27 *

FLSA2009-23

March 2, 2009

Core Terms

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

Panel: John L. McKeon, Deputy Administrator for Enforcement

Opinion

[*1]
Dear **Name** *:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-23. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See*29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990). **[*2]** Wage and Hour Opinion Letter FLSA2009-23 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement

January 16, 2009

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 section 3(t) of the Fair Labor Standards Act, 29 U.S.C. § 203(t). We agree that the current FOH sections addressing

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

[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.

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 non-tipped 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 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

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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.

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 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. [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 or firm and the Wage and Hour Division or the Department of Labor.

We trust **[*10]** that this letter is responsive to your inquiry.

Sincerely,

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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).

Alexander J. Passantino
Acting Administrator

Load Date: 2014-06-28

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