

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

RANDY SICKLESMITH, on behalf of	:	
himself and similarly situated employees,	:	
Plaintiff,	:	1:19-cv-01675-JEJ
	:	
v.	:	
	:	
HERSHEY ENTERTAINMENT &	:	
RESORTS COMPANY,	:	
Defendant.	:	

**PLAINTIFF’S BRIEF IN OPPOSITION
TO DEFENDANT’S MOTION TO DISMISS**

Dated: January 8, 2020

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I. INTRODUCTION

Defendant Hershey Entertainment & Resorts Company (“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.* and the Pennsylvania Minimum Wage Act (“PMWA”), 43 P.S. §§333.101, *et seq.*, corporate restaurants in Pennsylvania (such as Defendant) are allowed to pay their servers (such as Plaintiff Randy Sicklesmith (“Plaintiff”)) only \$2.83 per hour regardless of the amount of non-tip producing side work they perform in a shift. *See* Doc. 9 (“Motion”). As discussed below, the Motion should fail for several reasons, but most notably because eight separate district courts in the last year have rejected the same arguments that Defendant makes here.

II. PLAINTIFF’S CLAIMS AS A TIPPED EMPLOYEE UNDER THE FLSA AND PMWA

Defendant’s Motion does not dispute the basic facts alleged by Plaintiff in his Complaint. Defendant owns and operates the “Houlihan’s” restaurant located in Hershey, PA (“the Restaurant”). *See* Complaint (Doc. 1) at ¶ 7. During the past three years, Defendant has employed at least 40 servers (a.k.a. waitresses/waiters), including Plaintiff,¹ at the Restaurant. *Id.* at ¶ 8.

Defendant paid its servers a combination of (i) an hourly wage of \$2.83; (ii)

¹ Plaintiff was a server at the Restaurant from approximately January 2017 until September 2019. *Id.* at ¶ 9.

plus tips from customers of the Restaurant. *Id.* at ¶ 10. In seeking to comply with the FLSA and PMWA mandate that employees receive a minimum wage of \$7.25/hour, Defendant purports to utilize a “tip credit” in the amount of \$4.42 (\$7.25 - \$2.83) for each hour worked by Plaintiff and other servers. *Id.* at ¶ 11 (citing 29 U.S.C. § 203(m); 43 P.S. § 333.103(d)).

Plaintiff alleges that while he and other servers were being paid below the Pennsylvania minimum wage of \$7.25/hour, Defendant required that they spend at least 30% of their time performing non-tip-producing sidework at the Restaurant. *Id.* at ¶ 14. This work included, *inter alia*: rolling silverware; setting up drink stations, cleaning the soda machine, filling sauce containers, setting-up the salad cooler, preparing food, slicing fruit, sorting silverware and ramekins, and cleaning the Restaurant. *Id.*² Plaintiff alleges that he and other servers performed this work for approximately: “(a) one hour prior to the Restaurant opening to customers at the beginning of the day; and (b) 30 minutes at the end of the day when Restaurant managers relieve (or ‘cut’) servers of their customer service duties to focus exclusively on performing non-tip producing work.” *Id.*

Plaintiff acknowledges that restaurants, like Defendant, can use the tip credit to satisfy their minimum wage obligations to servers under certain circumstances.

² According to Plaintiff, Defendant created and posted lists of these and other non-tip-producing activities that servers were required to perform each day at the Restaurant. *Id.* at ¶ 13.

However, Plaintiff asserts that Defendant forfeited its right to take the tip credit (and violated the FLSA and PMWA by doing so) in two distinct ways by requiring its servers to perform untipped sidework tasks such as those described above:

First, Plaintiff alleges that the untipped sidework tasks Defendant required that he perform were completely unrelated to his tip-generating duties and should be classified as a separate job (the “Dual Jobs Rule”). *See id.* at ¶¶ 25, 29.

According to Plaintiff, the payment of the tipped minimum wage for this work violates both the FLSA and the PMWA. *Id.* (citing, 29 C.F.R. § 531.56(e); *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014) (Posner, J.) (when tipped employees perform “non-tipped duties” that “are unrelated to their tipped duties . . . such as, in the case of restaurant servers, washing dishes, preparing food, mopping the floor, or cleaning bathrooms, they are entitled to the full minimum wage for the time they spend at that work”); *Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 715 (E.D. Pa. 2014) (Under the PMWA “[w]hen employees perform both tipped and non-tipped work, employers must pay the full minimum wage for all hours that their employees spend performing non-tipped tasks”)).

Second, Plaintiff alleges that he and other servers were unlawfully paid the tipped minimum wage for performing a substantial amount – greater than 20% of their time – of “related” but still un-tipped sidework tasks (the “20% Rule”). *See id.* at ¶ 25 (citing *Belt v. P.F. Chang’s China Bistro, Inc.*, 2019 U.S. Dist. LEXIS

138003 (E.D. Pa. Aug. 15, 2019);³ *see also id.* at ¶ 29.

Defendant's Motion does not challenge Plaintiff's factual assertions that he and other Servers were paid only \$2.83/hour and were required to perform a substantial amount of sidework. *See* Motion (Doc. 9). Rather, Defendant merely argues that Plaintiff's Dual Jobs and 20% Rule claims are no longer valid. *Id.*

III. THE FLSA'S TIP CREDIT TO ITS MINIMUM WAGE REQUIREMENT

A. The Department of Labor's Recognition of the Dual Jobs and 20% Rule Claims for Tipped Servers Prior to November 2018

The FLSA and PMWA both require employers to pay employees a minimum wage of \$7.25/hour. *See* 29 U.S.C. § 206(a)(1)(C).⁴ 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 (or \$2.83/hour in Pennsylvania)⁵ so long as the employee's additional tip payments bring his or her total pay above the \$7.25/hour threshold. *See id.* at § 203(m); 29 C.F.R. § 531.50(a).⁶

However, an employer cannot automatically take advantage of this 70%

³ The *Belt* opinion was subsequently published at 401 F. Supp. 3d 512 (E.D. Pa. 2019)

⁴ District courts within this Circuit have relied on interpretations of the FLSA for tipped minimum wage claims under the PMWA. *See, e.g., Belt*, 401 F. Supp. 3d at 519 n.1.

⁵ *See* 34 Pa. Code § 231.101(b).

⁶ As one district court observed "an employer can save \$5.12 per hour per employee in decreased wages by classifying a worker as a 'tipped employee'" under the FLSA. *Irvine v. Destination Wild Dunes Mgmt.*, 106 F. Supp. 3d 729, 731 (D.S.C. 2015).

reduction in labor costs under the FLSA. The statute 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 v. Applebee’s Int’l, Inc.*, 638 F.3d 872, 876 (8th Cir. 2011).

Congress did not define “occupation” when § 203(m) and § 203(t) were enacted in 1966. *Id.* 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. § 531.56.⁷ *Id.* “Pursuant to 29 C.F.R. § 531.56(e), ... ‘if a 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

⁷ 29 C.F.R. § 531.56(e) (or the “Dual Jobs Regulation”) 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 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.”

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 v. Carlson Rests., Inc.*, 94 F. Supp. 3d 572, 581 (S.D.N.Y. 2015) (internal citations omitted).

In 1988, the DOL elaborated on the Dual Jobs Regulation in its Field Operations Handbook (“FOH”), 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.***

U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook at § 30d00(e) (Dec. 9, 1988) (attached at Exhibit A) (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 B); 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 C).⁸

The FOH was 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 (attached as Exhibit D). 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

In light of this authority, three federal appellate courts and the overwhelming majority of district courts recognized the validity of the Dual Jobs

⁸ In addition, the DOL adopted the 20% Rule in *amicus* briefs submitted to three federal appellate courts. *See Belt*, 401 F. Supp. 3d at 522-23 (citing cases).

and/or 20% Rule claims that Plaintiff asserts here when confronted with similar motions prior to the DOL's recent change in guidance discussed below. *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); *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018); *Harrison v. Rockne's Inc.*, 274 F. Supp. 3d 706 (N.D. Ohio. 2017); *McLamb v. High 5 Hospitality*, 197 F. Supp. 3d 656 (D. Del. 2016); *Irvine v. Destination Wild Dunes Mgmt.*, 106 F. Supp. 3d 729 (D.S.C. 2015); *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); *Nelson v. Firebirds of Overland Park, LLC*, 2018 U.S. Dist. LEXIS 101323 (D. Kan. June 18, 2018); *Brown v. Metro Corral Partners, LLC*, 2018 U.S. Dist. LEXIS 228430 (N.D. Ga. Mar. 8, 2018); *Alverson v. BL Rest. Ops. LLC*, 2017 U.S. Dist. LEXIS 133543 (W.D. Tex. Aug. 8, 2017) *adopted by* 2018 U.S. Dist. LEXIS (W.D. Tex. Feb. 22, 2018); *Foster v. New Apple, Inc.*, 2017 U.S. Dist. LEXIS 128412 (D.S.C. Aug. 8, 2017); *Goodson v. OS Rest. Servs., LLC*, 2017 U.S. Dist. LEXIS 71923 (M.D. Fla. May 9, 2017); *Barnhart v. Chesapeake Bay Seafood House Associates, LLC*, 2017 U.S. Dist. LEXIS 48660 (D. Md. Mar. 31, 2017); *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

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B. The Sudden Change in November 2018 to the DOL's Interpretation of the Dual Jobs Regulation

For the thirty years prior to November 2018, the DOL repeatedly stated that the 20% Rule was an appropriate guideline for related, but non-tip producing, tasks performed by servers paid under the tip credit based on the language of 29 C.F.R. § 531.56(e). However, beginning in November 2018, the DOL suddenly abandoned this position and took several affirmative steps to eliminate these minimum wage protections for tipped employees:

1. The November 2018 Opinion Letter

On November 8, 2018, the DOL's Wage and Hour Division issued an Opinion Letter which sought to supplant the 20% Rule. *See* U.S. DOL Opinion Letter, Nov. 8, 2018, 2018 DOLWH LEXIS 29 (the "November 2018 Letter") (attached as Exhibit E).

The November 2018 Letter “reproduced [] the verbatim text of Opinion Letter FLSA2009-23” and adopted it as “an official statement of [Wage and Hour Division] policy.” *See id.* at *1.⁹ According to the letter, “the current FOH sections addressing the tip credit have resulted in some confusion and inconsistent application,” and purports to “clarify” FOH section 30d00(e). *Id.* at *2. It then states that “from today forward” the DOL “do[es] 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.” *Id.* at *1, *7.

2. *The February 2019 FOH and Field Assistance Bulletin*

In February 2019, the DOL revised the section of the FOH addressing the Dual Jobs and 20% Rule. *See* U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook at § 30d00(f) (Feb. 15, 2019) (the “2019 FOH”) (attached at Exhibit G). Judge Brody cogently described the revisions as follows:

The first paragraph—which essentially restates the first half of the Dual Jobs regulation—is unchanged from the previous version of the [FOH]. However, the next two paragraphs replace the [20%] Rule. Under the previous [FOH], an employer could take the tip credit for all the hours worked by a tipped employee (such as a server) if that employee spent up to twenty percent of his or her time performing untipped related work (such as filling salt shakers). If, however, the employee spent more than twenty percent of his or her time performing untipped related

⁹ The 2009 letter was written by an acting administrator in the waning days of an outgoing administration, was never mailed and was quickly withdrawn by the DOL. *See* U.S. DOL Opinion Letter, Jan. 16, 2009, 2009 DOLWH LEXIS 27, at *1 (attached as Exhibit F).

work, then the employer could not take the tip credit for any of the time spent performing untipped related duties. The employer could only take the tip credit for the hours the employee spent performing tipped work.

Under the [2019 FOH], this twenty percent threshold is eliminated. Instead, the [2019 FOH] states that “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.” [FOH] § 30d00(f)(2). It goes on to say “[a]n 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.” *Id.* at § 30d00(f)(3)(a). Finally, it states that “[a]n 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.” *Id.* Depending on how this language is interpreted, the Current Handbook either allows an employer to take the tip credit for all the hours worked by an employee regardless of how much time is spent on untipped related work, or as long as such work is performed “contemporaneously with” or “for a reasonable time immediately before or after” performing tipped work.

Belt, 401 F. Supp. 3d 512, 524-25.

The same day that the DOL issued the 2019 FOH, it also issued a Field Assistance Bulletin addressing the 20% Rule. See U.S. Department of Labor, Wage & Hour Division, Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019) (attached as Exhibit H). The bulletin generally summarized the 2019 FOH and instructs that it should be followed in all investigation and enforcement actions. *Id.*

3. *The October 2019 Proposed Regulation Amendment*

On October 8, 2019, the DOL announced a proposed amendment that would,

among other things, “codify existing Wage and Hour Division (WHD) guidance” into 29 C.F.R. § 531.56(e). *See* U.S. DOL Notice of Proposed Rulemaking (Oct. 8, 2019) (attached as Exhibit I). According to the DOL, the proposal:

Amend[s] its tip regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also address which non-tipped duties are related to a tip-producing occupation.

Id. at 53957; *see also id.* at 53963-64, 76-77. The public notice and comment period for this proposal closed in December 2019. It is not known when a final regulation will be issued or if its text will be the same as the October proposal.

IV. THE APPLICABLE STANDARD

This Court recently described the Rule 12(b)(6) standard of review in *Sealander v. Bague*, 2019 U.S. Dist. LEXIS 194048, *6-9 (M.D. Pa. Nov. 7, 2019) (Jones, J.), which Plaintiff adopts here.

V. ARGUMENT

A. Plaintiff Adequately Pleads a Dual Jobs Rule Claim

Defendant incorrectly argues that “Plaintiff does not allege he held dual jobs during his employment at the Restaurant.” *See* Motion (Doc. 9) at p. 7. Moreover, this argument fundamentally misunderstands Plaintiff’s allegations in this case.

As discussed in section II *supra*, Plaintiff clearly states that the “non-tip-

generating tasks” that he identified in the Complaint could be considered “*unrelated* to the servers’ tip-generating duties” and thus would qualify as a Dual Job Rule claim. *See* Complaint (Doc. 1) at ¶ 25 (citing 29 C.F.R. § 531.56(e) and *Driver*, 739 F.3d at 1075) (emphasis supplied). These tasks include, *inter alia*, “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 anticipates that other non-tip-generating tasks that servers at the Restaurant were required to perform will be identified through discovery. However, the Court does not need to decide now whether these tasks are “unrelated” or “related” to the servers’ tip-generating duties, or if they were performed enough to qualify as a “dual job” under 29 C.F.R. § 531.56(e). That decision is for another day.

Rather, the Court must merely determine “whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Sealand*, 2019 U.S. Dist. LEXIS 194048, at *7. Multiple federal courts have previously held that plaintiffs who assert that they perform “unrelated” non-tip-generating duties (such as those identified by Plaintiff here) plausibly allege that they work in multiple occupations (one tipped and others not) to state a Dual Jobs Rule claim under the FLSA. *See, e.g., Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 616-17, 633 (9th Cir.

2018) (holding that plaintiff's claim that he was required to clean the restaurant was sufficient to assert a Dual Jobs Rule claim under 29 C.F.R. § 531.56(e)); *Driver*, 739 F.3d at 1075 (explaining that when tipped employees perform "non-tipped duties" that "are unrelated to their tipped duties . . . such as, in the case of restaurant servers, washing dishes, preparing food, mopping the floor, or cleaning bathrooms, they are entitled to the full minimum wage for the time they spend at that work"); *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545, 553-54 (W.D. Va. 2019) (refusing to dismiss a plaintiff's Dual Job Rule claim who alleged that her required cleaning activities were unrelated to her tip-producing work); *McLamb v. High 5 Hospitality*, 197 F. Supp. 3d 656, 658, 662 (D. Del. 2016) (same); *Barnhart v. Chesapeake Bay Seafood House Associates, LLC*, 2017 U.S. Dist. LEXIS 48660, *2, *13-14 (D. Md. Mar. 31, 2017) (same); *Callaway v. DenOne LLC*, 2019 U.S. Dist. LEXIS 37732, *11-17 (N.D. Ohio Mar. 8, 2019) (same).

B. Plaintiff's 20% Rule Claim is Valid

In the wake of the DOL's 2018 about-face on the validity of 20% Rule claims after 30 years of consistent guidance, at least nine district courts (including the Eastern District of Pennsylvania) have addressed dismissal requests similar to Defendant's Motion. *See Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512 (E.D. Pa. 2019); *Spencer v. Macado's Inc.*, 399 F. Supp. 3d 545 (W.D. Va. 2019); *Esry v. P.F. Chang's China Bistro, Inc.*, 373 F. Supp. 3d 1205 (E.D. Ark.

2019); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976 (W.D. Mo. 2019); *Berger v. Perry's Steakhouse of Illinois, LLC*, 2019 U.S. Dist. LEXIS 219751 (N.D. Ill. Dec. 23, 2019); *Flores v. HMS Host Corp.*, 2019 U.S. Dist. LEXIS 183906 (D. Md. Oct. 23, 2019); *Vasquez v. MC Miami Enterprises, LLC*, 2019 U.S. Dist. LEXIS 157073 (S.D. Fla. Sept. 12, 2019); *Shaffer v. Perry's Restaurants, Ltd.*, 2019 U.S. Dist. LEXIS 82079 (W.D. Tex. Apr. 3, 2019); *Callaway v. DenOne LLC*, 2019 U.S. Dist. LEXIS 37732 (N.D. Ohio Mar. 8, 2019). With the lone exception of the Western District of Texas in *Shaffer*,¹⁰ each of these courts have rejected the same arguments Defendant proffers here. *Id.* As discussed below, Plaintiff respectfully suggests that the Court should follow this weight of authority.

1. *The DOL's Post November 2018 Interpretation of the Dual Jobs Regulation is Not Entitled to Deference*

The Motion asks the Court to afford deference to the DOL's current interpretation of 29 C.F.R. § 531.56(e) which eliminates 20% Rule claims. *See* Motion (Doc. 9) at pp. 2-3 14-16. However, seven separate district courts have rejected similar requests in the last year. *See Belt*, 401 F. Supp. 3d at 531-35; *Spencer*, 399 F. Supp. 3d at 552-53; *Esry*, 373 F. Supp. 3d at 1209-11; *Cope*, 354 F. Supp. 3d at 985-86; *Berger*, 2019 U.S. Dist. LEXIS 219751, at *27-29; *Flores*,

¹⁰ In *Shaffer*, a magistrate judge issued a report and recommendation on a defendant's summary judgment motion that ***the plaintiff failed to oppose***. *See* 2019 U.S. Dist. LEXIS 82079, at *7. Thus, courts have afforded *Shaffer* minimal weight when confronted with arguments similar to those in Defendant's Motion. *See, e.g., Berger*, 2019 U.S. Dist. LEXIS 219751, at *26-27.

2019 U.S. Dist. LEXIS 183906, at *13-18; *Callaway*, 2019 U.S. Dist. LEXIS 37732, at *15-18.¹¹

Most notably in *Belt*, the Eastern District of Pennsylvania relied on the Supreme Court’s recent analysis in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) to hold that the DOL’s current interpretation of the Dual Jobs Regulation is not entitled to either *Auer* or *Skidmore* deference.

a. The DOL’s Current Interpretation of the Dual Jobs Regulation Does Not Warrant *Auer* Deference

The *Belt* court described four mandatory factors to be fulfilled for agency’s interpretation of an ambiguous regulation to receive *Auer* deference. *See* 401 F. Supp. 3d at 531-32. First, the interpretation must be “reasonable.” *Id.* at 531. Second, the interpretation must “reflect fair and considered judgment and cannot create an unfair surprise to regulated parties.” *Id.* at 531-32 (internal quotations and citations omitted). Third, “the regulatory interpretation must be one actually made by the agency and must be in the agency’s authoritative or official position, rather than any more ad hoc statement not reflecting the agency’s views.” *Id.* at 532. Finally, “the agency’s interpretation must in some way implicate its substantive expertise.” *Id.*

¹¹ One could reasonably speculate that the near uniform refusal to afford the DOL’s new guidance *Auer* or *Skidmore* deference is the reason behind the agency’s October 2019 announcement that it intends to amend the language of the Dual Jobs Regulation. *See* section III.B.3 *supra*.

As an initial matter, the *Belt* court held that the DOL’s current interpretation of the Dual Jobs Regulation was unreasonable for several reasons. *Id.* at 532-33. The most notable was that the DOL’s current interpretation possesses internal inconsistencies regarding the amount of related and untipped work an employee can do before he is performing a dual job under 29 C.F.R. § 531.56(e). *Id.* at 533. According to Judge Brody, “[t]his internal inconsistency alone undermines the reasonableness of the interpretation.” *Id.* The *Belt* court also observed that “if the DOL’s [current] interpretation is taken to be that there is no limit on the amount of time an employer may require an employee to spend on related and untipped work while still taking the tip credit for all the employee’s hours, this is plainly inconsistent” with the express language of the Dual Job Regulation which “places some undefined temporal limit on the amount of time a tipped employee may spend performing related and untipped work before he or she becomes an employee engaged in two occupations.” *Id.* “An interpretation proclaiming that there is no limit on the amount of related and untipped work directly contradicts the temporal language in the Dual Jobs regulation, and is unreasonable.” *Id.*

The *Belt* court also held that even if the DOL’s current interpretation was reasonable, it fails to reflect “fair and considered judgment” because it represents “unfair surprise” to regulated parties. *Id.* at 533-35. According to *Belt*:

[T]he DOL’s current interpretation of the Dual Jobs regulation is an express reversal of its prior position, the [20%] Rule. That prior

position had been held since at least 1988, when the [20%] Rule was added to the Field Operations Handbook. As recently as July 2016, the DOL continued to assert this position in amicus briefs. Moreover, the [20%] Rule was consistently awarded *Auer* deference by the federal courts. As Plaintiffs correctly point out, when they filed their complaint, the validity of the [20%] rule was “beyond serious challenge.”

Given this longstanding consistency, the DOL’s recent abandonment of the [20%] Rule is an “unfair surprise.” Moreover, the policy change is unexplained. The November 2018 Opinion Letter—which is virtually unchanged from the Opinion Letter issued and then withdrawn in 2009—states that the policy change is warranted because the [20%] Rule “resulted in some confusion and inconsistent application.” As evidence of this, the Opinion Letter cites to two district court cases from 2007 that purportedly came to different conclusions about the [20% R]ule. But the case the Letter cites as “rejecting” the [20% R]ule actually decided that determining the validity of the interpretation was “unnecessary” given the facts of the case. More troublingly, the Opinion Letter fails to acknowledge the subsequent decade of case law consistently deferring to the [20%] Rule, and the DOL’s consistent support of the [20%] Rule in amicus briefs. It is difficult to conceive of an individual or entity who could be “confused” about how to interpret the Dual Jobs regulation.

As the Supreme Court cautioned in *Kisor*, an agency’s change in policy position will rarely warrant *Auer* deference.

Id. at 534 (emphasis supplied); *see also Berger*, 2019 U.S. Dist. LEXIS 219751, at *27 (“Here, and without warning, the DOL’s new interpretation directly contradicts the [20% R]ule adopted over 30 years ago, causing unfair surprise.”).¹²

¹² Defendant attempts to avoid the *Belt* decision by arguing that since the November 2018 Letter was issued prior to the filing of the Complaint in this case, Plaintiff was not “unfairly surprised” by the DOL’s new interpretation making *Auer* deference appropriate. *See* Motion (Doc. 9) at p. 17. However, *Auer*’s “unfair surprise” factor does not examine whether the litigants knew of or were “caught off guard” by a change in interpretation, but rather if the change represents the lack of “fair and considered judgment” by the agency. *See Belt*, 401 F. Supp. 3d at 533-34. Here,

The *Belt* court is not alone in its refusal to extend *Auer* deference to the DOL's current interpretation of the 20% Rule. *See Spencer*, 399 F. Supp. 3d at 552-53; *Esry*, 373 F. Supp. 3d at 1209-11; *Cope*, 354 F. Supp. 3d at 985-86; *Berger*, 2019 U.S. Dist. LEXIS 219751, at *27-28; *Flores*, 2019 U.S. Dist. LEXIS 183906, at *13-16; *Callaway*, 2019 U.S. Dist. LEXIS 37732, at *15-18.

b. The DOL's Current Interpretation of the Dual Jobs Regulation Does Not Warrant *Skidmore* Deference

Next the *Belt* court examined whether the DOL's current interpretation warranted *Skidmore* deference because it had the "power to persuade" based on the factors articulated by the Third Circuit in *Sec'y United States Dep't of Labor v. Am. Future Sys. Inc.*, 873 F.3d 420 (3d Cir. 2017):

In deciding whether to award *Skidmore* deference, courts apply "a sliding-scale test in which the level of weight afforded to an interpretation varies depending on [the] analysis of the enumerated factors," including "whether the interpretation was: (1) issued contemporaneously with the statute; (2) consistent with other agency pronouncements; (3) reasonable given the language and purposes of the statute; (4) within the expertise of the relevant agency; and (5) part of a longstanding and unchanging policy."

Belt, 401 F. Supp. 3d at 535. According to *Belt*, *Skidmore* deference was improper

where the DOL has done an about-face after 30 years of recognizing the validity of the 20% Rule, it does. As the *Belt* recognized, "the Supreme Court has only rarely given *Auer* deference to an agency construction conflict[ing] with a prior one." *Id.* at 534 (quoting *Kisor*, 139 S. Ct. at 2417) (internal quotations omitted). Furthermore, other courts have refused to extend *Auer* deference to the DOL's current interpretation in cases, like this one, where the new guidance was issued prior to the plaintiffs filing suit. *See, e.g., Callaway*, 2019 U.S. Dist. LEXIS 37732, at *14-15, *17 (observing that the DOL's November 2018 Opinion Letter was issued "several weeks before this suit but well after the alleged FLSA violations.").

for the same reasons that *Auer* deference was unwarranted. *Id.* Most notably, it “was issued decades after the tip-credit provision was added to the FLSA, is unreasonable, and abandons decades of consistent agency policy without explanation.” *Id.*

Again, *Belt* is one of several district courts that have recently refused to extend *Skidmore* deference to the DOL’s current interpretation of the Dual Jobs Regulation. *See Spencer*, 399 F. Supp. 3d at 553; *Cope*, 354 F. Supp. 3d at 986; *Berger*, 2019 U.S. Dist. LEXIS 219751, at *28-29;¹³ *Flores*, 2019 U.S. Dist. LEXIS 183906, at *16-18; *see also Esry*, 373 F. Supp. 3d at 1211 (“The [DOL]’s new interpretation [of 29 C.F.R. § 531.56(e)] is not persuasive.”).

2. *Since the DOL’s Post November 2018 Interpretation of the Dual Jobs Regulation is Not Entitled to Deference, the Court Must Rely on the DOL’s Prior Interpretation*

Given that the DOL’s current interpretation of the Dual Jobs Regulation does not warrant deference under either *Auer* or *Skidmore*, the Court must independently interpret 29 C.F.R. § 531.56(e) to determine if it establishes a 20% Rule on untipped related work. *See Belt*, 401 F. Supp. 3d at 535. When pressed with this same question, the *Belt* court identified five reasons that the 20% Rule is a valid interpretation of an ambiguous regulation entitled to *Chevron* deference:¹⁴

¹³ The *Berger* court also held that the DOL’s current interpretation of the Dual Jobs Regulation is not able to be applied retroactively. *See* 2019 U.S. Dist. LEXIS 219751, at *29-30.

¹⁴ *See* 401 F. Supp. 3d at 526-531. Defendant’s Motion does not contest that the Dual Jobs

First, the *Belt* court followed the holdings by the Ninth Circuit in *Marsh* and the Eighth Circuit in *Fast* that the express language of 29 C.F.R. § 531.56(e) “places a temporal limit on the amount of untipped related work an employee can perform before they become engaged in ‘dual jobs.’” *Id.* at 536. According to *Belt*, the regulation “draws a distinction between an employee engaged in dual jobs—one tipped and one untipped—and an employee who is engaged in a single, tipped occupation despite ‘occasionally’, ‘part of [the] time’, or while ‘tak[ing] a turn’ performing related duties that are not ‘directed toward producing tips.’” *Id.*

Second, the *Belt* court held that the 20% Rule represented a reasonable interpretation of 29 C.F.R. § 531.56(e) and followed “from the ordinary meaning of the regulation.” *Id.* *Belt* cited to several federal appellate and district courts that have similarly held that a 20% limit on related untipped sidework was reasonable. *Id.* at 537 (citing cases).

Third, the *Belt* court held that “twenty percent limit to untipped related work is consistent with the DOL’s routine use of a twenty percent threshold in analogous contexts.” *Id.* at 536. According to Judge Brody, the “DOL consistently uses ‘a 20 percent threshold to delineate the line between substantial and nonsubstantial work in various contexts within the FLSA.’” *Id.* (citing *Fast* and *Marsh*).

Fourth, *Belt* held that the 20% Rule is “workable and provides crucial

Regulation is ambiguous or entitled to *Chevron* deference.

guidance to employers and employees on the meaning of the Dual Jobs regulation.” *Id.* at 537. In doing so, Judge Brody recognized that restaurants are already required to maintain time records of the hours its employees work in a tipped occupation, making the 20% Rule a natural outgrowth of this preexisting obligation on employers. *Id.*; *see also Irvine v. Destination Wild Dunes Mgmt.*, 106 F. Supp. 3d 729, 734 (D.S.C. 2015) (“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%.”).

Finally, the *Belt* court held that the 20% Rule was justified by the remedial purpose of the FLSA. *See* 401 F. Supp. 3d at 538 (observing that “A ‘fair day’s pay for a fair day’s work’ can only be guaranteed if employers’ ability to take the tip credit is limited to when their employees are actually ‘engaged in a tipped occupation.’”). This is especially important, because 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. 3, 2020).

Defendant’s Motion takes issue with these conclusions by the *Belt* court and

recycles several arguments made by defendants and rejected by courts prior to the DOL's 2018 change to its interpretation of the Dual Jobs Regulation. *See, e.g.*, Motion (Doc. 9) at pp. 19-20. However, these arguments go against the legion of federal appellate and district court authority holding that the 20% Rule is a reasonable interpretation of 29 C.F.R. § 531.56(e), *see, e.g., Marsh*, 905 F.3d at 630; *Fast*, 638 F.3d at 881; *Irvine*, 106 F. Supp. 3d at 734, including several other district court decisions that have been issued since the DOL's November 2018 Letter. *See, e.g., Spencer*, 399 F. Supp. 3d at 554; *Cope*, 354 F. Supp. 3d at 986-88; *Berger*, 2019 U.S. Dist. LEXIS 219751, at *29.

VI. CONCLUSION

For all the above reasons, Defendant's Motion should be denied. However, if the Court holds that Plaintiff has not adequately pled any particular cause of action, Plaintiff respectfully requests that the Court allow him to file an amended complaint that contains more detailed allegations. Such a procedure is warranted under Third Circuit law. *See Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 174 (3d Cir. 2010); *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008).

Date: January 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Andrew Santillo, hereby certify that on January 8, 2020, the attached was filed electronically and is available for viewing by all counsel of record via the Court's ECF system including Defendant's counsel listed below:

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Exhibit A

Rev. 563

FIELD OPERATIONS HANDBOOK - 12/9/88

30d - 30d01

30d TIPS AND TIPPED EMPLOYEES

30d00 General.

- (a) A "tipped employee", as defined in section 3(t) of FLSA, is any employee engaged in an occupation in which the individual customarily and regularly receives more than \$30.00 a month in tips.
- (b) Section 3(m) of FLSA makes clear the intent of Congress to place on the employer the burden of proving the amount of tips received by "tipped employees", and the amount of tip credit, if any, which the employer may claim. Since Sec 3(m) is not an exemption from the MW, but merely allows the employer to claim up to 40 percent of the MW as tip credit, the employer is responsible for ascertaining that the MW provisions are complied with in compensating "tipped employees".
- (c) (1) The tip provision applies on an individual employee basis. Thus, an employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others.
- (2) In establishments where employees perform a variety of different jobs, an employee's status as one who "customarily and regularly receives tips" will depend on the total fact situation and will be determined on the basis of such employee's activities over the entire w/w.
- (d) When an individual is employed in a tipped occupation and a non-tipped occupation (dual jobs), the tip credit is available only for the hours spent in the tipped occupation. Also, such employee must customarily and regularly receive at least \$30 a month in tips.
- (e) 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.

30d01 Retention of tips by employee.

- (a) Pursuant to Sec 3(m), 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 except to the extent that there is a valid pooling arrangement.

Exhibit B

(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 C

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.

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 D

1985 DOLWH LEXIS 9

U.S. Department of Labor

Reporter

1985 DOLWH LEXIS 9 *

[NO NUMBER IN ORIGINAL]

December 20, 1985

Core Terms

tipped, waitress, waiter, salad bar, occupation, clean, spend, regularly

Panel: Herbert J. Cohen, Deputy Administrator

Opinion

[*1]

This is in response to your letter of June 20 in which you request an opinion as to whether salad bar and dining room set-up are duties related to a tipped occupation within the meaning of section 3(m) of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

As outlined in your letter and in a conversation with a member of my staff on November 26, *** owns and operates several *** restaurants throughout the United States. *** regularly open to the public at 11 a.m. Generally, you state, two to four waiters or waitresses work each day in each restaurant. One waiter or waitress is assigned with opening responsibilities from 9:00 or 9:30 am.. to 11:00 a.m. These opening responsibilities are as follows:

- (1) Inspect dining room including windows and sills.
- (2) Check dining room lights.
- (3) Set thermostat.
- (4) Check tables and align table bases.
- (5) Check high chairs/booster seats.
- (6) Set tables.
- (7) Set table arrangers.

- (8) Clean and fill shakers.
- (9) Clean/replace ashtrays.
- (10) Stock waitress station with glasses, cups, mugs, and pitchers.
- (11) Check supplies of napkins, sugar, straws, etc.
- (12) Check supply and cleanliness [*2] of plates, salad plates and silverware.
- (13) Set up three (3) compartments, glass washing sink.
- (14) Check beverage dispensers.
- (15) Prepare tea.
- (16) At opening, prepare coffee.
 - 1. Cut and clean vegetables for salad bar.
 - 2. Clean and sanitize sneeze shield on salad bar.
 - 1. (19) Fill salad bar crocks with refrigerated and dry items.
- (20) Place vinegar and oil cruets at end of salad bar.
- (21) Place parmesan shaker on salad bar.
- (22) If iced salad bar, fill ice bin.

You state that typically the waiter or waitress with opening responsibilities works until 2 p.m. Any other waitresses working the lunch shift do not report until 10:30 or 11:00 a.m.

You state that a small portion of the 1.5 to 2 hour set-up time is spent in preparing vegetables for the salad bar. You state that the salad bar preparation is a related duty in a tipped occupation. you cited Opinion Letter No. 1554 (WH-502) in which the Administrator of the Wage and Hour Division found that duties such as cleaning and restocking the waitress station, refilling shakers, cleaning and resetting tables and vacuuming the carpet as performed by waitresses after hours constitute tipped employment within the [*3] meaning of Regulations 29 CFR Part 531.

In support of your position you also cite section 531.56(e) of 29 CFR Part 531. You compare the preparation of the salad bar to the preparation of short orders as performed by counter persons.

The FLSA is the Federal law of most general application concerning wages and hours of work. Under FLSA all covered and nonexempt employees must be paid not less than the minimum wage rate of \$ 3.35 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

As explained in section 3(m) of FLSA, tips received by tipped employees may be counted by an employer in an amount up to 40% of the applicable minimum wage. A "tipped employee" is defined in section 3(t) of FLSA as an employee engaged in an occupation in which he or she regularly receives not less than \$ 30 a month in tips.

Section 531.56(e) deals with tipped employees who are performing dual jobs. As explained in this section, when an individual is involved in a tipped occupation and a nontipped occupation, the tip credit is available only for the hours spent in the tipped occupation. For example, when a maintenance [*4] person in a hotel also serves as a waiter or waitress, the tip credit is available only for the hours worked as a waiter or waitress.

The legislative history of the 1974 amendments of FLSA (in particular, page 43 of Senate Report No. 93-960, February 22, 1974) indicates that employees who "customarily and regularly" receive tips are waiters, waitresses, bell persons, counter persons, bus help, and service bartenders. It also indicates that janitors, dishwashers, chefs, and laundry room attendants are not tipped employees. It is our opinion that salad preparation activities are

essentially the activities performed by chefs and no tip credit may be taken for the time spent in preparing vegetables for the salad bar. Enclosed is a copy of an opinion letter which contains a detailed discussion of this position.

Also as explained in section 531.56(e), the tip credit may be taken for time spent in duties related to the tipped occupation even though such duties need not by themselves be directed toward producing tips. For example, a waiter or waitress who spends part of his or her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses [*5] may continue to be engaged in a tipped occupation even though the duties listed above are not tip-producing. Therefore, tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the waiter or waitress regular duties and are assigned generally to the waiter/waitress staff. However, 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.

In the situation you describe, only one waiter or waitress is assigned to perform all preparatory activities. The opening waiter or waitress' responsibilities extend to the entire restaurant rather than to the specific area or customers which they serve. Furthermore, the activities performed prior to the opening of the restaurant consume a substantial portion of the waiter or waitress' workday. Although you have stated that a waiter or waitress may work an eight-hour shift, typically they work a five-hour shift from 9 a.m. to 2 p.m. The 1.5 to 2 hours of preparatory [*6] time constitutes 30% to 40% of the employee's workday.

Therefore, based on the information you have provided, it is our opinion that no tip credit may be taken for the hours spent by an assigned waiter or waitress in opening responsibilities.

We trust that the above is responsive to your inquiry.

Sincerely,

Load Date: 2014-06-28

Exhibit E

2018 DOLWH LEXIS 29

U.S. Department of Labor, 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 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

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.

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.

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 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> 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

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).

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.

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

Exhibit F

2009 DOLWH LEXIS 27

U.S. Department of Labor, 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

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

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 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

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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 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

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).

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,

Alexander J. Passantino
Acting Administrator

Load Date: 2014-06-28

End of Document

Exhibit G

other WH-administered statutes, regulations, or interpretations overrides or nullifies any higher standards or more stringent provisions of these other laws. *See* 29 CFR 531.26. (WHD enforcement in *non*-overtime workweeks is limited to the highest applicable minimum wage enforced by the WHD, which includes WHD-enforced prevailing wages when they apply (*e.g.*, DBRA, SCA, H-1B, *etc.*). If no overtime has been worked in a particular week, the WHD will not enforce any other state of local minimum wage higher than the highest minimum wage applicable under the laws enforced by the WHD; the WHI will advise the employer of the apparent violation of such other higher minimum wage standards and notify the appropriate authorities of the employer's deductions policies and possible underpayments that may have occurred. *See* FOH 30b10. Permissible deductions in an overtime week are discussed in FOH 32j08.

30d TIPS AND TIPPED EMPLOYEES

[12/15/2016]

30d00 General.

- (a) Tipped employees are subject to the section 6(a)(1) minimum wage. Section 3(m) of the FLSA (*see* 29 USC 203(m)) permits an employer to claim a partial credit against its minimum wage obligation to a tipped employee based on tips received by the employee. This credit against wages due is called a tip credit. 29 CFR 531 contains further guidance on this topic. The cash wage required under section 3(m), when an employer takes a tip credit, is not a subminimum wage. Tipped employees are entitled to the full section 6(a)(1) minimum wage, which may be comprised of both a direct or cash wage and a tip credit as set forth in section 3(m). The terms "direct wage" and "cash wage" are used interchangeably in the FOH when discussing the tip credit.
- (b) Section 3(m) of the FLSA makes clear the intent of Congress to place on the employer the burden of proving the amount of tips received by tipped employees and the amount of tip credit, if any, which the employer may claim against its minimum wage obligations. The employer may not claim a tip credit greater than the tips received. If the direct (or cash) wage paid plus the tips received is less than the section 6(a)(1) minimum wage, the employer is required to pay the balance on the regular pay day for the pay period so that the employee receives at least the minimum wage with the combination of wages and tips.
- (c) The language of section 3(m) was amended by the Small Business Job Protection Act of 1996. Effective 08/20/1996, section 3(m) provides:

"In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to – (1) the cash wage paid such employee which for purposes of such determination shall not be less than the cash wage required to be paid such an employee on August 20, 1996; and (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title. The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding two sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."

The required cash wage to be paid a tipped employee on 08/20/1996 was not less than \$2.13 per hour.

(d) FLSA 3(m) tip credit

The “FLSA 3(m) tip credit” is the tip credit an employer is permitted to claim against its minimum wage obligations as determined by section 3(m). Under section 3(m), the sum of the cash wage paid and the FLSA 3(m) tip credit will always equal the section 6(a)(1) minimum wage.

(e) Tip credit principles

As amended in 1996, section 3(m) limits the tip credit an employer may claim against its minimum wage obligations to “the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1).” Thus, the FLSA 3(m) tip credit is capped at the difference between the section 6(a)(1) wage and the direct or cash wage paid. The direct wage paid may not be less than the cash wage required to be paid a tipped employee on 08/20/1996, which was \$2.13 per hour. Under section 3(m), the direct wage paid may be comprised of cash, board, lodging, or facilities in accordance with 29 CFR 531 and [FOH 30c](#). Because the FLSA limits the section 3(m) tip credit to the difference between the cash wage paid and the federal minimum wage, for purposes of the FLSA, employees who are paid using the 3(m) tip credit are paid the minimum wage for each hour they work in a non-overtime workweek.

29 CFR 531.50

(1) *Definition of tipped employee*

A “tipped employee,” as defined in section 3(t) of the FLSA (*see* 29 USC 203(t)), is any employee engaged in an occupation in which the individual customarily and regularly receives more than \$30.00 a month in tips.

Although some states define “tipped employee” differently, the definition in section 3(t) is used for FLSA enforcement purposes.

Tip provisions apply on an individual employee basis. An employer may claim the tip credit for some employees even though the employer cannot meet the requirements for others.

29 CFR 531.50(b)

(2) *Tips are the property of the employee*

A tip is a sum presented by a customer to the tipped employee as a gift or gratuity in recognition of some service performed for him or her. *See* 29 CFR 531.52. The only ways in which an employer may use its employee’s tips are through a valid tip pool, as defined in [FOH 30d04](#), or as a partial wage credit. *See* FOH 30d00(d) and FOH 32j18(h). These restrictions on an employer’s use of its employees’ tips apply even when the employer has not taken a tip credit; in such a case, the employer may only use its employee’s tips in furtherance of a valid tip pool.

(3) *Notice requirement*

An employer cannot take an FLSA 3(m) tip credit unless it informs the tipped employee of the provisions of section 3(m) prior to taking a tip credit. Where an employer does not inform the tipped employee of the use of the tip credit, the full minimum wage is due. See FOH 30d01(b).

29 CFR 531.59(b) states that the employer must inform its tipped employees, in advance of taking the FLSA 3(m) tip credit, of the following requirements in section 3(m):

- a. The amount of the cash wage that is to be paid to the tipped employee by the employer, which may not be less than \$2.13 per hour
- b. The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer
- c. The amount of the tip credit claimed may not exceed the value of the tips actually received by the employee
- d. All tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips
- e. An employer may not claim a tip credit for any employee who has not been informed of these provisions

The WH-1088: Employee Rights under the FLSA (minimum wage poster) alone is not sufficient to meet these regulatory requirements. See 29 CFR 531.59(b) and WHD Opinion Letter FLSA (January 21, 1997).

(4) *Deductions*

a. Non-3(m) deductions when employer claims an FLSA 3(m) tip credit

When the 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; however, for overtime hours the employee's regular rate may exceed the FLSA minimum wage. Because section 3(m) caps a tipped employee's hourly wage in a non-overtime workweek at the minimum wage, an employer that claims an FLSA 3(m) tip credit may not take deductions for non-3(m) costs (e.g., walkouts, cash register shortages, breakage, cost of uniforms, etc.), because any such deduction would reduce the tipped employee's wages below the minimum wage. Even when an employer pays more than the \$2.13 minimum direct wage, the employee will have only received the minimum wage, and non-3(m) deductions cannot be made. For example, if an employer pays a direct wage of \$3.13, the FLSA 3(m) tip credit will be \$4.12 ($\$7.25 - \$3.13 = \4.12), and the employee will have only received the minimum wage for all non-overtime hours.

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 H



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 employee¹ 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).



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



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.



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- 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.

Exhibit I

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 10, 516, 531, 578, 579, and 580

RIN 1235-AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA)

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; withdrawal of proposed rulemaking; request for comments.

SUMMARY: In the Consolidated Appropriations Act, 2018 (CAA), Congress amended section 3(m) of the Fair Labor Standards Act (FLSA) to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). In this Notice of Proposed Rulemaking (NPRM), the Department proposes to amend its tip regulations to address this Congressional action. The Department also proposes to codify policy regarding the tip credit’s application to employees who performed tipped and non-tipped duties. This NPRM also withdraws the Department’s December 5, 2017 NPRM proposing changes to the Department’s tip regulations, as the CAA has superseded it.

DATES: Comments must be received on or before December 9, 2019.

The proposed rule Tip Regulations under the Fair Labor Standards Act, published December 5, 2017 at 82 FR 57395, is withdrawn as of October 8, 2019.

ADDRESSES: To facilitate the receipt and processing of written comments on this NPRM, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods:

Electronic Comments: Follow the instructions for submitting comments on the Federal eRulemaking Portal <http://www.regulations.gov>.

Mail: Address written submissions to Amy DeBisschop, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: This NPRM is available through the **Federal Register** and the <http://www.regulations.gov> website. You may also access this document via

the Wage and Hour Division’s (WHD) website at <http://www.dol.gov/whd/>. All comment submissions must include the agency name and Regulatory Information Number (RIN 1235-AA21) for this NPRM. Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Submit only one copy of your comment by only one method (e.g., persons submitting comments electronically are encouraged not to submit paper copies). Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this NPRM; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via <http://www.regulations.gov> enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number). Copies of this NPRM may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency’s existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD’s toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD’s website at <http://www.dol.gov/whd/america2.htm> for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

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). Section 3(m) of the FLSA allows an employer that meets certain requirements to count a limited amount of the tips its “tipped employees” receive as a credit toward its Federal minimum wage obligation (known as a “tip credit”). *See* 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only for “tipped employees”, and only if, among other things, its tipped employees retain all their tips. *Id.* This requirement, however, does not preclude an employer that takes a tip credit from implementing a tip pool in which tips are shared only among those employees who “customarily and regularly receive tips.” *Id.*

In 2011, the Department revised its tip regulations to reflect its view at the time that the FLSA required that tipped employees retain all tips received by them, except for tips distributed through a tip pool limited to employees who customarily and regularly receive tips, regardless of whether their employer takes a tip credit. *See, e.g.,* 29 CFR 531.52. On December 5, 2017, the Department published an NPRM, 82 FR 57,395, which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit.

On March 23, 2018, Congress amended section 3(m) of the FLSA in the CAA, Public Law 115-141, Div. S., Tit. XII, § 1201, 132 Stat. 348, 1148-49 (2018). Among other things, the CAA revised section 3(m) by renumbering the existing tip credit provision as section 3(m)(2)(A). Significantly, the CAA added a new section 3(m)(2)(B), which prohibits employers, whether or not they take a tip credit, from keeping their employees’ tips “for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips.” The CAA amended sections 16(b) and 16(c) of the FLSA to permit private parties and the Department to recover any tips unlawfully kept by an employer in violation of section 3(m)(2)(B), in addition to an equal amount of liquidated damages. The CAA also amended section 16(e) of the FLSA to provide the Department discretion to impose civil money penalties (CMPs) up to \$1,100 when employers unlawfully keep employee’s tips.

Congress specified in the CAA that the portions of the 2011 final rule that “are not addressed by section 3(m) . . .

(as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].” As the Department explained in a Field Assistance Bulletin (FAB) published shortly thereafter, that statement applies to those portions of the Department’s regulations at §§ 531.52, 531.54, and 531.59 that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not claim a tip credit. FAB No. 2018–3 (Apr. 6, 2018), available at https://www.dol.gov/whd/FieldBulletins/fab2018_3.pdf.

Because the Congressional amendments to the FLSA directly impacted the subject of the Department’s 2017 NPRM, this document withdraws that proposal. This document also explains the impact of the 2018 CAA amendments on the Department’s current tip pooling regulations. The CAA did not change the existing rules that apply to employers that take a tip credit, now in section 3(m)(2)(A) of the FLSA, which provide that such employers may institute a mandatory, “traditional” tip pool that is limited to employees who “customarily and regularly” receive tips. But the CAA did eliminate the regulatory restrictions on an employer’s ability to require tip pooling when it does not take a tip credit: Such employers may now implement mandatory, “nontraditional” tip pools in which employees who do not customarily and regularly receive tips, such as cooks and dishwashers, may participate.

The CAA also created a new statutory provision, 3(m)(2)(B), which applies to all employers regardless of whether they take a tip credit, and provides that employers may not keep employees’ tips and may not allow managers or supervisors to keep employees’ tips. Among other things, this new statutory provision prohibits employers, managers, and supervisors from receiving employees’ tips from any tip pooling arrangement. As explained further herein, section 3(m)(2)(B) also prohibits employers from operating tip pools in a manner such that they “keep” tips.

The Department is proposing to update its tip regulations to incorporate the CAA’s amendments to the FLSA. Although the CAA renumbered the FLSA’s existing tip credit provision as section 3(m)(2)(A), it did not substantively change that provision. Therefore, this rulemaking does not address the Department’s existing regulations and guidance implementing 3(m)(2)(A) that apply to employers that

take a tip credit unless it is necessary to clarify how those provisions relate to the statutory amendment. The Department is proposing to incorporate the new statutory provision, section 3(m)(2)(B)—which applies regardless of whether the employer takes a tip credit—into its existing regulations and is proposing to incorporate a new recordkeeping provision to assist the Department with its administration of that provision. The Department is additionally proposing, consistent with Congressional action, to remove the portions of its regulations that prohibited employers that pay their tipped employees a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations from including employees who do not customarily and regularly receive tips, such as cooks and dishwashers, in mandatory tip pooling arrangements. The Department is also proposing to amend its tip regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also address which non-tipped duties are related to a tip-producing occupation.

The Department is also proposing to incorporate the FLSA’s new CMP provision into its existing regulations. Since the Department is proposing to revise its CMP regulations to reflect the statutory amendments, the Department also proposes to revise portions of its CMP regulations to address courts of appeals’ decisions that have raised concerns that some of the regulations’ statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

Finally, the Department is proposing to amend the provisions of its regulations that address the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) to reflect the rescissions proposed in the FLSA regulations for tipped employees, to incorporate the Department’s guidance on when an employee performing non-tipped work is a tipped employee, and to otherwise align those regulations with the authority provided in the Executive Order.

The Department estimates the rule updating WHD’s regulations to reflect the CAA amendments, if finalized as proposed, could result in a potential

transfer of \$107 million, as tip pools are expanded to share tips among both front-of-the-house and back-of-the-house employees. The directly-observable transfer would only occur among employees because section 3(m)(2)(B) prohibits employers from participating in these tip pools or otherwise keeping employee’s tips. However, because back-of-the-house workers may now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as they do not reduce their wage below the applicable minimum wage). This could allow employers to capture some of the transfer. The Department estimates that regulatory familiarization costs associated with this proposed rule would be \$3.86 million in the first year. For purposes of Executive Order 13771, it is expected that this proposed rule would, if finalized as proposed, qualify as a deregulatory action.

II. Background

A. Section 3(m)

As explained above, the FLSA generally requires covered employers to pay employees at least the Federal minimum wage, which is currently \$7.25 per hour. Section 3(m) (now 3(m)(2)(A)) of the FLSA, however, permits an employer to count a limited amount of an employee’s tips (up to \$5.12 per hour) as a partial credit, called a “tip credit,” to satisfy the difference between the direct cash wage paid and the Federal minimum wage. This partial credit is known as a tip credit. An employer may take a tip credit only for a “tipped employee,” which section 3(t) of the FLSA defines as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” In addition, an employer may take a tip credit under section 3(m)(2)(A) only if, among other things, the tipped employees retain all the tips they receive. An employer taking a tip credit is allowed, however, to implement a mandatory tip pool in which tips are shared only among employees who “customarily and regularly receive tips.”

Section 3(m)(2)(B) of the FLSA, added through the CAA, provides that “an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips.” See Div. S., Tit. XII, § 1201. Importantly, section 3(m)(2)(B) applies regardless of whether an employer takes a tip credit.

*B. Statutory and Regulatory History*i. 1966 and 1974 Amendments to the FLSA¹

Congress created the FLSA's tip credit provision within the definition of "wages" in section 3(m) in 1966. *See* Public Law 89–601, 101(a), 80 Stat. 830 (1966). In 1974, Congress amended section 3(m) to provide that an employer could not credit tips received by its employees toward its Federal minimum wage obligation unless, among other things:

all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Public Law 93–259, 13(e), 88 Stat. 55 (1974). As a result of the amendment, an employer that takes a tip credit can require a tipped employee to share tips with other employees in occupations in which they customarily and regularly receive tips, but it cannot use employees' tips for any other purpose or require tipped employees to share them with employees who do not customarily and regularly receive tips. As the text of the statute makes plain, Congress only intended to regulate employers who take a tip credit, stating that those employers cannot take employees' tips except to pool them among employees who customarily and regularly receive them. The text contains no indication that Congress intended to regulate employers who do not take a tip credit and who use tip pools for other purposes, such as by sharing tips with "back of the house" employees like cooks and dishwashers.

The Department promulgated its initial tip regulations in 1967, one year after Congress created the tip credit. *See* 32 FR 13,575 (Sept. 28, 1967). Consistent with the Department's understanding of the 1966 amendments, the 1967 tip regulations permitted agreements under which tips received by employees would be transferred to the employer. Immediately after the 1974 amendments, the Department's WHD stated in a number of opinion letters that its 1967 regulations were superseded to the extent they conflicted with those amendments. *See, e.g.*, WHD Opinion Letter WH–310, 1975 WL 40934 (Feb. 18, 1974), at *1.

¹ Congress amended section 3(m)'s tip credit provision three times between 1974 and 2018, in 1977, 1989, and 1996. These amendments changed only the applicable amount of tips received by employees that could be used as a credit against an employer's minimum wage obligations. *See* Public Law 95–151, 3(b), 91 Stat. 1245 (1977); Public Law 101–157, 5, 103 Stat. 938 (1989); Public Law 104–188, 2105(b), 110 Stat. 1755 (1996).

In 2010, the Ninth Circuit analyzed section 3(m) and observed that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken." *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 583 (9th Cir. 2010). The Ninth Circuit reasoned that section 3(m)'s "plain text" merely "imposes conditions on taking a tip credit and does not state freestanding requirements pertaining to all tipped employees." *Id.* at 580–81. The contrary position, the court concluded, would render Section 203(m)'s "reference to the tip credit, as well as its conditional language and structure, superfluous." *Id.* at 581. The court thus held that the employer, which did not take a tip credit, did not violate section 203(m) by requiring its tipped employees to contribute to a tip pool that included employees who were not customarily and regularly tipped. *See id.*

ii. 2011 Regulations

In 2011, however, the Department revised its 1967 tip regulations to reflect its view of the 1974 amendments to the FLSA. *See* 76 FR 18,832, 18,854–56 (Apr. 5, 2011). Notwithstanding the *Cumbie* decision, the 2011 regulations prohibited employers from, among other things, establishing mandatory tip pools that include employees who are not customarily and regularly tipped—regardless of whether employers took a tip credit. *See* 29 CFR 531.52 (2011) ("The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool."); *see also* § 531.54 (providing that "an employer . . . may not retain any of the employees' tips"); § 531.59 ("With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee."). The Department acknowledged that section 3(m) did not expressly address the use of an employee's tips when an employer does not take a tip credit and pays a direct cash wage equal to or greater than the Federal minimum wage, but stated that the regulation would fill a "gap" that the Department then believed to exist in the statutory scheme. 76 FR at 18,841–42.

Multiple lawsuits have involved challenges to the Department's authority under section 3(m) to regulate employers that pay a direct cash wage of at least the Federal minimum wage.

The parties challenging the validity of the 2011 regulations argued, and courts ruling in favor of such parties have held, that the text of section 3(m) reflected Congress' intent to impose conditions only on employers that take a tip credit. *See, e.g., Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 562 (S.D.N.Y. 2013) ("Although the Court need not resolve this issue definitively . . . [it] finds Pret's argument more persuasive: The DOL regulations are contrary to the plain language of § 203(m).").

On February 23, 2016, a divided Ninth Circuit panel upheld the validity of the 2011 regulations. *See Oregon Rest. & Lodging Ass'n (ORLA) v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). Although the Ninth Circuit declined *en banc* review of the decision, ten judges dissented on the ground that the FLSA authorized the Department to address tip pooling and tip retention only when an employer takes a tip credit. *See ORLA*, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of reh'g en banc). The dissent noted the Ninth Circuit's decision in *Cumbie* that the FLSA "clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit." *Id.* at 358 (citing *Cumbie*, 596 F.3d at 579 n.6, 581, 581 n.11, 582, 583). The dissent therefore concluded that "because the Department has not been delegated authority to ban tip pooling by employers who forgo the tip credit, the Department's assertion of regulatory jurisdiction is manifestly contrary to the statute and exceeds its statutory authority." *Id.* at 363 (internal quotation marks omitted). On January 19, 2017, the National Restaurant Association, on behalf of itself and other *ORLA* plaintiffs, sought Supreme Court review. *See Pet'n for Writ of Cert., ORLA sub nom. Nat'l Rest. Ass'n v. U.S. DOL*, (Jan. 19, 2017) (No. 16–920).

On June 30, 2017, the Tenth Circuit ruled that the Department's 2011 tip regulations were invalid to the extent they barred an employer from using or sharing tips with employees who do not customarily and regularly receive tips when the employer pays a direct cash wage of at least the Federal minimum wage and does not take a section 3(m) tip credit. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1159 (10th Cir. 2017). The Tenth Circuit held that the text of the FLSA limits an employer's use of tips only when the employer takes a tip credit, "leaving [the Department] without authority to regulate to the contrary." *See Marlow*, 861 F.3d at 1163–64.

On July 20, 2017, the Department adopted a nationwide “nonenforcement policy” under which the Department would “not enforce” the 2011 regulations in any context in which an employer pays its employees a direct cash wage of at least the Federal minimum wage. *See* 82 FR 57395, 57399 (Dec. 5, 2017).

On May 22, 2018, the government responded to the petition for certiorari in *ORLA*, then captioned as *Nat’l Rest. Ass’n (NRA) et al. v. Dept. of Labor et al.*, explaining that the Department had reconsidered its defense of the 2011 regulations in light of the ten-judge dissent from denial of rehearing in *ORLA* and the Tenth Circuit’s decision in *Marlow*, and that it believed that it had exceeded its statutory authority in promulgating the 2011 regulations as they apply to employers that do not take a tip credit against their Federal minimum wage obligations. The government explained that “until the 2018 [congressional] amendments, Section 203(m) placed limits only on employers that took a tip credit,” and that “[n]either Section 203(m) nor any other provision of the FLSA prevents an employer that pays at least the minimum wage from instituting a nontraditional tip pool [that includes back-of-the-house employees like cooks and janitors] for employees’ tips.” *Br.* for the Respondents at 26–27, *NRA* (No. 16–920). On June 25, 2018, the Supreme Court denied the petition for certiorari.

iii. 2017 Notice of Proposed Rulemaking

On December 5, 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations. *See* 82 FR 57395 (Dec. 5, 2017). The Department issued the 2017 NPRM in part because of its concerns, in light of the *ORLA* rehearing dissent and the Tenth Circuit’s decision in *Marlow*, that it had misconstrued the statute when it promulgated the 2011 regulations. 82 FR 57399. The Department stated that where “an employer has paid a direct cash wage of at least the full Federal minimum wage and does not take the employee tips directly, a strong argument exists that the statutory protections of section 3(m) do not apply.” 82 FR 57402. The Department also proposed allowing these employers to establish tip pools that include employees who contribute to the customers’ experience but do not customarily and regularly receive tips—

such as dishwashers or cooks. *See, e.g.*, 82 FR 57399.

A number of commenters on the NPRM supported allowing employers to establish these tip pools. Several commenters pointed out that these workers contribute to each customer’s overall service, which directly affects the size of the customer’s tip. Many commenters, however, expressed concern that without regulatory protections in place, an employer would take tips received by employees for its own purposes.

During a hearing on March 6, 2018, before the Subcommittee on Labor, Health and Human Services, and Education of the U.S. House of Representatives Committee on Appropriations, Secretary of Labor R. Alexander Acosta was asked about the proposed rulemaking. The Secretary explained that the Tenth Circuit had made clear in *Marlow*, in reasoning the Secretary found persuasive, that the Department lacked statutory authority for its 2011 regulations at issue, and that the Secretary had concluded that Congress has not authorized the Department to fully regulate in this space. The Secretary, however, explained that Congress had the authority to implement a solution, and he suggested that Congress enact legislation providing that establishments, whether or not they take a tip credit, may not keep any portion of employees’ tips.²

C. The CAA’s Amendments to the FLSA

On March 23, 2018, Congress amended the FLSA through the CAA to further address employers’ practices with respect to their employees’ tips. Public Law 115–141, Div. S., Tit. XII, sec. 1201. The Department issued a FAB that provided guidance concerning WHD enforcement of the CAA amendments on April 6, 2018. *See* FAB No. 2018–3 (Apr. 6, 2018).

i. Amendments to Section 3(m) of the FLSA

The CAA left unchanged the existing text of section 3(m), but recodified it as section 3(m)(2)(A). Thus, the CAA did not alter the FLSA’s longstanding requirements that apply to employers that take a tip credit.

The CAA did, however, add new requirements for all employers. The CAA added a new section to the FLSA, 3(m)(2)(B). This provision expressly prohibits employers—regardless of whether they take a tip credit under

section 3(m)—from keeping tips received by their employees, including by distributing them to managers or supervisors: “An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.” CAA, Div. S, Tit. XII, § 1201(a) (codified as amended at 29 U.S.C. 203(m)(2)(B)); *see* FAB No. 2018–3.

ii. Effect on Regulations

The CAA amendments also expressly addressed the portions of the Department’s 2011 regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not take a tip credit. CAA, Div. S, Tit. XII, § 1201(c). Section 1201(c) of the CAA provides that the portions of WHD’s regulations at 29 CFR 531.52, 531.54, and 531.59 that were “not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].” The Department explained in a FAB that this statutory language had the effect of depriving of any further force or effect the Department’s existing regulations prohibiting employers that pay tipped employees the full Federal minimum wage from including back-of-the-house workers, such as cooks and dishwashers, in a tip pool. *See* FAB No. 2018–3.

iii. Amendments to Section 16 of the FLSA

The CAA also amended section 16(b) of the FLSA, which provides in part that an employee may sue for unpaid minimum wages or overtime compensation. The amendment to this provision states that “[a]ny employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages.” CAA, Div. S, Tit. XII, sec. 1201(b)(1). The amendment thus permits employees to sue for double the sum of any tips illegally kept by their employer and the amount of any tip credit taken by such employer.

Section 16(c) of the FLSA authorizes the Department to enforce the proper payment of unpaid minimum wages and/or unpaid overtime compensation. The CAA amended section 16(c) by adding to the Department’s enforcement authority: “The authority and

² A recording of the testimony is available at: <https://www.congress.gov/committees/video/house-appropriations/hsap00/6Woe1vfNM1k>.

requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.” CAA, Div. S, Tit. XII, sec. 1201(b)(2). Accordingly, when an employer unlawfully keeps an employee’s tips in violation of section 3(m)(2)(B), the Department may recover on behalf of the employee the same doubled sum of any tips kept and tip credit taken by the employer.

Section 16(e)(2) provides that any person who repeatedly or willfully violates the minimum wage or overtime provisions of the FLSA shall be subject to a civil money penalty not to exceed \$1,100 for each such violation.³ The CAA amended this section to add: “Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]” CAA, Div. S, Tit. XII, sec. 1201(b)(3). The amendment thus added a new civil money penalty for violations of section 3(m)(2)(B).

III. Withdrawal of the 2017 NPRM

As noted above, on December 5, 2017, the Department published an NPRM which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit.

The CAA amendments to the statutory text of the FLSA, which were signed into law on March 23, 2018, directly impacted the subject of the 2017 proposed rulemaking—employers that pay at least the full Federal minimum wage and do not take a tip credit under section 3(m). For that reason, the Department is withdrawing the 2017 NPRM and is addressing the 2018 CAA amendments through this rulemaking.

IV. Section-by-Section Analysis of Proposed Regulatory Revisions

This section describes in detail the Department’s proposed changes to its

tip regulations to implement the CAA amendments and address other issues. As discussed above, the CAA amendments deprived of any further force or effect the portions of the Department’s 2011 regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not take a tip credit, until future action by the WHD Administrator. At the same time, the CAA amendments expressly prohibit employers from keeping tips received by their employees for any purposes, regardless of whether the employer takes a tip credit. Pursuant to section 1201(c) of the CAA amendments and consistent with its position articulated in the 2017 NPRM, the Department proposes to strike the portions of its current regulations that prohibit employers that pay their tipped employees a direct cash wage at least equal to the Federal minimum wage and do not take a tip credit from establishing mandatory tip pools with employees who do not customarily and regularly receive tips, such as dishwashers and cooks.

The Department also proposes to amend § 531.52 to implement newly added section 3(m)(2)(B), which prohibits employers—regardless of whether they take a tip credit—from keeping employees’ tips for any purposes, including allowing managers and supervisors to keep the tips. The proposed regulation defines an individual who is a manager or supervisor, and therefore may not keep employees’ tips under section 3(m)(2)(B), as an individual who meets the duties test at § 541.100(a)(2)–(4) or § 541.101.

The Department also proposes to amend § 531.54 to reflect the new statutory provision, section 3(m)(2)(B). Proposed § 531.54(b) clarifies that section 3(m)(2)(B)’s prohibition on keeping tips applies regardless of whether the employer takes a tip credit and precludes employers from including themselves, managers, and/or supervisors in employer-mandated tip pools. Proposed § 531.54(b) also explains that although section 3(m)(2)(B) prohibits employers from sharing employees’ tips with supervisors, managers, and employers, an employer may institute a mandatory tip pool that requires employees to share or pool tips with other eligible employees. Proposed § 531.54(b) further provides that any employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips, no less often than when it pays wages, to avoid

“keep[ing]” the tips in violation of section 3(m)(2)(B).

Proposed §§ 531.54(c) and (d) would also set forth the different tip pooling requirements for employers that take a tip credit and for those that do not. Because the CAA did not substantively amend the statutory requirements under 3(m)(2)(A) that apply to employers that take a tip credit, the Department does not propose to change its existing tip pooling requirements in § 531.54 that apply to those employers. Those existing requirements, in relevant part, state that employers can only require tipped employees to contribute tips to a “traditional” tip pool, comprised of employees who customarily and regularly receive tips. In contrast, under the CAA amendments, an employer that chooses not to take a tip credit may require tipped employees to contribute tips to a “nontraditional” pool that includes employees, such as dishwashers and cooks, who are not employed in an occupation in which employees customarily and regularly receive tips. The proposed regulation clarifies that an employer that requires such a tip pool must pay a direct cash wage of at least the full Federal minimum wage to any tipped employee who contributes tips to the pool.

The Department is also proposing to amend § 531.56(e) to reflect recent guidance that an employer may take a tip credit for time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with or a reasonable time immediately before or after performing the tipped duties. The proposed regulation would also address which non-tipped duties are related to a tip-producing occupation.

The Department additionally proposes incorporating into its regulations the CAA amendments that provide for civil money penalties for violations of section 3(m)(2)(B). Since the Department is proposing to revise its regulations to reflect this new CMP provision, which, as proposed, would apply only to repeated and willful violations, the Department also proposes to revise its existing CMP regulations to address courts of appeals’ decisions that have raised concerns that some of the regulations’ statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

Finally, the Department proposes to amend the provisions of § 10.28, which addresses the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors), to make them consistent

³ The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 (Pub. L. No. 114–74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified cost-of-living formula.

with its proposed rescissions to the FLSA regulations, to remove similar restrictions on an employer's use of nontraditional tip pools, to otherwise align those regulations with the authority provided in the Executive Order, and to incorporate the Department's recent guidance on when an employee performing non-tipped work is a tipped employee.

The Department seeks public comment on these proposed regulatory changes. The Department asks commenters to define in their comments any terms they use to describe practices regarding tips. This NPRM uses the term "tip pooling" to describe any scenario in which a tip provided by a customer is shared, in whole or in part, among employees. The Department recognizes, however, that in some workplaces or under state laws, the term "tip pooling" may refer to a narrower set of practices, and that employers and workers may use other terms—for example "tip out," "tip sharing," or "tip jar"—to describe certain practices regarding tips.

A. Rescission of Portions of Sections 531.52, 531.54, and 531.59

As noted above, section 1201(c) of the CAA provides that the portions of the Department's regulations at 29 CFR 531.52, 531.54, and 531.59 that were "not addressed by section 3(m)" "shall have no further force or effect[.]" CAA, Div. S, Tit. XII, sec. 1201(c). This statutory language deprives of any further force or effect the portions of §§ 531.52, 531.54, and 531.59 that impose restrictions on an employer's use of employees' tips when the employer does not take a tip credit. As the Department explained in its FAB, under the CAA amendments, employers that do not take a tip credit may now establish mandatory tip pools that include employees who do not customarily and regularly receive tips, such as back-of-the-house workers like cooks and dishwashers. See FAB No. 2018–3. Section 1201(c) of the CAA did not impact the portions of §§ 531.52, 531.54, and 531.59 that apply to employers that do take a tip credit.

Consistent with the statutory language, as well as the Department's statements in the 2017 NPRM,⁴ the Department proposes to rescind the language in § 531.52 that bars employers

from establishing mandatory tip pools that include employees who are not customarily and regularly tipped, "whether or not it takes a tip credit," and to make additional minor clarifying edits; to revise §§ 531.54 to clarify that the restrictions and notice requirements for tip pools apply only to employers that take a tip credit; and to revise § 531.59 to provide that the bar on including employees who are not customarily and regularly tipped in a mandatory tip pool applies only to employers that take a tip credit.

B. Proposed Section 531.52—General Restrictions on an Employer's Use of Its Employees' Tips

i. An Employer May Not Keep Tips, Regardless of Whether It Takes a Tip Credit

Section 3(m)(2)(B) prohibits an employer, regardless of whether it takes a tip credit, from "keeping" tips received by its employees "for any purposes, including allowing managers and supervisors to keep any portion of employees' tips." Under the amended statute, an employer does not "keep" employees' tips in violation of section 3(m)(2)(B) merely by requiring an employee who receives a tip to share it with other eligible employees who also contributed to the service provided to the customer. In those circumstances, the employees, not the employer, keep the tips. Section 3(m)(2)(B), however, prohibits an employer from using its employees' tips for any other purpose. An employer would "keep" tips, for example, by using tips to cover its own general operating expenses, using tips to pay for capital improvements, or directing the tips to an individual who is not an employee, such as a vendor. This is true for tips provided through a credit card transaction, as well as for cash tips. The Department proposes to amend § 531.52 to include the new statutory language prohibiting an employer from keeping employees' tips, and to clarify that an employer may exert control over employees' tips only to distribute tips to the employee who received them, require employees to share tips with other eligible employees, or, where the employer facilitates tip pooling by collecting and redistributing employees' tips, distribute tips to employees in a tip pool.

The statutory language prohibits an "employer" from "keep[ing] tips received by its employees." The term "employer" is defined in section 3(d) of the FLSA to mean "any person [or entity] acting directly or indirectly in the interest of an employer in relation to an employee" Therefore, a

person or entity that meets the definition of a section 3(d) employer may not keep or receive tips from a tip pool.

ii. Managers and Supervisors May Not Keep Tips

As explained above, section 3(m)(2)(B) prohibits employers, regardless of whether they take a tip credit, from keeping tips, "including allowing managers or supervisors to keep any portion of employees' tips." 29 U.S.C. 203(m)(2)(B). This prohibition applies to managers or supervisors obtaining employees' tips directly or indirectly, such as via a tip pool. The Department's current enforcement policy under FAB No. 2018–3 is to use the duties test under the executive employee exemption of FLSA section 13(a)(1), as defined at 29 CFR 541.100(a)(2)–(4), to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B).

Proposed § 531.52 would reflect this policy. Because an employee who satisfies the executive duties test manages and supervises other employees, the test effectively identifies those employees whom Congress sought to preclude from keeping tips. The Department does not propose to use the salary requirements at § 541.100(a)(1) to help determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B). Accordingly, this proposal would interpret the terms "manager" and "supervisor" under section 3(m)(2)(b) more broadly—and to encompass more employees—than the term "executive" as used in Section 13(a)(1).

Sections 541.100(a)(2)–(4) provide that a manager or supervisor satisfies the duties test of the executive employee exemption if (1) the employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (see § 541.100(a)(2)); (2) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent (see § 541.100(a)(3)); and (3) the employee has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight (see § 541.100(a)(4)). In addition, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which she is employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is

⁴ As explained above, the government's brief in response to the petition for certiorari in the *NRA* litigation explained that the Department had reconsidered its defense of the 2011 regulations, and that it believed that it had exceeded its statutory authority in promulgating the 2011 regulations as they apply to employers that do not take a tip credit against their Federal minimum wage obligations.

actively engaged in its management, as defined under 29 CFR 541.101, would be considered a manager or supervisor for purposes of section 3(m)(2)(B). The Department believes that these well-established criteria would effectively identify employees who manage or supervise other employees and therefore those whom Congress sought to prevent from keeping other employees' tips. The Department additionally believes that employers can readily use these criteria to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B) because employers are generally familiar with these longstanding regulations. Moreover, the Department's staff is highly trained, and has extensive experience, in applying and enforcing these longstanding regulations.

The Department requests comments regarding whether other criteria may also be appropriate to determine whether an employee is a manager or supervisor for purposes of section 3(m)(2)(B), particularly in the varied situations where tipping is common.

C. Proposed Section 531.54—Tip Pooling

The Department also proposes to amend § 531.54, which generally addresses tip pooling, to reflect the CAA amendments. Proposed § 531.54 incorporates section 3(m)(2)(B)'s prohibition on employers keeping tips, including allowing managers or supervisors to keep employees' tips. This prohibition applies regardless of whether the employer takes a tip credit, and therefore governs any employer that facilitates or operates a mandatory tip pool. Proposed § 531.54 also contains other specific requirements for employers that establish mandatory tip pools, depending on whether they include employees who do not customarily and regularly receive tips.

i. Requirements When an Employer Collects and Redistributes Tips

The Department recognizes that employers operate a variety of tip pooling and tip sharing arrangements and that some employers may wish to pool tips received by one set of employees and redistribute them to another. Section 3(m)(2)(B) does not prohibit an employer from doing so, as long as the employer fully redistributes the tips no less often than when it pays wages. In those circumstances, the employees' tips are only temporarily within the employer's possession, and the employer does not "keep" the tips. When an employer collects employees' tips but fails to distribute them within this time period, however, and instead

holds the tips, the employer "keeps" them in violation of section 3(m)(2)(B). For example, an employer may not maintain a reserve of collected tips from one pay period to pay out in a subsequent pay period.

Proposed § 531.54(b)(1) provides that an employer that collects tips to administer a tip pool must fully distribute any tips the employer collects at the regular payday for the workweek, or when the pay period covers more than a single workweek, at the regular payday for the period in which the particular workweek ends. To the extent that it is not possible for an employer to ascertain the amount of tips received or how tips should be distributed prior to processing payroll, the proposed rule requires the distribution of those tips to employees as soon as practicable after the regular payday. Thus, for a two-week pay period, an employer must fully distribute any tips the employer collects during those two weeks on the regular payday for that period, or to the extent that it is not possible to ascertain the amount or distribution of the tips, as soon as possible following that payday. This proposed requirement aligns with the Department's current guidance on how soon an employer must provide tips charged on credit cards to tipped employees. See WHD Field Operations Handbook (FOH) 30d05.

Because the proposal defines "keep" within the meaning of section 3(m)(2)(B), the proposed requirement that an employer fully and promptly distribute any tips it collects would apply regardless of whether the employer takes a tip credit, and regardless of whether the employer requires employees to participate in a "traditional" tip pool or in a "nontraditional" tip pool.

The Department requests comments on this proposed requirement, and requests information about how this requirement might affect employers' current practices for administering tip pools and tip distribution.

ii. Additional Requirements for Mandatory Tip Pools When an Employer Takes a Tip Credit

Current § 531.54 provides that an employer, regardless of whether it takes a tip credit, may only require its tipped employees to share tips with other employees who customarily and regularly receive tips. The employer also must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose. Although, as discussed above,

the CAA amendments deprived of any further force or effect these regulatory tip pooling requirements as they apply to employers that do not take a tip credit, the CAA did not affect these requirements as they apply to employers that do take a tip credit. Therefore, proposed § 531.54(c) retains these requirements but clarifies that they apply only to employers that take a tip credit.

iii. Conditions Under Which an Employer May Mandate Participation in a Nontraditional Tip Pool

As explained above, as a result of the CAA amendments to the FLSA, employers that do not take a tip credit may now require tipped employees to participate in nontraditional tip pools that include employees who do not customarily and regularly receive tips, such as cooks and dishwashers, so long as the pools do not include employers, managers, or supervisors. Proposed § 531.54(d) implements these conditions.

As explained above, the CAA did not substantively amend the FLSA's existing tip credit provision, which states that employers may only take a tip credit against their minimum wage obligations to employees who are employed in an occupation in which they customarily and regularly receive tips, such as bussers and servers, and that employers that take a tip credit may only require tip pooling among such employees. See 29 U.S.C. 203(m)(2)(A). Over the years, the Department has developed guidance for itself on how to identify customarily and regularly tipped employees. See, e.g., WHD Opinion Letter FLSA 2009–12, 2009 WL 649014 (Jan. 15, 2009); WHD Opinion Letter FLSA 2008–18, 2008 WL 5483058 (Dec. 19, 2008); WHD FOH 30d04(b), (f) (listing occupations that do, and do not, meet these criteria). This guidance is based in large part on the legislative history of the FLSA's tip credit provision. See S. Rep. No. 93–690, at 43 (1974).⁵ According to this guidance, employers may not take a tip credit for back-of-the-house employees who receive tips through a tip pool because those employees are not employed in an occupation in which they customarily and regularly receive tips. Similarly, employers may not include those non-customarily and regularly tipped employees in a traditional section 3(m)(2)(A) tip pool.

⁵ Since the CAA did not change the FLSA's existing tip credit provision, that guidance is still applicable to an employer that takes a tip credit.

D. Proposed Section 516.28—Recordkeeping Requirements for Employers That Have Employees Who Receive Tips

The Department is proposing revisions to the recordkeeping requirements in § 516.28 to provide consistent and effective administration of section 3(m)(2)(B) of the FLSA. Section 516.28 imposes certain recordkeeping requirements on only those employers that take a tip credit. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit (see § 516.28(a)(1)) and maintain records regarding the weekly or monthly amount of tips received, as reported by the employee to the employer (see § 516.28(a)(2)). The employer may use information on IRS Form 4070 (Employee's Report of Tips to Employer) to satisfy the requirements under § 516.28(a)(2).⁶

The Department proposes to apply similar recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. Proposed § 516.28(b)(1) would require these employers to identify on their payroll records each employee who receives tips. Proposed § 516.28(b)(2) would require employers that do not take a tip credit but that collect tips to operate a mandatory tip pool to keep records of the weekly or monthly amount of tips received by each employee as reported by the employee to the employer (this may consist of reports from the employees to the employer on IRS Form 4070). The proposed recordkeeping requirements would help the Department determine whether employers are complying with their tip pooling obligations. The Department requests comments on these proposed requirements.

E. Proposed Section 531.56(e)—Dual Jobs

The Department proposes to amend § 531.56(e) to reflect recent guidance, which addresses whether an employer can take a tip credit for the time that a tipped employee spends performing duties in a tipped occupation that do not produce tips. Section 3(t) of the FLSA defines a "tipped employee" for whom an employer may take a tip credit under section 3(m) 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). Current § 531.56(e) recognizes

that an employee may be employed both in a tipped occupation and in a non-tipped occupation, providing that in such a "dual jobs" situation, the employee is a "tipped employee" for purposes of section 3(t) only while he or she is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. In addition to addressing dual jobs, the current regulation also recognizes that an employee in a tipped occupation may perform related duties that are "themselves not directed toward producing tips," such as, for example, a server "who spends part of her time" performing non-tipped duties, such as "cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses." The regulation distinguishes this situation, in which the employee is still engaged in the tipped occupation of serving, from a dual jobs situation, in which the employee is engaged part of the time in a non-tipped occupation. 29 CFR 531.56(e).

The Department has in the past provided enforcement guidance on whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation. Previously, the Department advised that an employer may not take a tip credit for the time an employee spent performing related duties that do not produce tips if that time exceeded 20 percent of the employee's workweek. However, this policy was difficult for employers to administer and led to confusion, in part because employers lacked guidance to determine whether a particular non-tipped duty is "related" to the tip-producing occupation. One court described it as "infeasible," observing that the policy would "present a discovery nightmare" and require employers to "keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff'd*, 291 F. App'x 310 (11th Cir. 2008). The Department believes that such a situation would help neither employer nor employee. See WHD Opinion Letter FLSA 2018–27, 2018 WL 5921455, at *3 (Nov. 8, 2018).

In November 2018, the Department issued an opinion letter addressing these issues.⁷ The Department

subsequently issued a FAB and revised its Field Operations Handbook (FOH) to reflect the interpretation of related duties in the opinion letter. See FAB 2019–2 (Feb. 15, 2019); WHD FOH 30d00(f). In these guidance documents, the Department explained that it would no longer prohibit an employer from taking a tip credit for the time an employee performs related, non-tipped duties—as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. See FAB 2019–2, at *2 (Feb. 15, 2019) ("[Section] 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."); see also WHD FOH 30d00(f) WHD Opinion Letter FLSA2018–27, 2018 WL 5921455, at *3–4 (Nov. 8, 2018). The Department believes this policy is consistent with the plain statutory text, which permits employers to take a tip credit based on whether an employee is engaged in a tipped "occupation," not on whether the employee is performing certain kinds of duties within the tipped occupation.

In its recent guidance, the Department also explained that, in addition to the examples listed in 531.56(e), it would use the Occupational Information Network (O*NET) to determine whether a tipped employee's non-tipped duties are related to their tipped occupation. O*NET is a comprehensive database of worker attributes and job characteristics, and is available to the public online at www.onetonline.com. O*NET includes information on work activities for over 900 occupations based on the Standard Occupational Classification system, a statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

The Department is proposing to revise § 531.56(e) to reflect the guidance on related duties in the recent opinion letter, FAB, and FOH revisions. Proposed § 531.56(e) would retain current language on dual jobs providing that when an individual is employed in

⁶ For information regarding IRS Form 4070, see https://www.irs.gov/pub/irs-access/f4070_accessible.pdf.

⁷ The Department had provided the same guidance initially in WHD Opinion Letter

FLSA2009–23, which was issued on January 16, 2009 and was withdrawn on March 2, 2009 "for further consideration."

a tipped occupation and a non-tipped occupation, the tip credit is available only for the hours the employee spends working in the tipped occupation. It would also continue to distinguish such a dual jobs scenario from one in which an employee performs duties that are related to her tipped occupation but not themselves directed toward producing tips. The proposed regulation would clarify that an employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. Proposed § 531.56(e) would also provide that, in addition to the examples listed in the regulation, a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET).

The Department requests comments on these proposed changes to § 531.56(e). The Department is particularly interested in comments on how to identify related duties for occupations that may qualify as tipped occupations, but which lack a description in the O*NET database, perhaps because they are newly emerging. In its enforcement guidance, the Department has stated that when an O*NET description does not exist for an occupation, the Department will consider any duties usually and customarily performed by employees in that occupation to be related duties so long as the duties are consistent with the related duties for similar occupations listed in O*NET.

F. Proposed Parts 578, 579, and 580—Civil Money Penalties

Section 1201(b)(3) of the CAA amended FLSA section 16(e)(2) by adding a new penalty provision: “Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).”

The CAA thus provides the Department with discretion to impose CMPs up to \$1,100⁸ when employers unlawfully keep employee tips, including when they allow managers or supervisors to keep any portion of

employees’ tips. See 29 U.S.C. 203(m)(2)(B). In assessing CMPs for violations of section 3(m)(2)(B) under amended section 16(e)(2), the Department proposes to follow the same guidelines and procedures that it follows for assessing CMPs for violation of the minimum wage (section 6) and overtime (section 7) provisions of the FLSA, and to issue CMPs only when it determines there has been a willful or repeated violation of section 3(m)(2)(B). The Department has been assessing CMPs for repeated or willful violations of the minimum wage and overtime provisions of the FLSA using the guidelines in part 578 and procedures in part 580 for nearly three decades. As such, employers are generally familiar with these regulations, and the Department’s staff and Administrative Law Judges have experience applying them.

Part 578 of the Department’s regulations (§§ 578.1–578.4) sets out the criteria the Department uses when determining whether a minimum wage or overtime violation is repeated or willful and thus subject to a CMP, as well as the amount of any CMP it assesses, and part 580 (§§ 580.1–580.18) sets out the procedures for assessing and contesting CMPs. Additionally, § 579.1(a) lists the maximum allowable CMPs for violations of the FLSA’s child labor, minimum wage, and overtime provisions. See 29 CFR 579.1. The Department proposes to revise § 578.1 to provide that section 1201 of the CAA authorizes the Department to issue CMPs for violations of section 3(m)(2)(B); to revise § 578.3(a)(1) to provide that any person who willfully or repeatedly violates section 3(m)(2)(B) shall be subject to a CMP not to exceed \$1,100 (as adjusted for inflation under the IAA); to revise §§ 578.3(b)–(c) to provide that the Department will use the criteria therein to determine whether an employer’s violation of section 3(m)(2)(B) is repeated or willful and thus subject to a civil penalty; and to revise § 578.4 to provide that the Department will determine the amount of the penalty for repeated or willful violations of section 3(m)(2)(B) according to the guidelines set forth in that section. The Department proposes to revise §§ 579.1(a) and 579.1(a)(2) to provide that, consistent with the CAA amendments, any person who willfully or repeatedly violates section 3(m)(2)(B) shall be subject to a CMP not to exceed \$1,100. Additionally, the Department proposes to revise §§ 580.2, 580.3, 580.12, and 580.18 to provide that the assessment of civil penalties for violations of section 3(m)(2)(B) shall be

governed by the rules and procedures set forth therein. Finally, the Department proposes additional, nonsubstantive changes to § 578.1 to better reflect the history of amendments to the civil money penalty for violations of section 6 (minimum wage) and section 7 (overtime) of the Act.

Since the Department is proposing to revise parts 578 and 579 to reflect the new CMP provision that the CAA added to the FLSA, the Department also proposes to revise §§ 578.3(c)(2) and (3), and identical language in § 579.2, to address courts of appeals’ concerns that some of the regulations’ statements regarding willful violations are inconsistent with Supreme Court authority and how the Department actually litigates willfulness.

When it initially promulgated § 578.3(c) to provide guidance for assessing CMPs for violations of the FLSA’s minimum wage or overtime pay requirements, the Department based its definition of a “willful” violation on the Supreme Court’s decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). See 57 FR 49,129 (Oct. 29, 1992). In *Richland Shoe*, the Supreme Court held that a violation is willful if the employer “knew or showed reckless disregard” for whether its conduct was prohibited by the FLSA. 486 U.S. at 133. Section 578.3(c)(1) incorporates this holding and provides that “[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.” Section 578.3(c)(2) provides that “an employer’s conduct shall be deemed knowing” if the employer received advice from the WHD that its conduct is unlawful. Section 578.3(c)(3) provides that “an employer’s conduct shall be deemed to be in reckless disregard” of the FLSA’s requirements if the employer should have inquired further into whether its conduct complied with the FLSA and failed to make adequate further inquiry.

An appellate court has identified an “incongruity” between §§ 578.3(c)(2) and (3) and “the *Richland Shoe* standard on which the regulation is based.” *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 680 (1st Cir. 1998). The court expressed “significant reservations about [§ 578.3(c)(2)’s] blanket assertion that a party’s decision not to comply with [WHD’s] advice constitutes a ‘knowing’ violation” under *Richland Shoe*. *Id.* The court further stated that § 578.3(c)(3) “by its terms—specifically, that a party ‘should have inquired further’ about the legality of its conduct—embraces a negligence standard of liability,” which *Richland Shoe* “expressly rejected.” *Id.* at 680–81

⁸ This number is adjusted by inflation annually as required by the authorities in footnote 5 of this NPRM.

(citing 486 U.S. at 133–35). Describing §§ 578.3(c)(2) and (3) as “incomplete” and “unhelpful,” the court urged the Department “to reconsider [them] to ensure that they comport with the Court’s reading of . . . ‘willful’ in *Richland Shoe*.” *Id.* at 681 n.16.

In several cases addressing this issue, the Department has argued that advice from WHD to an employer that its conduct was unlawful “would not necessarily be dispositive of willfulness” in a future enforcement action, and that the employer would have the opportunity “to contest the assertion that the violation was willful notwithstanding its receipt of such advice.” *See, e.g., Br. for Appellee at 22–23, Rhea Lana, Inc. v. DOL*, 824 F.3d 1023 (DC Cir. 2016) (No. 15–5014), 2015 WL 4052846, at *22–23. The Department stated that § 578.3(c)(2) “simply reflects the commonsense principle that, in the absence of persuasive and relevant evidence presented by an employer, notice from the agency of a FLSA violation may be used to establish willfulness,” and that such notice is “but one piece of evidence.” *Id.* at 26. In *Rhea Lana*, the court did not reject outright the Department’s reading of § 578.3(c), but pointed out that it was possible to read the regulation as “a stand-alone trigger for willfulness penalties” in a future enforcement action against the employer. 824 F.3d at 1031–32.

In light of *Baystate*, *Rhea Lana*, and § 578.3(c)(1)’s command that “[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful,” the Department proposes to revise §§ 578.3(c)(2) and (3) to clarify that no single fact or circumstance is automatically dispositive as to willfulness to the exclusion of consideration of all other facts and circumstances. Revising §§ 578.3(c)(2) and (3) as proposed would ensure consistency between the regulation and how the Department litigates and briefs the issue of willfulness under the FLSA; resolve concerns that the regulation is inconsistent with *Richland Shoe*; and provide greater clarity to the regulated community regarding the standard for willfulness under the FLSA, including by specifying that no one fact or circumstance will preclude an employer from arguing that its conduct was not willful. To ensure consistent guidance regarding willful violations, the Department proposes to similarly revise identical language in § 579.2 addressing the proper assessment of CMPs for willful violations of the FLSA’s child labor provisions.

G. Additional Proposed Regulatory Revisions

Section 531.50 currently sets forth the provisions of the FLSA that apply to tips and tipped employees. The Department proposes to revise § 531.50 to reflect the language that the CAA added to the FLSA. The Department also proposes to update §§ 531.50, 531.51, 531.52, 531.55, 531.56, 531.59, and 531.60 to reflect the new statutory citation to the FLSA’s existing tip credit provision, previously cited as section 3(m), as section 3(m)(2)(A). The Department also proposes to clarify references in §§ 531.56(d), 531.59(a) and (b), and 531.60 to the amount an employer can take as a tip credit under section 3(m) (now 3(m)(2)(A)). The Department’s regulations currently state that the an employer can take a tip credit for each employee equal to the difference between the minimum wage required by section 6(a)(1) of the FLSA (currently \$7.25 an hour) and \$2.13 an hour. To ensure that the Department’s regulations clearly state employers’ obligations under the FLSA, the Department proposes to revise §§ 531.56(d), 531.59(a) and (b), and 531.60 to provide, consistent with the text of the statute, that the tip credit permitted by section 3(m)(2)(A) is equal to the difference between the Federal minimum wage and the cash wage paid by the employer. That cash wage must be at least \$2.13 per hour, but the statute does not preclude an employer from paying more.

Finally, the Department proposes to amend the tip provisions of its Executive Order 13658 regulations. Executive Order 13658 raised the hourly minimum wage paid by contractors to workers performing work on or in connection with covered Federal contracts. The Executive Order also established a tip credit for workers covered by the Order who are tipped employees pursuant to section 3(t) of the FLSA. Section 4(c) of the Executive Order encourages the Department, when promulgating regulations under that Order, to incorporate existing “definitions, procedures, remedies, and enforcement processes” from a number of laws that the agency enforces, including the FLSA. The Department’s current Executive Order 13658 regulations are modeled after the Department’s current FLSA tip regulations, and prohibit covered employers from implementing tip pools that include employees who are not customarily and regularly tipped. The Department proposes to amend § 10.28, consistent with its proposed rescissions to portions of the Department’s FLSA

regulations, to remove similar restrictions on an employer’s use of such tip pools and to otherwise align those regulations with the authority provided in the Executive Order. Federal contractors covered by the FLSA would, of course, also be subject to the FLSA regulations proposed herein. The Department also proposes to amend § 10.28, consistent with its proposed revisions to § 531.56(e), to reflect its current guidance on when an employee performing non-tipped work constitutes a tipped employee for the purposes of 3(t).

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule.⁹ Persons are not required to respond to the information collection requirements until the Office of Management and Budget (OMB) approves them under the PRA. This NPRM would revise the existing information collection burden estimates previously approved under OMB control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) because employers may choose to pay the full Federal minimum wage and not take a tip credit, and collect tips to operate an employer-required, mandatory tip pooling arrangement, thereby triggering the recordkeeping requirement in proposed § 516.28(b). The Department has opened OMB control number 1235–0NEW for this action. As the PRA requires, the Department has submitted the information collection revisions to OMB for review to reflect changes that would result from this proposed rule. The Department proposes a slight burden increase for employers keeping records concerning employees who receive tips, as well as a regulatory familiarization burden.

Summary: FLSA section 11(c) requires covered employers to make, keep, and preserve records of employees and their wages, hours, and other conditions of employment, as prescribed by regulation. The Department’s regulations at 29 CFR part 516 establish the basic FLSA

⁹ See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

recordkeeping requirements. Section 516.28(a) currently requires employers to keep certain records concerning tipped employees for whom the employer takes a tip credit under the FLSA. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit, identify the hourly tip credit for each such employee, and maintain records regarding the weekly or monthly amount of tips received (which may consist of IRS Form 4070) as reported by the employee to the employer. The adoption of proposed § 516.28(b)(1) and (b)(2) would require an employer that does not take a tip credit, but that collects employees' tips to operate a mandatory tip pooling arrangement, to indicate on its pay records each employee who receives tips and to maintain records of the weekly or monthly amount of tips that each such employee receives (this may consist of reports that the employees make to the employer on IRS Form 4070). The increase in the number of respondents and, accordingly, the burden hours associated with records to be kept under the proposed § 516.28(b)(1)–(2), is attributable to an expanding economy increasing the number of establishments employing individuals who receive tips since the last PRA revision of this recordkeeping requirement.

Purpose and Use: WHD and employees use employer records to determine whether covered employers have complied with various FLSA requirements. Employers use the records to document compliance with the FLSA, and in the case of this NPRM, the Department would use the records regarding employees who receive tips to determine compliance with sections 3(m)(2)(A) and 3(m)(2)(B).

Technology: The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

Minimizing Small Entity Burden: Although the FLSA recordkeeping requirements do involve small businesses, including small state and local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection.

Public Comments: As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed

and continuing collections of information in accordance with the PRA. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and money) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Department seeks public comments regarding the burdens imposed by the information collections associated with this NPRM. Commenters may send their views about this information collection to the Department in the same manner as all other comments (e.g., through the regulations.gov website). All comments received will be made a matter of public record and posted without change to <http://www.regulations.gov> and <http://www.reginfo.gov>, including any personal information provided.

As previously noted, an agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted information-collection requests under OMB control number 1235–0NEW to update them to reflect this rulemaking and provide interested parties a specific opportunity to comment under the PRA. See 44 U.S.C. 3507(d); 5 CFR 1320.11. Interested parties may receive a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications may be addressed to OMB. Comments to OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. OMB will consider all written comments that the agency receives within 30 days of publication of this proposed rule. Commenters are encouraged, but not required, to send the Department a courtesy copy of any comments sent to OMB. The courtesy copy may be sent via the same channels as comments on the rule.

The Department is particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Total annual burden estimates, which reflect both the existing and new responses for the recordkeeping information collection, are summarized as follows:

Type of Review: Revision of a currently approved collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Records to be Kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235–0NEW.

Affected Public: Private Sector: businesses or other for-profits, farms, and not-for-profit institutions; State, Local and Tribal governments; and individuals or households.

Estimated Number of Respondents: 3,860,288 (102,994 from this rulemaking).

Estimated Number of Responses: 43,799,221 (248,032 from this rulemaking).

Estimated Burden Hours: 1,007,512 hours (24,593 from this rulemaking).

Estimated Time per Response: Various (unaffected by this rulemaking).

Frequency: Various (unaffected by this rulemaking).

Other Burden Cost: \$0.

VI. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improved Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.¹⁰ Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a

¹⁰ 58 FR 51735 (Sept. 30, 1993).

rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Because the annual effect of this proposed rule would be greater than \$100 million, this proposed rule would be economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This proposed rule is expected to be an Executive Order 13771 deregulatory action, because it provides more flexibility to employers in structuring their employee tip pools. Details on the estimated costs and transfers, as well as qualitative discussions of cost savings of this proposed rule, can be found in the economic analysis below. The unquantified cost savings are expected to outweigh the quantified costs. Cost savings include reduced turnover of back-of-the-house employees, greater flexibility for tip pooling, and reduced effort spent ensuring that the tip pool is limited to only customarily and regularly tipped employees.

B. Economic Analysis

i. Introduction

In March 2018, Congress amended section 3(m) and sections 16(b), (c), and (e) of the FLSA to prohibit employers from keeping their employees' tips, to permit recovery of tips that an employer unlawfully keeps, and suspend the

operations of the portions of the 2011 final rule that restricted tip pooling when employers do not take a tip credit. This analysis examines the economic impact associated with the Department's proposed implementation of those amendments, specifically the transfers resulting from employers that do not claim a tip credit and previously did not have a mandatory tip pool, or that only had a traditional tip pool limited to "front-of-the-house" employees (*i.e.*, servers and bartenders) implementing a nontraditional tip pool that includes "back-of-the-house" employees (*i.e.*, janitors, chefs, dishwashers, and food-preparation workers). Thus, a transfer of tip income will occur from "front-of-the-house" employees. The Department also quantified rule familiarization costs and qualitatively discusses additional costs, cost savings, and benefits. To perform this analysis, the Department compares the impact relative to a pre-statutory baseline (*i.e.*, before Congress amended the FLSA in March 2018). If the Department were to look at economic impacts relative to a post-statutory baseline, there would likely be no impact aside from rule familiarization costs, as the transfers arise from the changes put forth in the statute.

The Department is also proposing to amend its regulations to reflect guidance which provides that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. This interpretation was promulgated in a November 2018 opinion letter and subsequent FAB, and reflects WHD's enforcement position. As explained below, the Department lacks data to quantify any potential costs, benefits, or transfers which may be associated with the implementation of this policy; therefore, the Department discusses potential costs, benefits, and transfers qualitatively. The Department welcomes comments on the impact of this proposal, including data on employers' responses to the codification of this policy.

The economic analysis covers employees in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic Beverages)) and 722511 (Full-service Restaurants); referred to in this analysis as "restaurants and drinking places." The two occupations are classified under Bureau of Labor Statistics (BLS)

Standard Occupational Classification (SOC) codes SOC 35-3031 (Waiters and Waitresses) and SOC 35-3011 (Bartenders).¹¹ The Department considered these two occupations because they constitute a large percentage of total tipped workers and a large percentage of the workers in these occupations receive tips (see Table 1 for shares of workers in these employees who may receive tips). The Department understands that there are other occupations beyond servers and bartenders with tipped workers, such as SOC 35-9011 (Dining room and Cafeteria Attendants and Bartender Helpers), SOC 35-9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop), and others, as well as other industries that employ workers who receive tips, such as NAICS 722515 (snack and nonalcoholic beverage bars), NAICS 722513 (limited service restaurants), NAICS 721110 (hotels and motels), and NAICS 713210 (casinos); thus, the Department welcomes comments and suggestions on whether this analysis should extend to such occupations and industries.

The analysis covers ten years to ensure that it captures major costs and transfers. When summarizing the costs and transfers of the proposed rule, the Department presents the first year's impact, as well as the 10-year annualized costs and transfers with 3 percent and 7 percent discounting.¹²

ii. Estimated Transfers

Under the regulations proposed in this NPRM, transfers would arise when employers that already pay the full Federal minimum wage and previously did not have a mandatory tip pool or only had a traditional tip pool institute nontraditional tip pools in which tipped employees such as servers and bartenders are required to share tips with employees who do not customarily and regularly receive tips, such as cooks and dishwashers. The Department believes that including back-of-the-house workers in tip pools could help equalize income among the employees within the establishment, and could also help promote cooperation and collaboration among employees. Because the statute prohibits employers from keeping employee tips, directly-observable transfers will only occur

¹¹ In the Current Population Survey, these occupations correspond to Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110). The industries correspond to Restaurants and Other Food Services (Census Code 8680) and Drinking Places, Alcoholic Beverages (Census Code 8690).

¹² Discount rates are directed by OMB. See Circular A-4, OMB (Sept. 17, 2003).

among employees. However, because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as they do not reduce these employees' wages below the applicable minimum wage); offsets of this type are implied in the model underlying the quantitative estimates below. To the extent that wages are sticky in the short run, back-of-the-house employees are recipients of transfers, but across a longer time horizon, market adjustments increasingly allow employers to capture the transfer.

The analysis assumes that employers will institute nontraditional tip pools with employees who do not customarily and regularly receive tips only in situations that are beneficial to them. Accordingly, it assumes that employers will include back-of-the-house employees in their tip pools only if they believe that they can do so without losing their front-of-the-house staff. To attract and retain the tipped workers that they need, employers must pay these workers as much as their "outside option," or the hourly earnings that they could receive in a non-tipped job with a similar skill level requirement to their current position. For each tipped worker, the Department assumes a transfer will occur only if their total earnings, including tips, is greater than the predicted outside-option wage from a non-tipped job. This methodology was informed by comments submitted as part of the Department's 2017 NPRM that discussed using outside options to determine potential transfer of tips.

The transfer calculation excludes any workers who are paid a direct cash wage below the full FLSA minimum wage of \$7.25, because under the amended statute and the Department's proposed rule, employers who do take a tip credit are still subject to section 3(m)(2)(A)'s restrictions on tip pools. Some employers may begin paying their tipped workers a direct cash wage of at least the full FLSA minimum wage in order to institute a tip pool with back-of-the-house workers. This potential transfer is not quantified due to uncertainty regarding how many employers would choose to no longer use the tip credit. Choosing to no longer take a tip credit would require a change to employers' payroll systems and methods of compensation to which employers and employees are accustomed, which could discourage employers from making this change. The Department requests comments on the prevalence of this adjustment.

The transfer calculation also excludes any workers who are paid a direct cash wage by their employers, exclusive of any tips received, that exceeds the applicable minimum wage (either the Federal or applicable State minimum wage). The Department assumes that because these employers are already paying more than required under applicable law for these workers, any reduction in compensation would result in these workers leaving that employment. These employees will therefore not have their tips redistributed through a nontraditional tip pool. The Department requests comments and data on this assumption.

The Department does not attempt to definitively interpret individual state law; it is assumed, however, that some wait staff and bartenders work in a state that either prohibits mandatory tip pooling or imposes stricter limits on who can participate in a mandatory tip pool than are proposed in this NPRM,¹³ or in a state that is in the Tenth Circuit¹⁴ where, as a result of *Marlow v. New Food Guy, Inc.*, 861 F.3d at 1159, employers that do not take a tip credit were already permitted to institute nontraditional tip pools at the time Congress amended the FLSA. The transfer estimate excludes tipped employees in these states whom the changes proposed in this NPRM may not affect—amounting to about 43 percent of a \$0.5 billion intermediate estimate of the potential transfer amount.¹⁵ Thus, the Department first determined total transfers for all wait staff and bartenders using the methodology described above. The Department then excluded workers whom the proposed changes will not affect due to their respective state laws. The Department welcomes comments with more information regarding the

¹³ See, e.g., Minn. Stat. § 177.24, subd. 3 ("No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees."); Mass. Gen. Laws ch. 149, § 152A(c) ("No employer or person shall cause, require or permit any wait staff employee, service employee, or service bartender to participate in a tip pool through which such employee remits any wage, tip or service charge, or any portion thereof, for distribution to any person who is not a wait staff employee, service employee, or service bartender.")

¹⁴ The jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah. See About Us, The United States Court of Appeals for the Tenth Circuit, <https://www.ca10.uscourts.gov/clerk> (last visited May 9, 2019).

¹⁵ Arkansas, California, Colorado, Delaware, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Utah, and Wyoming.

effects of this proposed rule in specific states. Finally, the Department further reduced the total transfer amount to account for the fact that an uncertain number of employers will decline to change their tip pooling practices even when it is seemingly economically beneficial for them to do so because it will require changes to practices to which employees are accustomed, as well as payroll and recordkeeping changes.

To compute potential tip transfers, the Department used individual-level microdata from the 2017 Current Population Survey (CPS), a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Merged Outgoing Rotation Group (CPS-MORG) and provide more detailed information about those surveyed.¹⁶ The Department used 2017 CPS data to calculate the transfer because the CAA went into effect in March 2018. Although 2018 CPS data is available, 2017 is the most recent full year of data that is prior to the statutory change. In this analysis, 2017 wage data are inflated to \$2018 using the GDP deflator. For purposes of rule familiarization costs, the Department used the most recent year of data (2018) to reflect employers reading the rule after it is published.

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips.¹⁷ CPS data are not available

¹⁶ See Current Population Survey, U.S. Census Bureau, <https://www.census.gov/programs-surveys/cps.html> (last visited August 13, 2019); CPS Merged Outgoing Rotation Groups, NBER, <http://www.nber.org/data/morg.html> (last visited August 13, 2019).

¹⁷ This question is only asked of hourly employees and consequently nonhourly workers are excluded from the transfer estimate. The Department did not quantify transfers from nonhourly workers because without knowing the prevalence of tipped income among nonhourly workers, the Department cannot accurately estimate potential transfers from these workers. However, the Department believes the transfer from nonhourly workers will be small because only 13 percent of wait staff and bartenders in restaurants and drinking places are nonhourly and the Department believes nonhourly workers may have a lower probability of receiving tips.

separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff at restaurants and drinking places receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.¹⁸ Therefore, when bartenders and wait staff responded affirmatively to this

question, the Department assumed that they receive tips. All data tables in this analysis include estimates for the year 2017 as the baseline. Table 1 presents the estimates of the share of bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2017. Approximately 64 percent of bartenders and 55 percent of wait staff reported usually earning OTTC in 2017.

These numbers include workers in all states, including states whom the changes proposed in this NPRM may not affect. These numbers also include workers who are paid a direct cash wage below the full FLSA minimum wage of \$7.25 (*i.e.*, employers whose employers are using a tip credit). Both these populations are excluded from the transfer calculation.

TABLE 1—SHARE OF BARTENDERS AND WAITERS/WAITRESSES IN RESTAURANTS AND DRINKING PLACES WHO EARNED OVERTIME PAY, TIPS, OR COMMISSIONS

Occupation	Total workers (millions)	Workers responding to question on OTTC (millions)	Report Earning OTTC	
			Workers (millions)	Percent
Total	2.21	1.92	1.08	56.5
Bartenders	0.34	0.27	0.17	63.5
Waiters/Waitresses	1.88	1.65	0.91	55.4

Source: CEPR, 2017 CPS-MORG.
Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).
Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

Of the 1.08 million bartenders and wait staff who receive OTTC, only 688,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As shown in Table 2, 54 percent of bartenders' earnings (an average of

\$276 per week) and 49 percent of waiters' and waitresses' earnings (an average of \$234 per week) were from overtime pay, tips, and commissions in 2017. For workers who reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported

their OTTC amounts (54 or 49 percent) was applied to their weekly total income to estimate weekly tips. Nonhourly workers, who are not asked the question on receipt of OTTC, are assumed to not be tipped employees.

TABLE 2—PORTION OF INCOME FROM OVERTIME PAY, TIPS, AND COMMISSIONS FOR BARTENDERS AND WAITERS/WAITRESSES IN RESTAURANTS AND DRINKING PLACES

Occupation	Those who report the amount earned in OTTC			
	Workers	Average weekly earnings	Average weekly OTTC	Percent of earnings attributable to OTTC
Total	688,171	\$478.34	\$240.15	50%
Bartenders	105,787	512.29	275.65	54
Waiters and waitresses	582,384	472.17	233.71	49

Source: CEPR, 2017 CPS-MORG, inflated to \$2018 using the GDP deflator.
Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).
Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

1. Outside-Option Wage Calculation

As discussed above, to determine potential transfers of tips, the Department assumes that employers will only redistribute tips from tipped employees to employees who are not customarily and regularly tipped in a nontraditional tip pool if the tipped employee's total earnings, including the tips the employee retains, are greater than the "outside-option wage" that the

tipped employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used robust quartile regression analysis to predict the wage that these workers would earn in a non-tipped job. Hourly wage was regressed on age, age squared, age cubed, education, gender, race, ethnicity, citizenship, marital status, veteran status, metro area status and state for a sample of non-tipped

workers.¹⁹ The Department restricted the regression sample to workers earning at least the Federal minimum wage of \$7.25 per hour (inclusive of OTTC), and those who are employed. This analysis excludes states where the law prohibits non-tipped back-of-the-house employees from being included in the tip pool, and states governed by the *Marlow* decision were also excluded from the regression analysis.

¹⁸ According to BLS Current Population Survey data, in 2017, workers in service occupations worked an average of 35 hours per week. See <https://www.bls.gov/cps/aa2017/cpsaat23.htm>.

¹⁹ For workers who had missing values for one or more of these explanatory variables we imputed the missing value as the average value for tipped/non-tipped workers.

In calculating the outside-option wage for tipped workers, the Department defined the comparator sample for tipped workers in two different ways: (1) All non-tipped workers (*i.e.*, workers who are either not waiters/waitresses or bartenders, or do not work in restaurants or drinking places), and (2) Non-tipped workers in a set of occupations that are likely to represent outside options. The Department determined the list of relevant occupations by exploring the similarity between the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the Occupational Information Network (O*NET) system for occupations that share important similarities with waiters and waitresses and bartenders—the occupations had to require “customer and personal service” knowledge and “service orientation” skills.²⁰ The list was further reduced by eliminating occupations that are not comparable to the waitress and bartender occupations in terms of education and training, as waiter and waitress and bartender occupations do not require formal education or training. See Appendix Table 1 for a list of these occupations. The transfer estimates presented in this analysis use this sample of limited occupations to predict each tipped worker’s outside-option wage, that is, the wage that the tipped worker could earn in a non-tipped job. The Department also ran the regression to predict the outside-option wage using all non-tipped workers as the outside-option sample, and found that transfers are approximately 30 percent lower in that specification.

The regression calculates a distribution of outside-option wages for each worker. The Department considered two methods: (1) Using the 50th percentile and (2) using the same percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.²¹ The second method accounts for the fact that two workers may have the exact same characteristics (age, race, education,

²⁰ For a full list of all occupations on O*NET, see <https://www.onetcenter.org/taxonomy/2010/updated.html>.

²¹ Because of the uncertainty in the estimate of the percentile ranking of the worker’s current wage, the Department used the midpoint percentile for workers in each decile. For example, workers whose current wage was estimated to be in the zero to tenth percentile range were assigned the predicted fifth percentile outside-option wage, those with wages estimated to be in the eleventh to twentieth percentile were assigned the predicted fifteenth percentile outside-option wage, etc.

etc.), but one worker may have a higher or lower outside-option wage because he or she is a more or less effective employee. This method assumes that a worker’s position in the wage distribution for wait staff and bartenders in restaurants and drinking places reflects their position in the wage distribution for the outside-option occupations. The Department believes this method is more appropriate than the 50th percentile method.²²

2. Transfer Calculation

After determining each tipped worker’s outside-option wage, the Department calculated the potential transferrable tips as the lesser of the following four numbers:

1. The positive differential between a worker’s current earnings (wage plus tips) and their predicted outside-option wage.
2. The positive differential between a worker’s current earnings and the state minimum wage.
3. The total tips earned by the worker, or
4. Zero if the worker currently earns a direct cash wage above the full applicable minimum wage.

The second number is included for cases where the outside-option wage predicted by the analysis is below the state minimum wage, because the worker will not earn less than their applicable state minimum wage. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than their total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. For hourly-paid workers, the Department subtracted predicted overtime pay to better estimate total tips.²³ For workers who reported receiving overtime, tips, and commissions, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for all waiters and waitresses and bartenders in their state (see Table 2).

The Department set the transfer to zero if the worker currently earns a direct cash wage above the full applicable minimum wage. If the employer is paying a tipped employee a direct cash wage above the required full minimum wage, this indicates the wage is set at the market clearing wage and any reduction in the wage (*e.g.*, by requiring tips to be transferred to back-of-the-house workers) would cause the

²² The 50th percentile method results in a higher transfer estimate (\$173 million compared with \$107 million).

²³ Predicted overtime pay is calculated as $(1.5 \times \text{base wage}) \times \text{weekly hours worked over 40}$.

employee to quit and look for other work. Therefore, where an employer is paying a tipped employee above the full applicable minimum wage, the employer would generally not require the employee to contribute tips to a nontraditional tip pool.

To determine the annual total tip transfer, the Department first multiplied a weighted sum of weekly tip transfers for all wait staff and bartenders who work at full-service restaurants and bars in the United States by 45.2 weeks—the average weeks worked in a year for waiters and waitresses and bartenders in the 2017 CPS Annual Social and Economic Supplement. The Department then reduced this total by 43 percent to account for wait staff and bartenders who work in a state that prohibits mandatory tip pooling or imposes stricter limits on who can participate in a mandatory tip pool than the limits proposed in this NPRM or a state that is in the Tenth Circuit. Using this methodology, the total potential transfer from front-of-the-house employees associated with this proposed rule is \$213.4 million. This represents the transfers that the Department expects would occur if every employer that does not take a tip credit, and for whom it was economically beneficial, instituted tip pools that include back-of-the-house workers. In reality, even when it is seemingly economically beneficial, many employers may not change their tip pooling practices, because it would require changes to the current practice to which their employees are accustomed, as well as their payroll and recordkeeping systems.

The Department was unable to determine what proportion of the total tips estimated to be potentially transferred from these workers will realistically be transferred. The Department assumes that the likely potential transfers are somewhere between a minimum of zero and a maximum of \$213.4 million, and therefore used the midpoint as a better estimate of likely transfers. The Department accordingly estimates that transfers of tips from front-of-the-house workers will be around \$107 million in the first year that this rule is effective. Assuming these transfers occur annually, and there is no real wage growth, this results in 10-year annualized transfers of \$107 million at both the 3 percent and 7 percent discount rates. The Department requests comments on whether the midpoint is the appropriate adjustment.

The Department acknowledges that some employers could respond to the proposed rule by decreasing back-of-the-house workers’ wages, as the rule will

allow employers to supplement these employees' wages with tips. Some employers may consider exchanging back-of-the-house workers' hourly wages for tips, but tips fluctuate at any given time. Thus, employers' ability to do so would be limited by market forces, such as, potentially, workers' aversion to risk and the endowment effect (workers potentially valuing their set wages more than tips of the same average amount). Because of a lack of data to quantify the extent to which this will occur, the Department has not included this possibility in the present analysis.

The Department welcomes comments and information regarding whether and to what extent employers will choose to expand existing tip pools to include back-of-the-house employees or otherwise change their current compensation structures.

iii. Estimated Costs, Cost Savings, and Benefits

In this subsection, the Department addresses costs attributable to the proposed rule, by quantifying regulatory familiarization costs and qualitatively discussing additional recordkeeping costs. The Department qualitatively

discusses benefits and cost savings associated with this proposed rule. Lastly, the Department qualitatively discusses the potential costs, transfers, and benefits associated with its proposed revision to its regulations to reflect its guidance that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties performed contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.²⁴ Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple restaurants, and may also require chain restaurants to familiarize themselves with the regulation at the establishment level. To be conservative, the Department used the number of establishments in its cost estimate—which is larger than the

number of firms—and assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

The Department assumes that all establishments will incur some regulatory familiarization costs regardless of whether the employer decides to change its tip pooling practices as a result of the proposed rule.²⁵ There may be differences in familiarization cost by the size of establishments; however, our analysis does not compute different costs for establishments of different sizes. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments in the two industries, Drinking Places (Alcoholic Beverages) and Full-Service Restaurants; (2) the wage rate for the employees reviewing the rule; and (3) the number of hours that it estimates employers will spend reviewing the rule. Table 3 shows the number of establishments in the two industries. To estimate the number of potentially affected establishments, the Department used data from BLS's Quarterly Census of Employment and Wages (QCEW) for 2018.

TABLE 3—NUMBER OF ESTABLISHMENTS WITH TIPPED WORKERS

Industry	Establishments
NAICS 722410 (Drinking Places (Alcoholic Beverages))	42,826
NAICS 722511 (Full-service Restaurants)	247,237
Total	290,063

Source: QCEW, 2018

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) with a mean wage of \$32.65 per hour in 2018 will review the rule.²⁶ Given the change proposed, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further, the

change effected by this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is \$53.22; thus, the average cost per establishment is \$13.30 for 15 minutes of review time. The number of establishments in the selected industries was 290,063 in 2018. Therefore, regulatory familiarization costs in Year 1 are estimated to be \$3.86 million (\$13.30 × 290,063 establishments), which amounts to a 10-year annualized cost of \$452,422 at a discount rate of 3

percent or \$549,471 at a discount rate of 7 percent. Regulatory familiarization costs in future years are assumed to be de minimis.

2. Other Costs

The Department also assumes that there will be a minimal increase in recordkeeping costs associated with this proposed rule. Under the Department's current regulations, employers are only required to keep records of which employees receive tips and how much each employee receives if the employer takes a tip credit. If this rule is finalized as proposed, employers that do not take

²⁴ An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments, where each establishment may

participate in a different predominant economic activity. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.
²⁵ This includes establishments in states excluded from the transfer calculation.
²⁶ A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job

positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. See BLS, "13–1141 Compensation, Benefits, and Job Analysis Specialists," <https://www.bls.gov/oes/current/oes131141.htm> (last visited August 14, 2019).

a tip credit but collect tips to institute a mandatory tip pool must keep records showing which employees are included in the tip pool, and the amount of tips they receive, as reported by employees to the employer. As such records are already required under IRS Form 4070, there will be minimal recordkeeping costs for employers that pay the full Federal minimum wage in direct cash wages and choose to institute a nontraditional tip pool.

Employers may incur some training costs associated with familiarizing first line managers and staff with the proposed rule; however, the Department believes these costs will be de minimis. The Department welcomes data on these costs.

3. Benefits

Section 3(m)'s tip credit provision allows an employer to meet a portion of its Federal minimum wage obligation from the tips customers give employees. If an employer takes a tip credit, section 3(m)(2)(A) applies, along with its requirement that only employees who customarily and regularly receive tips be included in any mandatory tip pool. When an employer does not take a tip credit, however, the proposed rule would allow the employer to act in a manner currently prohibited by regulation—that is, by distributing tips to employees who are employed in occupations in which they do not customarily and regularly receive tips (e.g., cooks or dishwashers) through a tip pool. The proposed rule, therefore, provides employers greater flexibility in determining their pay policies for tipped and non-tipped workers.

Full-service restaurants commonly have a tip pool. One study suggests that tip pooling contributes to increased service quality, along with enhanced interaction and cooperation between coworkers, especially when team members rely on input or task completion from each other.²⁷ Another study indicates that tip pooling may foster customer-focused service, promote employee camaraderie, and increase productivity.²⁸ Additionally, under the proposed changes, the employer will be able to distribute customer tips to back-of-the-house employees like cooks and dishwashers, possibly resulting in increased earnings

for those employees. The Department believes that allowing employers to expand tip pools beyond customarily and regularly tipped workers like servers and bartenders could help incentivize back-of-the-house workers, which may improve the customer's experience.

4. Cost Savings

The cost savings associated with this rule would result from the increased earnings for back-of-the-house employees. Higher earnings for these employees could result in reduced turnover, which reduces hiring and training costs for employers. This proposed rule would also give employers greater flexibility for tip pooling, and could reduce effort spent ensuring that the tip pool is limited to only customarily and regularly tipped employees. The Department believes that the cost savings would outweigh any increased rule-familiarization and recordkeeping costs.

This rule may also reduce deadweight loss. Deadweight loss is the loss of economic efficiency that occurs when the perfectly competitive equilibrium in a market for a good or service is not achieved. Minimum wages may prevent the market from reaching equilibrium and thus result in fewer hours worked than would otherwise be efficient. Allowing nontraditional tip pools may cause a shift in the labor demand and/or supply curves for wait staff and bartenders. This could result in the market moving closer to the competitive market equilibrium. The Department did not quantify the potential reduction in deadweight loss because of uncertainty (e.g., what are the appropriate demand and supply elasticities).

5. Costs, Benefits, and Potential Transfers Associated With Revision to Dual Jobs Regulation

The Department proposes to amend its regulations to reflect its recent guidance removing the limit on the amount of time that an employee for whom an employer takes a tip credit can perform related, non-tipped duties has potential benefits. Under the previous guidance, in order to ensure they were in compliance, employers may have tracked how tipped employees were spending their time, which could be difficult and costly. Removing the time requirement will eliminate this monitoring cost. Additionally, the revisions add clarity by providing a reference list of applicable related duties through O*NET. Although employers will reference this list of duties to ensure that their employees'

non-tipped duties are related to their tipped occupations, this would likely be less of a burden than constantly monitoring their employee's time.

The removal of the twenty percent time limit may result in tipped workers such as wait staff and bartenders performing more of these non-tipped duties such as "cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses." Consequently, employment of workers currently performing these duties, such as dishwashers and cooks, may fall, possibly resulting in a transfer of employment-related producer surplus from those non-tipped workers to tipped workers who work longer hours.

However, tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage. For example, assume that prior to this change, a restaurant server spends 12 minutes each hour of their shift (i.e., 20 percent) performing related, non-tipped duties (e.g., clearing tables, washing dishes, etc.), and 48 minutes providing direct customer service. Assume the server earns \$12 per hour in tips (i.e., \$0.25 per minute of customer service work). With no 20 percent limit on the performance of related, non-tipped duties, an employee might spend more than 12 minutes per hour performing related, non-tipped duties, as long as they still receive enough tips to earn at least \$7.25 per hour for the shift. Thus, if an employee now spends 20 minutes performing non-tipped work (i.e., 33 percent of their shift) and 40 minutes interacting with customers, they would be expected to lose \$2 per hour in tips, a decrease accounting for eight fewer minutes per hour spent performing tip-generating work (i.e., 8 minutes × \$0.25 per minute). Similarly, employers that had been paying the full minimum wage to tipped employees performing related, non-tipped duties could potentially pay the lower direct cash wage for this time and could pass these reduced labor cost savings on to consumers. As mentioned above, the Department lacks data to quantify this potential reduction in tips. For instance, data does not exist on the amount of time that tipped employees currently spend on tipped duties or related, nontipped duties. Absent such a baseline, the Department cannot quantify how time spent by tipped employees on related, nontipped duties would change as a result of this proposed rule. The Department welcomes feedback on how employers would adjust employees' schedules as a result of this recent guidance.

²⁷ Samuel Estreicher & Jonathan Nash, *The Law and Economics of Tipping: The Laborer's Perspective*, Am. Law & Econ. Ass'n Annual Meetings. (2004), <https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1068&context=alea>.

²⁸ Ofer H. Azar, *The Implications of Tipping for Economics and Management*, 30 (10) Int'l J. Soc. Econ., 1084–94 (2003), <http://individual.utoronto.ca/diep/c/azar2003.pdf>.

iv. Summary of Transfers and Costs
 Below the Department provides a summary table of the quantified transfers and costs for the RIA. Transfer costs in years two through ten are assumed to be the same as in Year 1.

TABLE 4—SUMMARY OF TRANSFERS AND COSTS CALCULATIONS
 [2018 dollars]

	Potential tip transfers (Millions)	Regulatory familiarization costs (Millions)
Year 1:		
Preferred Estimate	\$106.7	\$3.9
Lower-Bound	0.0	N/A
Upper-Bound	213.4	N/A
10-year Annualized Transfers (Preferred Est.):		
3% Discount Rate	106.7	0.5
7% Discount Rate	106.7	0.5

v. Additional Potential Impacts of This Rulemaking

The Department believes that by implementing section 3(m)(2)(B) and providing clarification on tip pooling, this proposal could affect the number of employers who choose to implement tip pools or otherwise affect their practices. Because of the lack of data to determine how employers would behave, the Department welcomes comments that provide insight into employers' decisions to implement tip pools, and how these decisions affect both employers and employees.

C. Analysis of Regulatory Alternatives

In developing this NPRM, the Department considered a regulatory alternative that would be less restrictive than what is currently proposed and one that would be more restrictive. For the less-restrictive option, the Department considered excluding employers that do not take a tip credit from the requirement to keep records of the weekly or monthly amount of tips received by each employee as reported by the employee to the employer.²⁹ The Department concluded, however, that requiring all employers with tip pools to keep records of the weekly or monthly amount of tips received by employees would ensure uniformity among these employers and help the Department administer section 3(m)(2)(B).

For a more restrictive alternative, the Department considered requiring employers that collect cash tips for a mandatory tip pool to fully distribute the tips on a daily basis. The Department concluded, however, that this requirement would be unnecessarily onerous for employers.

²⁹ Current § 516.28(a) requires employers that take a tip credit under the FLSA to keep records of the weekly or monthly amount of tips received by employees.

The Department's proposal for full distribution of cash and credit-card tips on the regular payday or, in certain cases, as soon as practicable afterward, would be simpler for employers to follow. It would align the policy for cash tips with the current policy for credit-card tips and allow employers to pay tips the same day they otherwise pay their employees. The Department believes that the current proposal will ensure that employers do not operate tip pools in such a manner that they "keep" tips.

VII. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined the regulatory requirements of the proposed rule to determine whether they would have a significant economic impact on a substantial number of small entities.

In its analysis, the Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status.³⁰ According to the 2017 standards, Full-service Restaurants (NAICS 722511) and Drinking Places (Alcoholic Beverages) (NAICS 722410)

³⁰ SBA, Summary of Size Standards by Industry Sector, 2017, www.sba.gov/document/support-table-size-standards.

have a size standard of \$7.5 million in annual revenue.³¹ The Department used this number to estimate the number of small entities. Any establishments with annual sales revenue less than this amount were considered small entities.

The Department used the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments (operating the entire year) and annual sales/receipts for the two industries in the analysis: Full-service Restaurants and Drinking Places (Alcoholic Beverages).³² From annual receipts/sales, the Department can estimate how many establishments fall under the size standard. Table 5 shows the number of private, year-round establishments in the two industries by revenue.³³

The annual cost per establishment is the regulatory familiarization cost of \$13.30 per establishment calculated in section V.B.iii.1. The Department applied this cost to all sizes of establishments since each establishment would incur this cost regardless of the number of affected workers. Finally, the impact of this provision was calculated as the ratio of annual cost per establishment to average sales receipts per establishment. As shown, the annual cost per establishment is less than 0.03 percent of average annual sales for establishments in all small

³¹ *Id.*, Subsector 722.

³² U.S. Census Bureau, 2012 Economic Census, Accommodation and Food Services: Subject Series—Estab & Firm Size: Summary Statistics by Sales Size of Establishments for the U.S.: 2012. <https://factfinder.census.gov/faces/tables/services/jsf/pages/productview.xhtml?src=bkmk>.

³³ The small-business size standard for the two industries is \$7.5 million in annual revenue. However, the final size category reported in the table is \$5 million–\$9 million. This is a data limitation because the 2012 Economic Census reported this category of \$5 million–\$9 million and not \$5 million–\$7.5 million. Thus, the total number of firms shown may be slightly higher than the actual number of small entities.

entity size classes. The impact of this proposed rule on small establishments

will be de minimis. The Department certifies that the proposed rule will not

have a significant economic impact on a substantial number of small entities.

TABLE 5—COSTS TO SMALL ENTITIES

Annual revenue/sales/receipts	Number of establishments [a]	Average annual sales per establishment (\$) [b]	Annual cost per establishment (\$) [c]	Annual cost per establishment as percent of sales/receipts
722511 Full-service Restaurants				
< \$100,000	10,211	\$68,356	\$13.30	0.02
100,000 to 499,999	28,651	193,823	13.30	0.01
250,000 to 499,999	39,554	405,727	13.30	0.00
500,000 to 999,999	46,793	792,561	13.30	0.00
1,000,000 to 2,499,999	45,173	1,729,025	13.30	0.00
2,500,000 to 4,999,999	17,039	3,750,831	13.30	0.00
5,000,000 to 9,999,999	3,531	7,128,700	13.30	0.00
722410 Drinking Places (Alcoholic Beverages)				
< 100,000	4,622	69,775	13.30	0.02
100,000 to 249,999	11,610	188,975	13.30	0.01
250,000 to 499,999	9,059	387,358	13.30	0.00
500,000 to 999,999	5,138	762,365	13.30	0.00
1,000,000 to 2,499,999	3,386	1,665,727	13.30	0.00
2,500,000 to 4,999,999	755	3,708,103	13.30	0.00
5,000,000 to 9,999,999	164	7,318,368	13.30	0.00

[a] Limited to establishments operated for the entire year.

[b] Inflated to \$2018 using the GDP deflator.

[c] The annual cost per establishment is the regulatory familiarization cost per establishment calculated in section V.B.iii.1.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. This rulemaking is not expected to affect state, local, or tribal governments. While this rulemaking would affect employers in the private sector, it is not expected to result in expenditures greater than \$100 million in any one year. See section V.B for an assessment of anticipated costs and benefits to the private sector.

IX. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 10

Administrative practice and procedure, Construction industry, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages

29 CFR Part 516

Minimum wages, Reporting and recordkeeping requirements, Wages

29 CFR Part 531

Wages

29 CFR Part 578

Penalties, Wages

29 CFR Part 579

Child labor, Penalties

29 CFR Part 580

Administrative practice and procedure, Child labor, Penalties, Wages.

For the reasons set forth above, the Department proposes to amend Title 29, Parts 10, 516, 531, 578, 579, and 580 of the Code of Federal Regulations as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

■ 1. The authority citation for Part 10 is revised to read as follows:

Authority: 4 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. Amend § 10.28 by revising paragraphs (b)(2), (c), (e), and (f) to read as follows:

§ 10.28 Tipped employees.

* * * * *

(b) * * *

(2)(i) In some situations an employee is employed in a dual job, as for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than \$30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(ii) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(iii) “*Related*” duties defined. In addition to the examples described in (e)(ii), a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at www.onetonline. Occupations not listed in O*NET may qualify as tipped occupations. For those 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.

(c) *Characteristics of tips*. A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive Order.

(e) *Tip pooling*. Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive Order. There is no maximum contribution percentage on mandatory tip pools. However, an employer must notify its employees of any required tip pool contribution

amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees’ tips for any other purpose.

(f) *Notice*. An employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer’s use of the tip credit. The employer must inform the tipped employee of the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section; the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a tip pooling arrangement; and that the tip credit shall not apply to any worker who has not been informed of these requirements in this section.

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

■ 3. Revise the authority section for Part 516 to read:

Authority: Sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211. Section 516.28 also issued under 29 U.S.C. 203(m), as amended by sec. 2105(b), Pub. L. 104–188, 110 Stat. 1755; sec. 8102(a), Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348. Section 516.33 also issued under 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 516.34 also issued under Sec. 7, 103 Stat. 944, 29 U.S.C. 207(q).

■ 4. Amend § 516.28 by revising the section heading and paragraph (b) to read as follows:

§ 516.28 Tipped employees and employer-administered tip pools.

* * * * *

(b) With respect to employees who receive tips but for whom a tip credit is not taken under section 3(m)(2)(A), any employer that collects tips received by employees to operate a mandatory tip-pooling or tip-sharing arrangement shall maintain and preserve payroll or other records containing the information and data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter, or other notation placed on the pay records identifying each employee who receive tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

■ 5. Revise the authority citation for Part 531 to read as follows:

Authority: 29 U.S.C. 203(m) and (t), as amended by sec. 3(m), Pub. L. 75–718, 52 Stat. 1060; sec. 2, Pub. L. 87–30, 75 Stat. 65; sec. 101, sec. 602, Pub. L. 89–601, 80 Stat. 830; sec. 29(B), Pub. L. 93–259, 88 Stat. 55 sec. 3, sec. 15(c), Pub. L. 95–151, 91 Stat. 1245; sec. 2105(b), Pub. L. 104–188, 110 Stat. 1755; sec. 8102, Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348.

■ 6. Amend § 531.50 by:
 ■ a. Revising paragraph (a) introductory text and adding paragraph (a)(3);
 ■ b. Redesignating paragraph (b) as paragraph (c); and
 ■ c. Adding a new paragraph (b).

The revisions and additions read as follows:

§ 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m)(2)(A) provides that, in determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee’s employer shall be an amount equal to—

* * *

(3) Section 3(m)(2)(A) also provides that an employer that takes a tip credit against its minimum wage obligations to its tipped employees must inform those employees of the provisions of that subsection, and that the employees must retain all of their tips, although the employer may require those employees to participate in a tip pool with other tipped employees that customarily and regularly receive tips.

(b) Section 3(m)(2)(B) provides that an employer may not keep tips received by its employees for any purposes, including allowing managers and supervisors to keep any portion of employees’ tips, regardless of whether the employer takes a tip credit under section 3(m)(2)(A).

* * * * *

■ 7. Revise the first sentence of § 531.51 to read as follows:

§ 531.51 Conditions for taking tip credits in making wage payments.

The wage credit permitted on account of tips under section 3(m)(2)(A) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of “tipped employees” as defined in section 3(t).

* * *

■ 8. Revise § 531.52 to read as follows:

§ 531.52 General restrictions on an employer's use of its employees' tips.

(a) A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. An employer that takes a tip credit against its minimum wage obligations is prohibited from using an employee's tips for any reason other than that which is statutorily permitted in section 3(m)(2)(A): As a credit against its minimum wage obligations to the employee, or in furtherance of a tip pool limited to employees who customarily and regularly receive tips. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m)(2)(A) which govern wage credits for tips.

(b) Section 3(m)(2)(B) of the Act provides that an employer may not keep tips received by its employees for any purposes, regardless of whether the employer takes a tip credit.

(1) An employer may exert control over an employee's tips only to distribute tips to the employee who received them, require employees to share tips with other employees in compliance with § 531.54, or, where the employer facilitates tip pooling by collecting and redistributing employees' tips, distribute tips to employees in a tip pool in compliance with § 531.54.

(2) An employer may not allow managers and supervisors to keep any portion of an employee's tips, regardless of whether the employer takes a tip credit. For purposes of section 3(m)(2)(B), the term "manager" or "supervisor" shall mean any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101.

■ 9. Revise § 531.54 to read as follows:

§ 531.54 Tip pooling.

(a) *Monies counted as tips.* Where employees practice tip splitting, as where waiters give a portion of their tips to the busser, both the amounts retained by the waiters and those given the bussers are considered tips of the individuals who retain them, in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the

employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. Section 3(m)(2)(A) does not impose a maximum contribution percentage on mandatory tip pools.

(b) *Meaning of "keep."* Section 3(m)(2)(B)'s prohibition against keeping tips applies regardless of whether an employer takes a tip credit. Section 3(m)(2)(B) expressly prohibits employers from requiring employees to share tips with managers or supervisors, as defined in § 531.52(b)(2), or employers, as defined in 29 U.S.C. 203(d). An employer does not violate section 3(m)(2)(B)'s prohibition against keeping tips if it requires employees to share tips with other employees who are eligible to receive tips.

(1) *Full and prompt distribution of tips.* An employer that facilitates tip pooling by collecting and redistributing employees' tips does not violate section 3(m)(2)(B)'s prohibition against keeping tips if it fully distributes any tips the employer collects no later than the regular payday for the workweek in which the tips were collected, or when the pay period covers more than a single workweek, the regular payday for the period in which the workweek ends. To the extent that it is not possible for an employer to ascertain the amount of tips that have been received or how tips should be distributed prior to processing payroll, tips must be distributed to employees as soon as practicable after the regular payday.

(c) *Employers that take a section 3(m)(2)(A) tip credit.* When an employer takes a tip credit pursuant to section 3(m)(2)(A):

(1) The employer may require an employee for whom the employer takes a tip credit to contribute tips to a tip pool only if it is limited to employees who customarily and regularly receive tips; and

(2) The employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(d) *Employers that do not take a section 3(m)(2)(A) tip credit.* An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip pooling arrangement that includes dishwashers, cooks, or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly

receives tips. An employer may not participate in such a tip pool, and may not include supervisors and managers in the pool.

■ 10. Revise § 531.55(a) to read as follows:

§ 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

* * * * *

■ 11. Amend § 531.56 by revising the second and third sentences in paragraph (a), and paragraphs (d) and (e) to read as follows:

§ 531.56 "More than \$30 a month in tips."

(a) *In general.* * * * An employee employed in an occupation in which the tips he receives meet this minimum standard is a "tipped employee" for whom the wage credit provided by section 3(m)(2)(A) may be taken in computing the compensation due him under the Act for employment in such occupation, whether he is employed in it full time or part time. An employee employed full time or part time in an occupation in which he does not receive more than \$30 a month in tips customarily and regularly is not a "tipped employee" within the meaning of the Act and must receive the full compensation required by its provisions in cash or allowable facilities without any deduction for tips received under the provisions of section 3(m)(2)(A).

* * * * *

(d) *Significance of minimum monthly tip receipts.* More than \$30 a month in tips customarily and regularly received by the employee is a minimum standard that must be met before any wage credit for tips is determined under section 3(m)(2)(A). It does not govern or limit the determination of the appropriate amount of wage credit under section 3(m)(2)(A) that may be taken for tips under section 6(a)(1) (tip credit equals the difference between the minimum wage required by section 6(a)(1) and the cash wage paid (at least \$2.13 per hour)).

(e) *Dual jobs.* (1) In some situations an employee is employed in a dual job, as for example, where a maintenance

person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than \$30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(2) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(3) “*Related*” duties defined. In addition to the examples described in (e)(2), a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at www.onetonline. Occupations not listed in O*NET may qualify as tipped occupations. For those 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.

■ 12. Revise § 531.59 to read as follows:

§ 531.59 The tip wage credit.

(a) In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m)(2)(A) the amount paid to a tipped employee by an employer is increased on account of tips by an amount equal to the formula set forth in the statute (minimum wage required by section 6(a)(1) of the Act minus cash wage paid (at least \$2.13)), provided that the employer satisfies all the requirements of section 3(m)(2)(A). This tip credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m).

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an

occupation in which the employee qualifies as a “tipped employee.” Pursuant to section 3(m)(2)(A), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer’s use of the tip credit of the provisions of section 3(m)(2)(A) of the Act, *i.e.*: The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employer except for a tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section. The credit allowed on account of tips may be less than that permitted by statute (minimum wage required by section 6(a)(1) minus the cash wage paid (at least \$2.13)); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a tip pool limited to employees who customarily and regularly receive tips as described in § 531.54, section 3(m)(2)(A) also requires employers that take a tip credit to permit employees to retain all tips received by the employee.

■ 13. Revise § 531.60 to read as follows:

§ 531.60 Overtime payments.

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee’s regular rate of pay is determined by dividing the employee’s total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. (See part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m)(2)(A), a tipped employee’s regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus the cash wage paid (at least \$2.13)), the reasonable cost or

fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part 531, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

PART 578—[AMENDED]

■ 14. The heading of Part 578 is revised to read as follows:

PART 578—TIP RETENTION, MINIMUM WAGE, AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

■ 15. The authority citation for Part 578 is revised to read as follows:

Authority: 29 U.S.C. 216(e), as amended by sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29, sec. 302(a), Pub. L. 110–233, 122 Stat. 920, and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–358, 1321–373, and sec. 701, Pub. L. 114–74, 129 Stat 584.

■ 16. Revise § 578.1 to read as follows:

§ 578.1 What does this part cover?

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act to provide that any person who repeatedly or willfully violates the minimum wage (section 6) or overtime provisions (section 7) of the Act shall be subject to a civil money penalty not to exceed \$1,000 for each such violation. In 2001, WHD adjusted this penalty for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)). See 66 FR 63503 (Dec. 7, 2001). The Genetic Information Nondiscrimination Act of 2008 amended section 16(e) of the Act to reflect this increase. See Pub. L. 110–233, sec. 302(a), 122 Stat. 920. Section 1201(b)(3) of the Consolidated Appropriations Act, 2018, amended section 16(e) to add that any person who violates section 3(m)(2)(B) of the Act shall be subject to a civil money penalty not to exceed \$1,100. The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvement Act of

2015 (Pub. L. 114–74, section 701), requires that inflationary adjustments be annually made in these civil money penalties according to a specified cost-of-living formula. This part defines terms necessary for administration of the civil money penalty provisions, describes the violations for which a penalty may be imposed, and describes criteria for determining the amount of penalty to be assessed. The procedural requirements for assessing and contesting such penalties are contained in part 580 of this chapter.

■ 17. Revise § 578.3 to read as follows:

§ 578.3 What types of violations may result in a penalty being assessed?

(a)(1) A penalty of up to \$1,100 may be assessed against any person who repeatedly or willfully violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to \$1,964 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be "repeated" for purposes of this section:

(1) Where the employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer's violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be "willful" for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful is a relevant fact and circumstance when determining if the employer's conduct is knowing.

(3) For purposes of this section, whether the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is a relevant fact and circumstance when determining if the employer's conduct is in reckless disregard of the requirements of the Act.

18. Revise § 578.4(a) to read as follows:

§ 578.4 Determination of penalty.

(a) In determining the amount of penalty to be assessed for any repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business.

* * * * *

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

■ 19. The authority citation for Part 579 is revised to read as follows:

Authority: 29 U.S.C. 203(m), (l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114–7, 129 Stat 584.

■ 20. Amend § 579.1 by:

■ a. Revising paragraph (a) introductory text;

■ b. Redesignating paragraph (a)(2) as paragraph (a)(2)(i); and

■ c. Adding paragraph (a)(2)(ii).

The revisions and additions read as follows:

§ 579.1 Purpose and scope.

(a) Section 16(e), added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1974, and as further amended by the Fair Labor Standards Amendments of 1989, the Omnibus Budget Reconciliation Act of 1990, the Compactor and Balers Safety Standards Modernization Act of 1996, the Genetic Information Nondiscrimination Act of 2008, and the Consolidated Appropriations Act of 2018, provides for the imposition of civil money penalties in the following manner:

* * * * *

(2) * * *

(ii) Any person who repeatedly or willfully violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed \$1,100 for each such violation.

* * * * *

■ 21. Amend § 579.2 by revising the definition of "Willful violations" to read as follows:

§ 579.2 Definitions.

* * * * *

Willful violations under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be *willful* for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful is a relevant fact and circumstance when determining if the employer's conduct is knowing. For purposes of this section, whether the employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is a relevant fact and circumstance when determining if the employer's conduct is in reckless disregard of the requirements of the Act.

PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

■ 22. The authority citation for part 580 continues to read as follows:

Authority: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

■ 23. Revise the first sentence of § 580.2 to read as follows:

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set

forth in part 579, and for assessment of civil money penalties for any repeated or willful violation of the tip retention provisions of section 3(m)(2)(B), the minimum wage provisions of section 6, or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. * * *

■ 24. Revise the first sentence of § 580.3 to read as follows:

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 3(m)(2)(B), section 6, or section 7 of the Act, and determines

that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. * * *

■ 25. Amend § 580.12 by revising the first sentence of paragraph (b) of to read as follows:

§ 580.12 Decision and Order of Administrative Law Judge.

* * * * *

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. * * *

* * * * *

■ 26. Amend § 580.18 by revising the third sentence in paragraph (b)(3) to read as follows:

§ 580.18 Collection and recovery of penalty.

* * * * *

(b) * * *

(3) * * * A willful violation of sections 3(m)(2)(B), 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. * * *

The following appendix will not appear in the Code of Federal Regulations.

Appendix Table 1—List of Occupations Included in the Outside-Option Regression Sample

Amusement and Recreation Attendants
 Bus Drivers, School or Special Client
 Bus Drivers, Transit and Intercity
 Cashiers
 Childcare Workers
 Concierges
 Door-To-Door Sales Workers, News and Street Vendors, and Related Workers
 Driver/Sales Workers
 Flight Attendants
 Funeral Attendants
 Hairdressers, Hairstylists, and Cosmetologists
 Home Health Aides
 Hotel, Motel, and Resort Desk Clerks
 Insurance Sales Agents
 Library Assistants, Clerical
 Maids and Housekeeping Cleaners
 Manicurists and Pedicurists
 Massage Therapists
 Nursing Assistants
 Occupational Therapy Aides
 Office Clerks, General
 Orderlies
 Parking Lot Attendants
 Parts Salespersons
 Personal Care Aides
 Pharmacy Aides
 Pharmacy Technicians
 Postal Service Clerks
 Real Estate Sales Agents
 Receptionists and Information Clerks
 Recreation Workers
 Residential Advisors
 Retail Salespersons
 Sales Agents, Financial Services
 Sales Representatives, Wholesale and Manufacturing, Except Technical and Scientific Products
 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive
 Social and Human Service Assistants
 Statement Clerks
 Stock Clerks, Sales Floor
 Subway and Streetcar Operators
 Taxi Drivers and Chauffeurs
 Telemarketers
 Telephone Operators
 Tellers
 Tour Guides and Escorts
 Travel Agents
 Travel Guides

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Signed in Washington, DC this 19th day of
September, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

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