

**DEPARTMENT OF LABOR****Office of the Secretary****29 CFR Part 10****Wage and Hour Division****29 CFR Part 531**

RIN 1235-AA21

**Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal****AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Department of Labor (Department) finalizes its proposal to withdraw one portion of the Tip Regulations Under the Fair Labor Standards Act (FLSA) (2020 Tip final rule) and finalize its proposed revisions related to the determination of when a tipped employee is employed in dual jobs under the Fair Labor Standards Act of 1938 (FLSA or the Act). Specifically, the Department is amending its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation. Work that is part of the tipped occupation includes work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.

**DATES:** As of December 28, 2021 the Department is withdrawing the revision of 29 CFR 531.56(e) (in amendatory instruction 11), published December 30, 2020, at 85 FR 86756, delayed until April 30, 2021, on February 26, 2021, at 86 FR 11632, and further delayed until December 31, 2021, on April 29, 2021, at 86 FR 22597. This final rule is effective December 28, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Director, 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 rule 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 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation 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 <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

Section 6(a) of the FLSA requires covered employers to pay nonexempt employees a minimum wage of at least \$7.25 per hour. See 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to a "tipped employee" by taking a partial credit, known as a "tip credit," toward the minimum wage based on the amount of tips an employee receives provided that the employer meets certain requirements. See 29 U.S.C. 203(m)(2)(A). An employer that elects to take a tip credit must pay the tipped employee a direct cash wage of at least \$2.13 per hour. Provided that the employer meets certain requirements, the employer may then take a credit against its wage obligation for the difference, up to \$5.12 per hour, if the employees' tips are sufficient to fulfill the remainder of the minimum wage.

Section 3(t) defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. 203(t). Congress left "occupation," and what it means to be "engaged in an occupation," in section 3(t) undefined. Thus, Congress delegated to the Department the authority to determine what it means to be "engaged in an occupation" that customarily and regularly receives tips. See Fair Labor Standards Amendments of 1966, Public Law 89-601, sec. 101, sec. 602, 80 Stat. 830, 830, 844 (1966).

Since 1967, the Department's dual jobs regulation has recognized 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 the employee 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. See 32 FR 13580-81; 29 CFR 531.56(e). At the same time, the Department's regulation also recognized that an employee employed in a tipped

occupation may perform related duties that are not "themselves . . . directed toward producing tips," thus distinguishing between employees who have dual jobs and tipped employees who perform "related duties" that do not "themselves" produce tips.

For several decades, the Department issued guidance interpreting the dual jobs regulation as it applies to employees who perform both tipped and non-tipped duties, first through a series of Wage and Hour Division (WHD) opinion letters, and then through WHD's Field Operations Handbook (FOH). The 1988 FOH provision stated that the dual jobs regulation at § 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)," if those duties are "incidental" and "generally assigned" to tipped employees. *Id.* at 30d00(e). To illustrate the types of related, non-tip-producing duties for which employers could take a tip credit, the FOH listed "a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses," the same examples included in § 531.56(e). *Id.* But "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." Consistent with WHD's interpretations elsewhere in the FLSA, the FOH defined a "substantial" amount of time spent performing general preparation or maintenance work as being "in excess of 20 percent," creating a substantial but limited tolerance for this work. *Id.* This guidance (80/20 guidance) recognized that if a tipped employee performs too much related, non-tipped work, the employee is no longer engaged in a tipped occupation. A number of courts deferred to the guidance.<sup>1</sup>

In 2018, the Department rescinded the 80/20 guidance. In 2018 and 2019, the Department issued new subregulatory guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are

<sup>1</sup> Both the Eighth Circuit and the Ninth Circuit deferred to the Department's dual jobs regulations and 80/20 guidance in the FOH. See *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 632 (9th Cir. 2018) (en banc); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011).

performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); Field Assistance Bulletin (FAB) 2019–2 (Feb. 15, 2019); FOH 30d00(f) (2018–2019 guidance). The Department 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. Most courts that have considered the 2018–2019 guidance, including one court of appeals, have declined to defer to the Department's interpretation of the dual jobs regulation in this guidance. See, e.g., *Rafferty v. Denny's, Inc.*, No. 20–13715, 2021 WL 4189698 (11th Cir. Sept. 15, 2021).

The 2020 Tip final rule would have codified the Department's 2018–2019 guidance, although it would have used O\*NET as a guide rather than as a definitive tool for determining work related to a tipped occupation. See 85 FR 86756, 86772 (Dec. 30, 2020). Even though, as noted above, multiple circuit courts had deferred to the Department's 80/20 guidance, the Department opined that this guidance “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.” *Id.* at 86767. This final rule was published with an effective date of March 1, 2021, see *id.* at 86756; however, the Department extended the effective date for this part of the rule until December 31, 2021, see 86 FR 11632, 86 FR 15811, and proposed to withdraw and re-propose the dual jobs provision of the 2020 Tip final rule on June 23, 2021, see 86 FR 32818.

In its reproposal, the Department proposed to amend its dual jobs regulation to clarify that an employee is only engaged in a tipped occupation under 29 U.S.C. 203(t) when the employee either performs work that produces tips, or performs work that directly supports the tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time. See 86 FR 32818. The Department's proposal defined work that “directly supports” tip-producing work as work that assists a tipped employee to perform the work for which the employee receives tips. The proposed regulatory text also explained that an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1)

exceeds, in the aggregate, 20 percent of the employee's hours worked during the workweek or (2) is performed for a continuous period of time exceeding 30 minutes.

This final rule withdraws that part of the 2020 rule amending the Department's dual jobs regulation at § 531.56(e) and updates that same regulation to incorporate the changes it proposed in its 2021 NPRM in § 531.56(e) and (f), with slight modifications. In finalizing this rule, the Department has taken into consideration the need to ensure that workers do not receive a reduced direct cash wage when they are not engaged in a tipped occupation, as well as the practical concerns of employers who must apply this rule in varied workplaces. The final rule amends § 531.56 to define when an employee is performing the work of a tipped occupation, and is therefore engaged in a tipped occupation for purposes of section 3(t) of the FLSA. The Department has clarified and modified some of the definitions in the final rule from the proposal in order to ensure that this rule is broadly protective of tipped employees, and that the test set forth in the rule is one that employers can comply with and that the Department can administer.

As the Department stated above, the goal of this final rule is to protect tipped employees, while also providing clarity and flexibility to employers to address the variable situations that arise in tipped occupations. The Department finalizes its test providing that work performed for which a tipped employee receives tips is part of the tipped occupation, as well as a non-substantial amount of work that assists the tip-producing work. The final rule recognizes that when a tipped employee performs a substantial amount of directly supporting work that does not itself produce tips they cease to be engaged in a tipped occupation. An employer cannot take a tip credit when a tipped employee performs work that is not part of the tipped occupation.

However, the Department recognizes that a tipped employee's tip-producing services to customers are multi-faceted. In response to comments about the administrability of the Department's proposal, the Department has modified the rule's definitions. In the final rule, the Department clarifies that its definition of *tip-producing work* was intended to be broadly construed to encompass any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips and provides more examples illustrating the scope of this term. The final rule also amends the

definition of *directly supporting work* to explain that this category includes work that is performed by the tipped employee in preparation for or otherwise assists in the provision of tip-producing customer service work, and also provides more examples illustrating the scope of this term. The final rule also modifies the definition of *work that is not part of the tipped occupation* to reflect the changes to these two definitional categories. Additionally, the final rule modifies the 30-minute limitation in order to treat it uniformly with the 20 percent tolerance.

Consistent with its revisions to § 531.56(e) and (f), the Department also amends the portions of its regulations that address the payment of tipped employees under Executive Order 13658, Establishing a Minimum Wage for Contractors, to incorporate the Department's explanation of when an employee performing non-tipped work is still engaged in a tipped occupation.

The Department estimates this final rule could result in costs to employers, consisting of rule familiarization costs, adjustment costs, and managerial costs. The Department also expects that this rule could result in transfers from employers to employees in the form of increased wages. For more information on the economic impacts of this rule, please see Section V.

The Office of Information and Regulatory Affairs designated this rule as a ‘major rule,’ as defined by 5 U.S.C. 804(2), under the Congressional Review Act (5 U.S.C. 801 *et seq.*).

## II. Background

### A. FLSA Provisions on Tips and Tipped Employees

Section 6(a) of the FLSA requires covered employers to pay nonexempt employees a minimum wage of at least \$7.25 per hour. See 29 U.S.C. 206(a). Under section 3(m)(2)(A) an employer may satisfy a portion of its minimum wage obligation to any “tipped employee” by taking a partial credit, referred to as a “tip credit,” toward the minimum wage based on tips an employee receives, provided that the employer meets certain requirements. See 29 U.S.C. 203(m)(2)(A). An employer that elects to take a tip credit must pay the tipped employee a direct cash wage of at least \$2.13 per hour. The employer may then take a credit against its wage obligation for the difference, up to \$5.12 per hour, if the employees' tips are sufficient to fulfill the remainder of the minimum wage among other criteria.

Section 3(t) defines “tipped employee” as “any employee engaged in

an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. 203(t). The legislative history accompanying the 1974 amendments to the FLSA’s tip provisions identified tipped occupations to include “waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc.” S. Rep. No. 93–690, at 43 (Feb. 22, 1974). On the other hand, the legislative history identified “janitors, dishwashers, chefs, [and] laundry room attendants” as occupations in which employees do not customarily and regularly receive tips within the meaning of section 3(t). *See id.* Since the 1974 Amendments, the Department’s guidance documents have identified a number of additional occupations, including barbacks and certain sushi chefs, as tipped occupations. *See, e.g.,* Field Operations Handbook (FOH) 30d04(b). However, Congress left “occupation,” and what it means to be “engaged in an occupation,” in section 3(t) undefined. Thus, Congress delegated to the Department the authority to determine what it means to be “engaged in an occupation” that customarily and regularly receives tips. *See* Fair Labor Standards Amendments of 1966, Public Law 89–601, sec. 101, sec. 602, 80 Stat. 830, 830, 844 (1966).

#### B. The Department’s “Dual Jobs” Regulation

The Department promulgated its initial tip regulations in 1967, the year after Congress first created the tip credit provision. *See* 32 FR 13575 (Sept. 28, 1967); Public Law 89–601, sec. 101(a), 80 Stat. 830 (1966). As part of this rulemaking, the Department promulgated a “dual jobs” regulation recognizing 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 the employee 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. *See* 32 FR 13580–81; 29 CFR 531.56(e). At the same time, the regulation also recognizes that an employee in a tipped occupation may perform related duties that are not “themselves . . . directed toward producing tips.” It uses the example of 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.” 29 CFR 531.56(e). In that example, where the

tipped employee performs non-tipped duties related to the tipped occupation for a limited amount of time, the employee is still engaged in the tipped occupation of a server, for which the employer may take a tip credit, rather than working part of the time in a non-tipped occupation. *See id.* Section 531.56(e) thus distinguishes between employees who have dual jobs and tipped employees who perform “related duties” that are not themselves directed toward producing tips.

#### C. The Department’s Dual Jobs Guidance

Over the past several decades, the Department has issued guidance interpreting the dual jobs regulation as it applies to employees who perform both tipped and non-tipped duties. The Department first addressed this issue through a series of Wage and Hour Division (WHD) opinion letters. In a 1979 opinion letter, the Department considered whether a restaurant employer could take a tip credit for time servers spent preparing vegetables for use in the salad bar before the establishment was open to the public. *See* WHD Opinion Letter FLSA–895 (Aug. 8, 1979) (“1979 Opinion Letter”). Citing the dual jobs regulation and the legislative history distinguishing between tipped occupations, such as servers, and non-tipped occupations, such as chefs, the Department concluded that “salad preparation activities are essentially the activities performed by chefs,” and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.*

A 1980 opinion letter addressed a situation in which tipped restaurant servers performed various non-tipped duties including cleaning and resetting tables, cleaning and stocking the server station, and vacuuming the dining room carpet after the restaurant was closed. *See* WHD Opinion Letter WH–502 (Mar. 28, 1980) (“1980 Opinion Letter”). The Department reiterated language from the dual jobs regulation distinguishing between employees who spend “part of [their] time” performing “related duties in an occupation that is a tipped occupation” that do not produce tips and “where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties.” *Id.* Because in the circumstance presented the non-tipped duties were “assigned generally to the waitress/waiter staff,” the Department found them to be related to the employees’ tipped occupation. The letter suggested, however, that the employer would not

be permitted to take the tip credit if “specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.” *Id.*

In 1985, the Department issued an opinion letter addressing non-tipped duties both unrelated and related to the tipped occupation of server. *See* WHD Opinion Letter FLSA–854 (Dec. 20, 1985) (“1985 Opinion Letter”). First, the letter concluded (as had the 1979 Opinion Letter) that “salad preparation activities are essentially the activities performed by chefs,” not servers, and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.* Second, the letter explained, building on statements in the 1980 Opinion Letter, that although a “tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the [servers’] regular duties and are assigned generally to the [server] staff,” if “specific employees are routinely assigned to maintenance-type work or . . . 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.* Under the circumstances described by the employer seeking an opinion—specifically, “one waiter or waitress is assigned to perform . . . preparatory activities,” including setting tables and ensuring that restaurant supplies are stocked, and those activities “constitute[] 30% to 40% of the employee’s workday”—a tip credit was not permissible as to the time the employee spent performing those activities. *Id.*

WHD’s FOH is an “operations manual” that makes available to WHD staff, as well as the public, policies “established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” In 1988, WHD revised its FOH to add section 30d00(e), which distilled and refined the policies established in the 1979, 1980, and 1985 Opinion Letters. *See* WHD FOH Revision 563. According to the 1988 FOH entry, the dual jobs regulation at § 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),” if those duties are “incidental” and “generally assigned” to tipped employees. *Id.* at 30d00(e). To illustrate the types of related, non-tip-producing duties for which employers could take a tip credit, the FOH listed “a waiter/waitress, who spends some

time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses,” the same examples included in § 531.56(e). *Id.* But “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.” Consistent with WHD’s interpretations elsewhere in the FLSA, the FOH defined a “substantial” amount of time spent performing general preparation or maintenance work as being “in excess of 20 percent,” creating a significant but limited tolerance for this work. *Id.* This guidance recognized that if a tipped employee performs too much related, non-tipped work, the employee is no longer engaged in a tipped occupation.

WHD did not revisit its 80/20 guidance until more than 20 years later, when it briefly superseded its 80/20 guidance in favor of guidance that placed no limitation on the amount of duties related to a tip-producing occupation that may be performed by a tipped employee, “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.” See WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009). This guidance further stated that the Department “believe[d] that guidance [was] necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation . . . .” *Id.* Accordingly, it stated that the Department would consider certain duties listed in O\*NET for a particular occupation to be related to the tip-producing occupation. See *id.* The guidance cited *Pellon v. Bus Representation Int’l, Inc.*, 291 F. App’x 310 (11th Cir. 2008) (unpublished), *aff’g* 528 F. Supp. 2d 1306 (S.D. Fla. 2007), in which the district court granted summary judgment to the employer based in part on the infeasibility of determining whether the employees spent more than 20 percent of their work time on such duties; significantly, however, the court believed such a determination was unnecessary because the employees had not shown that their non-tipped work exceeded that threshold. See 528 F. Supp. 2d at 1313–15. However, WHD later withdrew this guidance on March 2, 2009, and reverted to and followed the 80/20 approach for most of the next decade.

See WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009); WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018).

Between 2009 and 2018, both the Eighth Circuit and the Ninth Circuit deferred to the Department’s dual jobs regulations and 80/20 guidance in the FOH. See *Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 632 (9th Cir. 2018) (en banc); *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011). Both courts of appeal concluded that the Department’s dual jobs regulation at 531.56(e) appropriately interprets section 3(t) of the FLSA which “does not define when an employee is ‘engaged in an [tipped] occupation.’” *Applebee’s*, 638 F.3d at 876, 879; see also *Marsh*, 905 F.3d at 623. Both courts further held that the Department’s 80/20 guidance was a reasonable interpretation of the dual jobs regulation. See *Marsh*, 905 F.3d at 625 (“The DOL’s interpretation is consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself.”); *Applebee’s*, 638 F.3d at 881 (“The 20 percent threshold used by the DOL in its Handbook is not inconsistent with § 531.56(e) and is a reasonable interpretation of the terms ‘part of [the] time’ and ‘occasionally’ used in that regulation.”).

In November 2018, WHD reinstated the January 16, 2009, opinion letter rescinding the 80/20 guidance and articulating a new test. See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018). Shortly thereafter, WHD issued FAB No. 2019–2, announcing that its FOH had been updated to reflect the guidance contained in the reinstated opinion letter. See FAB No. 2019–2 (Feb. 15, 2019), see also WHD FOH Revision 767 (Feb. 15, 2019). WHD explained that it would no longer prohibit an employer from taking a tip credit for the time an employee performed related, non-tipped duties as long as those duties were performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018), see also FOH 30d00(f)(3). WHD also explained that it would use O\*NET, a database of worker attributes and job characteristics and source of descriptive occupational information,<sup>2</sup> to determine whether a tipped employee’s non-tipped duties were related to the employee’s tipped occupation. See *id.*

<sup>2</sup> O\*NET is developed under the sponsorship of the Department’s Employment and Training Administration through a grant to the North Carolina Department of Commerce. See <https://www.onetcenter.org/overview.html>.

The Eleventh Circuit recently considered the 2018 Opinion Letter and 2019 FAB and declined to grant deference to the Department’s interpretation of the dual jobs regulation in this guidance. See *Rafferty v. Denny’s, Inc.*, No. 20–13715, 2021 WL 4189698 at \*18 (11th Cir. Sept. 15, 2021). The Court determined that the Department’s interpretation of the dual jobs regulation in this guidance was not a reasonable one, concluding that “the removal of any limit on the time a tipped employee may perform [related] non-tipped duties flatly contradicts . . . the ceiling on related duties” imposed by the regulation’s use of the terms “occasional” and “part of the time.” *Id.* at \*15. The Court also criticized the 2018–2019 guidance’s use of O\*NET to define related duties, concluding that it risked creating “a fox-guarding-the-henhouse situation” whereby employers could “effectively render . . . untipped duties ‘related,’” by “requiring tipped employees to perform” them, “whether [such] duties are, in fact, related or not to their tipped duties.” *Id.* Pointing to statements in the NPRM for the 2020 Tip final rule and the NPRM for this final rule in which the Department noted that the removal of time limits on related work could lead to a loss of earnings for tipped employees, the Court also concluded that the 2018–2019 guidance “tramples the reasons for the dual-jobs regulation’s existence and is inconsistent with the FLSA’s policy of promoting fair conditions for workers.” *Id.* at \*16.

The Eleventh Circuit went on to conclude that a 20 percent limitation on the amount of related non-tipped duties that an employee can perform and still be considered a tipped employee was a reasonable interpretation of the dual jobs regulation and section 3(t) of the FLSA. *Id.* at \*18. After reviewing section 3(t), the court stated “we must construe the dual-jobs regulation to ensure that the reduced direct wage for tipped employees is available to employers only when employees are actually engaged in a tipped occupation that will allow them to earn the remainder of at least the minimum wage.” *Id.* The court further concluded that “[t]he plain language of [the definition of a tipped employee in 3(t)] tells us that for the employer to qualify to take the tip credit, the employee’s job must, by tradition *and in reality*, be one where she consistently earns tips.” *Id.* (emphasis added). The Court also concluded that a 20 percent threshold “aligns with the general meaning” of “infrequently” in the dual jobs regulation; noted that “the Department

often invokes a” 20 percent limitation in “distinguishing substantial and nonsubstantial work in different contexts within the FLSA”; and noted that a 20 percent limitation on related duties “is consistent with [30] years of DOL interpretation of the dual jobs regulation—through administrations of both political parties.”

A large number of district courts have also considered and declined to defer to the 2018–2019 guidance. Among other concerns, these courts have noted that the guidance: (1) Does not clearly define what it means to perform related, non-tipped duties “contemporaneously with, or for a reasonable time immediately before or after, tipped duties,” thus inserting “new uncertainty and ambiguity into the analysis,” *see, e.g., Flores v. HMS Host Corp.*, No. 18–3312, 2019 WL 5454647 at \*6 (D. Md. Oct. 23, 2019), and companion case *Storch v. HMS Host Corp.*, No. 18–3322; (2) is potentially in conflict with language in 29 CFR 531.56(e) limiting the tip credit to related, non-tipped duties performed “occasionally” and “part of [the] time,” *see Belt v. P.F. Chang’s China Bistro, Inc.*, 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019); and (3) potentially “runs contrary to the remedial purpose of the FLSA—to ensure a fair minimum wage,” *see Berger v. Perry’s Steakhouse of Illinois*, 430 F. Supp. 3d 397 (N.D. Ill. 2019).<sup>3</sup> In addition, some courts have also expressed doubts about whether it is reasonable to rely on O\*NET to determine related duties. *See O’Neal*, 2020 WL 210801, at \*7 (employer practices of requiring non-tipped employees to perform certain duties would then be reflected in O\*NET, allowing employers to influence the definitions).<sup>4</sup> After declining to defer to

the Department’s 2018–2019 guidance, many of these district courts have, like the Eleventh Circuit, independently concluded that the 80/20 approach is reasonable, and applied a 20 percent tolerance to the cases before them.<sup>5</sup>

#### D. The 2020 Tip Final Rule

The NPRM for the 2020 Tip final rule (2019 NPRM) proposed to codify the Department’s 2018–2019 guidance regarding when an employer can continue to take a tip credit for a tipped employee who performs related, non-tipped duties. *See* 84 FR 53956, 53963 (Oct. 8, 2019). Although, as noted above, multiple circuit courts had deferred to the Department’s 80/20 guidance, the Department opined in its 2019 NPRM that this guidance “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.” *Id.* Some employer representatives raised similar criticism in their comments on the 2019 NPRM.

The 2020 Tip final rule amended § 531.56(e) to largely reflect the Department’s guidance issued in 2018 and 2019 that addressed 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. *See* 85 FR 86771. The 2020 Tip final rule reiterated the Department’s conclusion from the 2019 NPRM that its prior 80/20 guidance was difficult to administer “in part because the guidance did not explain how employers could determine whether a particular non-tipped duty is ‘related’ to the tip-producing occupation and in part because the monitoring surrounding the 80/20 approach on individual duties was onerous for employers.” *Id.* at 86767. The 2020 Tip final rule provided, consistent with the Department’s 2018–2019 guidance, that “an employer may take a tip credit for all non-tipped duties an employee performs that meet two requirements. First, the duties must be related to the employee’s tipped occupation; second, the employee must perform the related

the 2020 Tip final rule addressed this criticism by explaining through the notice-and-comment rulemaking process its reasoning for replacing the 80/20 approach with an updated related duties test).

<sup>5</sup> *See, e.g., Rorie*, 485 F. Supp. 3d at 1042; *Sicklesmith*, 440 F. Supp. 3d at 404–05; *Belt*, 401 F. Supp. 3d at 536–37; *Esry v. P.F. Chang’s*, 373 F. Supp. 3d at 1211; *Berger*, 430 F. Supp. 3d at 412; *Cope*, 354 F. Supp. 3d at 987; *Spencer*, 399 F. Supp. 3d at 554; *Roberson*, 2020 WL 7265860, at \*7–\*8; *Williams*, 2020 WL 4692504, at \*10; *O’Neal*, 2020 WL 210801, at \*7; *see also* 85 FR 86771 (noting that

duties contemporaneously with the tip-producing activities or within a reasonable time immediately before or after the tipped activities.” *Id.* at 86767.

Rather than using O\*NET as a definitive list of related duties, the final rule adopted O\*NET as a source of guidance for determining when a tipped employee’s non-tipped duties are related to their tipped occupation. Under the 2020 Tip final rule, a non-tipped duty is presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O\*NET. *See id.* at 86771. The 2020 Tip final rule included a qualitative discussion of the potential economic impacts of the rule’s revisions to the dual jobs regulations but “[did] not quantify them due to lack of data and the wide range of possible responses by market actors that [could not] be predicted with specificity.” *Id.* at 86776. The Department noted that one commenter, the Economic Policy Institute (EPI), provided a quantitative estimate of the economic impact of this portion of the rule but concluded that its estimate was not reliable. *See id.* at 86785. The 2020 Tip final rule was published with an effective date of March 1, 2021, *see id.* at 86756; however, the Department extended the effective date for this part of the rule until December 31, 2021, 86 FR 22597.

#### E. Legal Challenge to the 2020 Tip Final Rule

On January 19, 2021, while the 2020 Tip final rule was pending, Attorneys General from eight states and the District of Columbia (“AG Coalition”) filed a complaint in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule, including that portion amending the dual jobs regulations. (*Pennsylvania* complaint or *Pennsylvania* litigation).<sup>6</sup> The *Pennsylvania* complaint alleges that this portion of the 2020 Tip final rule is contrary to the FLSA. Specifically, the complaint alleges that the rule’s elimination of the 20 percent limitation on the amount of time that tipped employees can perform related, non-tipped work contravenes the FLSA’s definition of a tipped employee: An employee “engaged in an occupation in which [they] customarily and regularly” receive tips, 29 U.S.C. 203(t).<sup>7</sup> According to the complaint, “when employees ‘spend more than 20 percent

<sup>6</sup> *See* Compl., *Pennsylvania v. Scalia*, No. 2:21–cv–00258 (E.D. Pa. Jan. 19, 2021).

<sup>7</sup> *Id.*, ¶¶ 87–89.

<sup>3</sup> *See also Roberson v. Tex. Roadhouse Mgmt. Corp.*, No. 19–628, 2020 WL 7265860 (W.D. Ky. Dec. 10, 2020); *Rorie v. WSP2*, 485 F. Supp. 3d 1037 (W.D. Ark. 2020); *Williams v. Bob Evans Restaurants*, No. 18–1353, 2020 WL 4692504 (W.D. Pa. Aug. 13, 2020); *Esry v. OTB Acquisition*, No. 18–255, 2020 WL 3269003 (E.D. Ark. June 17, 2020); *Reynolds v. Chesapeake & Del. Brewing Holdings*, No. 19–2184, 2020 WL 2404904 (E.D. Pa. May 12, 2020); *Sicklesmith v. Hershey Ent. & Resorts Co.*, 440 F. Supp. 3d 391 (M.D. Pa. 2020); *O’Neal v. Denn-Ohio*, No. 19–280, 2020 WL 210801 (N.D. Ohio Jan. 14, 2020); *Spencer v. Macado’s*, 399 F. Supp. 3d 545 (W.D. Va. 2019); *Esry v. P.F. Chang’s China Bistro*, 373 F. Supp. 3d 1205 (E.D. Ark. 2019); *Cope v. Let’s Eat Out*, 354 F. Supp. 3d 976 (W.D. Mo. 2019).

One district court has followed the guidance. *See Shaffer v. Perry’s Restaurants, Ltd.*, No. 16–1193, 2019 WL 2098116 (W.D. Tex. Apr. 24, 2019)

<sup>4</sup> District courts have also declined to defer to the 2018–19 guidance on the grounds that it did not reflect the Department’s “fair and considered judgment,” because the Department did not provide a compelling justification for changing policies after 30 years of enforcing the 80/20 guidance. *See e.g., Williams*, 2020 WL 4692504, at \*10; *O’Neal*, 2020 WL 210801, at \*7; *see also* 85 FR 86771 (noting that

of their time performing untipped related work' they are no longer 'engaged in an occupation in which [they] customarily and regularly receive[] . . . tips.'" <sup>8</sup>

The complaint also alleges that this portion of the 2020 Tip final rule is arbitrary and capricious for several reasons. First, the complaint alleges that the 2020 Tip final rule's new test for when an employer can continue to take a tip credit for a tipped employee who performs related, non-tipped duties relied on "ill-defined" terms—"contemporaneously with" and "a reasonable time immediately before or after tipped duties" <sup>9</sup>—which some district courts have also found to be unclear when construing the 2018–2019 guidance. <sup>10</sup> According to the complaint, the 2020 Tip final rule failed to "provide any guidance as to when—or whether—a worker could be deemed a dual employee during a shift or how long before or after a shift constitutes a 'reasonable time.'" <sup>11</sup> The complaint also alleges that the Department failed to offer a valid justification for replacing the 80/20 guidance with a new test for when an employer can take a tip credit for related, non-tipped duties. The complaint disputes the Department's conclusion in the 2020 Tip final rule that its former 80/20 guidance was difficult to administer, noting that courts consistently applied and, in many cases, deferred to the 80/20 guidance. <sup>12</sup> The complaint argues that the 2020 Tip final rule's new test, in contrast, will invite "a flood of new litigation" due to its "murkiness" and its reliance on "ill-defined" terms. <sup>13</sup>

The complaint further alleges that the rule's use of O\*NET to define "related duties" is "itself" arbitrary and capricious because O\*NET "seeks to describe the work world as it is, not as it should be" and "does not objectively evaluate whether a task is actually related to a given occupation." <sup>14</sup> According to the complaint, the use of O\*NET to define related, non-tipped duties "dramatically expand[ed] the

universe of duties that can be performed by tipped workers," thereby authorizing employer "conduct that has been prohibited under the FLSA for decades." <sup>15</sup> Lastly, the complaint alleges that the Department "failed to consider or quantify the effect" that this portion of the rule "would have on workers and their families" in the rule's economic analysis and "disregarded" the data and analysis provided by a commenter on the NPRM for the 2020 Tip final rule, the EPI. <sup>16</sup> The complaint claims that these asserted flaws in the Department's economic analysis are evidence of a "lack of reasoned decision-making." <sup>17</sup>

#### F. Delay and Partial Withdrawal of the 2020 Tip Final Rule

On February 26, 2021, the Department delayed the effective date of the 2020 Tip final rule until April 30, 2021, to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule, as contemplated by the Regulatory Freeze Memorandum and OMB Memorandum M–21–14. *See* 86 FR 11632. On March 25, 2021, the Department proposed to further delay the effective date of three portions <sup>18</sup> of the 2020 Tip final rule, including the portion of the rule that amended the Department's dual jobs regulations to address the FLSA tip credit's application to tipped employees who perform tipped and non-tipped duties, until December 31, 2021. *See* 86 FR 15811. The Department received comments on the merits of the delay and on the merits of the 2020 Tip final rule itself. On April 29, 2021, the Department finalized the proposed partial delay. *See* 86 FR 22597.

Delaying the effective date of the dual jobs provision of the 2020 Tip final rule provided the Department the opportunity to consider whether § 531.56(e) of the 2020 Tip final rule accurately identifies when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation, such that an employer can continue to take a tip credit for the time the tipped employee spends on such non-tipped work, and whether the 2020 Tip final rule adequately considered the possible costs, benefits, and transfers between employers and employees related to the adoption of the standard articulated therein. It also allowed the

Department to further evaluate the legal concerns with this portion of the rule that were raised in the *Pennsylvania* complaint.

#### G. The Department's Proposal

The Department proposed in the Dual Jobs NPRM to withdraw and repropose the portion of the 2020 Tip final rule related to the determination of when a tipped employee is employed in dual jobs. *See* 86 FR 32818. Specifically, the Department proposed to amend its regulations at § 531.56 to clarify that an employee is only *engaged in a tipped occupation* pursuant to 29 U.S.C. 203(t) when the employee performs *work that is part of the tipped occupation* and that an employer may only take a tip credit when tipped employees perform work that is part of the tipped occupation. The Department proposed to define work that is part of the tipped occupation as work that produces tips, or performs work that directly supports the *tip-producing work*, provided that the directly supporting work is not performed for a substantial amount of time. The NPRM explained that "it is important to provide a clear limitation on the amount of non-tipped work that tipped employees perform in support of their tip-producing work, because if a tipped employee engages in a substantial amount of such non-tipped work, that work is no longer incidental to the tipped work, and thus, the employee is no longer employed in a tipped occupation." *See* 86 FR 32820.

The Department explained that an employee has performed work that directly supports tip-producing work for a *substantial amount of time* if that directly supporting work either (1) exceeds, in the aggregate, 20 percent of the employee's hours worked during the workweek, or (2) is performed for a continuous period of time exceeding 30 minutes. The Department further proposed that if a tipped employee spends more than 20 percent of their workweek performing directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek. Additionally, the Department proposed that if a tipped employee spends a continuous, or uninterrupted, period of time performing directly supporting work that exceeds 30 minutes, the employer cannot take a tip credit for the entire period of time that was spent on such directly supporting work. The Department also proposed to clarify that an employer cannot take a tip credit for any time that a tipped employee spends performing *work that is not part of the tipped occupation*, defined as any work

<sup>8</sup> *Id.* ¶ 87 (citing *Belt*, 401 F. Supp. 3d at 526).

<sup>9</sup> *Id.* ¶ 128.

<sup>10</sup> *See, e.g., Belt*, 401 F. Supp. 3d at 533; *Flores*, 2019 WL 5454647, at \*6.

<sup>11</sup> Compl. ¶ 131, *Pennsylvania* (No. 2:21–cv–00258); *see also id.* ¶ 129 ("The Department never provides a precise definition of 'contemporaneous,' simply stating that it means 'during the same time as' before making the caveat that it 'does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.'")

<sup>12</sup> *See id.* ¶ 127; *see also id.* ¶ 41 (noting that many courts awarded *Auer* deference to the 80/20 guidance).

<sup>13</sup> *Id.* ¶¶ 127–28.

<sup>14</sup> *Id.* ¶ 115.

<sup>15</sup> *Id.* ¶¶ 114–15.

<sup>16</sup> *Id.* at § I(C)(i), ¶¶ 108–9.

<sup>17</sup> *Id.* ¶ 105.

<sup>18</sup> The Department withdrew the two delayed portions of the 2020 Tip final rule addressing civil money penalties and finalized changes to those portions on September 24, 2021. *See* 86 FR 52973.

that does not generate tips and does not directly support tip-producing work.

Finally, the Department proposed to amend the provisions of the Executive Order 13568 regulation, which address the hourly minimum wage paid by contractors to workers performing work on or in connection with covered Federal contracts, to reflect the proposed revisions made to § 531.56.

The 60-day comment period for the NPRM ended on August 23, 2021. The Department received over 1,860 comments from various constituencies including tipped employees, small business owners, worker advocacy groups, employer and industry associations, non-profit organizations, law firms, attorneys general, and other interested members of the public. All timely received comments may be viewed on the *regulations.gov* website, docket ID WHD-2019-0004. The Department has considered the timely submitted comments addressing the proposed changes and discusses significant comments below.

The Department also received some comments on issues that are beyond the scope of this rulemaking. These include, for example, comments suggesting that the FLSA should be amended to eliminate the tip credit or comments asking the Department to add new recordkeeping requirements. The Department does not address those issues in this final rule.

### III. Final Regulatory Revisions

Having considered the comments, the Department finalizes its proposal with some modifications. The sections below respond to commenter feedback on specific aspects of the rule, and address the regulatory revisions adopted in the final rule.

#### A. Overview

As discussed above, the Department received over 1,860 comments on the Dual Jobs NPRM. Commenters representing employees, including the National Employment Lawyers Association (NELA), National Employment Law Project (NELP), National Women's Law Center (NWLCC), the Center for Law and Social Policy (CLASP), Restaurant Opportunity Center United (ROC), Texas RioGrande Legal Aid, Community Legal Services (CLS) of Philadelphia, William E. Morris Institute for Justice, Institute for Women's Policy Research (IWPR), Women's Law Project (WLP), Fish Potter Bolaños, Leadership Conference on Civil and Human Rights, NETWORK Lobby for Catholic Social Justice, and the Economic Policy Institute (EPI), generally supported the proposal.

Chairman of the Committee on Education of Labor Bobby Scott and Representatives Alma Adams, Mark Takano, Suzanne Bonamici, and Pramila Jayapal ("Scott letter"), Attorneys General from eight states and the District of Columbia ("AG Coalition"), and hundreds of tipped workers, some service industry managers and small business owners, and many other members of the public also supported the proposal. NWLCC stated that it "appreciate[d] the Department's efforts to ensure that the rules it promulgates and administers protect tipped workers' wages to the maximum extent possible in keeping with its charge to improve working conditions and to 'foster, promote, and develop the welfare of the wage earners . . . of the United States.'" Other commenters noted that because "the Department routinely identifies significant wage violations in industries with large concentrations of tipped workers . . . [s]trengthening protections for people working in tipped jobs should thus be a priority for the Department" and that the proposed rule "takes important steps to do so."

Commenters representing employers, including the National Federation of Independent Businesses (NFIB), Restaurant Law Center and National Restaurant Association (RLC/NRA), Center for Workplace Compliance (CWC), Littler Mendelson's Workplace Policy Institute (WPI), the Florida Restaurant and Lodging Association (FRLA), Hospitality Maine, Missouri Restaurant Association (MRA), the Central Florida Compensation and Benefits Association (CFCBA), the American Hotel and Lodging Association (AHLA), the National Retail Federation and the National Council of Chain Restaurants (NRF/NCCR), Franchise Business Services (FBS), Landry's, Seyfarth Shaw, and the Chamber of Commerce, as well as many, but not all, the hundreds of individual restaurant and small business owners who commented, and Representative Gregory Murphy, however, generally urged the Department to allow the 2020 Tip final rule go into effect instead of adopting the new test proposed in the NPRM. These commenters argued that the 2020 Tip final rule "set forth a clear, workable standard" for employers, and that it is "more practical to implement." In particular, these commenters argued that the Department's proposal would oblige employers to carefully distinguish between and monitor the time employees spend performing tip-producing work and directly supporting work, and that doing so would be impracticable and burdensome. Many

commenters representing employers noted the impact of the COVID-19 pandemic on the service industry, and opposed new regulations while the pandemic is ongoing. See AHLA; NRA/RLC; WPI.

The Department also received many comments from individual tipped employees. Many individual commenters who worked as tipped employees stated that their employers frequently required them to perform non-tipped, directly supporting work and were paid as little as \$2.13 for that time, despite being unable to earn tips while performing such work. For example, one commenter who worked as a server described an employer sending other staff home and "hav[ing] the servers (myself included as a server) finish washing the floors [because] we, as servers, are making a fraction of what the kitchen and dishwashers get paid." Another individual stated "at my job me and my fellow servers are required to clean and break down the entire restaurant . . . . This process can take hours even after the last c[u]stomer has left the building. It's quite clear that restaurants are abusing the ability to push extra labor on the ones th[e] corporation only has to pay their pocket change on." Likewise, ROC quoted one of their members as saying "The sub-minimum [tipped] wage already allows owners to get away with not paying their employees and having guests make up the difference, but why does that extend to the parts of the shift where the guest isn't picking up the slack?" CLS of Philadelphia, which provides legal assistance to low-income workers, described representing workers who were employed as bussers in a restaurant but for over half of their day they performed work for which they did not receive tips, such as cleaning the restaurant, washing dishes, and preparing food, and "for many days, the little they received in tips did not even bring their hourly rate for their tipped work up to the minimum wage."

In part because tipped employees can receive as little as \$2.13 per hour in direct cash wages, they are among the most vulnerable workers that the Department protects. As NELP commented, "Tipped work is precarious work; workers' take-home pay fluctuates widely depending on the seasons, the weather, the shift they are given, and the generosity of customers." The median hourly wages, including tips, for servers, bartenders, bussers, and bartender helpers is \$12.03 or less.<sup>19</sup>

<sup>19</sup> Bureau of Labor Statistics, May 2020 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). The

Other tipped workers earn similarly low wages.<sup>20</sup> Like their employers, tipped employees have also been adversely affected by the COVID-19 pandemic, *see, e.g.*, NELP, NWLC, and ROC and other commenters stated that the pandemic led to “shifts in employer and consumer behavior” that has led to some tipped employees being asked to perform significantly more work for which they do not receive tips, despite being paid the reduced direct cash wage.

In finalizing this rule, the Department has taken into consideration the need to ensure that workers do not receive a reduced direct cash wage when they are not engaged in a tipped occupation, as well as the practical concerns of employers. The final rule clarifies some of the definitions from the proposal in order to ensure that this rule is functional, broadly protective of tipped workers, and that the test set forth in the rule is one that employers can comply with and that the Department can administer. The Department believes that the final rule protects tipped employees by limiting the amount of non-tipped work that employers can shift to tipped workers while still relying on tips to cover their minimum wage obligations, while also providing clarity to employers to address the variable situations that arise in tipped occupations.

#### B. § 531.56(e)—Dual Jobs

The Department proposed that § 531.56(e) would retain the longstanding regulatory dual jobs language which provides that when an individual is employed in 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. The Department also proposed to make this section gender-neutral by using terms such as “server” and “maintenance person.”

The Department received only one comment regarding proposed § 531.56(e), from the AG Coalition, which supported the Department’s proposal to make its longstanding

regulatory dual jobs language more inclusive by making it gender-neutral.<sup>21</sup> Accordingly, the Department finalizes the revisions to § 531.56(e) as proposed.<sup>22</sup>

#### C. Engaged in a Tipped Occupation—§ 531.56(f).

In § 531.56(f), the Department proposed that “[a]n employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation” and that “[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee’s tipped occupation.” The Department finalizes this language as proposed.

Few commenters opined specifically on the premise that an employee must be performing the work of a tipped occupation to be engaged in a tipped occupation, and therefore as a “tipped employee” for whom the employer may take a tip credit. RLC/NRA asserted, however, that the Department’s proposal “furthers no legitimate statutory purpose under the FLSA” because if “a worker receives at least the minimum required cash wage” plus sufficient tips to bring their hourly earnings above the minimum wage “over the course of the workweek . . . the employee has . . . received wages in compliance with the FLSA’s minimum wage.”

As explained above, Congress delegated to the Department the authority to define what it means to be “engaged in an occupation” in which an employee customarily and regularly receives tips within the meaning of section 3(t) of the FLSA. In turn, section 3(t) defines what it means to be a “tipped employee” for whom an employer may take a tip credit under section 3(m). When Congress created the tip credit provision in the 1966 amendments to the FLSA, it left the terms “occupation” and “engaged in an occupation” in section 3(t) undefined. The 1966 amendments also authorized the Secretary “to promulgate necessary rules, regulations, or orders with regard to the amendments.” Public Law 89–601, sec. 602, 80 Stat. at 844; *see Long Island Care at Home, Ltd. v. Coke*, 551

U.S. 158, 165 (2007) (interpreting effectively identical authorizing language in amendments made to the FLSA in 1974 as “provid[ing] the Department with the power to fill . . . gaps through rules and regulations.”).

Under the Department’s interpretation of section 3(t) in § 531.56(f) of the final rule, an employee must be performing the work of a tipped occupation in order to be “engaged in” a tipped occupation, and therefore to be a tipped employee for whom an employer may take a tip credit under FLSA section 3(m)(2)(A). The Department rejects the RLC/NRA’s argument that so long as tipped employees receive enough in direct cash wages and tips to equal the Federal minimum wage, the statutory requirement has been met. This circular logic fails to acknowledge that an employer is permitted to take a tip credit only when an employee is engaged in a tipped occupation, that is, when the employee is actually performing work that is part of the tipped occupation.

Section 531.56(f) adopted in this final rule affects only whether and when an employer may take a tip credit against its minimum wage obligations for an employee performing non-tipped work. The provision does not impact long-established understandings of what occupations are and are not “customarily and regularly” tipped occupations. *See, e.g.*, S. Rep. No. 93–690, at 43 (Feb. 22, 1974); Field Operations Handbook (FOH) 30d04(b).

#### D. Defining Work That Is and Is Not Part of a Tipped Occupation—§§ 531.56(f)(1)–(3), (5)

The Department proposed to define work that is part of a tipped occupation to encompass tip-producing work and work that directly supports tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time. The Department proposed to define tip-producing work broadly to mean “[a]ny work for which employees receive tips.” The Department proposed to define directly-supporting work—which is part of the tipped occupation so long as it is not performed for a substantial amount of time—to mean “work that assists a tipped employee to perform the work for which the employee receives tips.” Finally, the Department proposed to define work that is not part of the tipped occupation as that work that is neither tip-producing nor directly supporting. In the NPRM, the Department also proposed examples of each type of work.

median hourly wage, including tips, for waiters and waitresses is \$11.42, while bartenders earn \$12.03 and dining room and cafeteria attendants and bartender helpers earn \$12.03. The Department believes that median earnings data is most appropriate because mean data is more likely to be skewed towards high earners.

<sup>20</sup> According to the BLS National Occupational and Employment Wage Estimates, maids and housekeeping cleaners earn \$12.61 per hour; baggage porters and bellhops earn \$13.00; parking attendants earn \$13.02, and manicurist and pedicurists earn \$13.41. [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).

<sup>21</sup> The Department’s revisions to § 531.56(e) are also consistent with general practice for Federal government publications. For example, guidance from the Office of the Federal Register advises agencies to avoid using gender-specific job titles. *See* Office of the Federal Register, Drafting Legal Documents: Principles of Clear Writing § 18 (last reviewed March 2021).

<sup>22</sup> As discussed below, NRA/RLC argued that “the dual jobs concept,” in which “an employee performs two clearly distinct and separate jobs,” a tipped job and a non-tipped job, “has no relevance to the restaurant industry.” However, it did not make any comments on the Department’s proposed revisions to § 531.56(e).



## 1. Comments

Many commenters generally supported the Department's proposed definitions of work that is and is not part of a tipped occupation. *See* NELP; NWLC; ROC. The Scott letter stated that "there must be a clear standard for when an employee is no longer engaged in a tipped occupation. Without such a limitation, Congress's intent to only make a tip credit available for employees engaged in a tipped occupation would be circumvented." The AG Coalition stated that, in defining the work that is part of a tipped occupation, the Department "aims to establish a clearer test for employers to determine when they can take the tip credit."

Many commenters who worked as tipped employees shared their experiences with performing a substantial amount of non-tipped work when they did not have the opportunity to receive tips during this time. These workers described being required to perform non-tipped work for substantial amounts of time, such as filling condiments and sweeping an assigned section of the restaurant for 30–45 minutes before and after the restaurant is open, rolling silverware for an hour after a long shift, or moving chairs to and from an outdoor patio for an hour before and an hour after service.

For example, one commenter described working as a server spending "2–3 hours of my shift setting up the dining room and bar, stocking the kitchen, sweeping, washing bar dishes, doing my own prep work, and then doing it all again at the end of the night," and noting that "I was not making . . . additional tips during this time." An individual stated that performing non-tipped, directly supporting work affects the tips that servers can receive, because they cannot provide "a warm, welcoming experience for the guests," when they are "consumed with sidework."

NELP commented that "[w]hile employers are required to top up tipped workers whose tips are not enough to bring them up to the full minimum wage, many employers do not maintain accurate and complete records of tips earned by their tipped employees, and require too much side work while still paying subminimum wages." One Fair Wage (OFW) expressed concern that employers "simultaneously use tips to reduce their wage obligations while also requiring their workers to perform work that does not allow them to earn the tips that subsidize their wages."

Some employee representatives emphasized that the FLSA authorizes

the Department to limit the amount of non-tipped work that an employee can perform and still be considered to be engaged in a tipped occupation, and argued that it in fact authorizes stricter limits on non-tipped work than those proposed in the NPRM. *See* OFW; Fish Potter Bolaños; Network; IWPR. OFW, for instance, argued that while the Department's proposal is permitted by the FLSA, the Department has "the power to craft a rule that is more protective for workers." Specifically, OFW urged the Department to require employers to pay the full minimum wage for any "side work" that does not generate tips. Noting that section 3(t) defines a tipped employee as an employee engaged in an occupation in which they customarily and regularly receive tips, OFW argued that a tipped employee "must be conducting duties that generate tips" to "receive tips 'customarily' and 'regularly.'" OFW further noted that "[t]he tip credit functions only by allowing tipped workers to make up the difference between the subminimum wage [the direct cash wage of at least \$2.13] and the regular [full] minimum wage through earning tips from customers"; however, "[w]hen workers are performing side work their time spent doing such work is by definition not tip-generating work."

Fish Potter Bolaños, Network, and IWPR also argued that "the vague definition of 'tipped occupation' in the FLSA could permit a more stringent threshold for the tasks for which an employer can pay a worker just \$2.13 an hour." Consistent with OFW, these organizations urged the Department "to revise its proposal to provide that an employer cannot take a tip credit for *any* time during which a tipped worker is not earnings tips"; alternatively, they asked the Department to "consider reducing the threshold" for non-tipped, directly supporting work "to, for example, 5 [percent] or 10 [percent]" of an employee's workweek.

NWLC also encouraged the Department to consider other alternatives that would clarify "the amount of non-tipped work for which an employer can pay employees anything less than the full minimum wage." For example, NWLC asked the Department to amend its proposal to prohibit employers from claiming a tip credit "for time when the employer's establishment is not open for service to customers."

In general, commenters representing employers did not support the Department's proposed definitions of work that is and is not part of the tipped occupation. RLC/NRA and several

business owners and managers who submitted similar comments argued that the Department lacks the authority to place any limits on the amount of non-tipped work that a restaurant worker may perform and still be considered to be engaged in a tipped occupation. *See, e.g.,* NRA/RLC ("the dual jobs concept simply has no relevance to the restaurant setting"). According to these commenters, the FLSA "provides no basis for carving up a tipped restaurant job into tipped and non-tipped segments." Rather, "so long as an employer assigns a tipped employee to perform the core functions of an occupation during a shift . . . that employee does not cease to be engaged in the tipped occupation by virtue of performing side work during a shift[.]" NRA/RLC; *see also* Seyfarth Shaw.

NRA/RLC asserted that "most tipped occupations involve a mix of tasks that directly and immediately generate tips and tasks that do not directly and immediately generate tips"; thus, "[a] server does not cease to be a server" based on the amount of time they spend on "non-tipped tasks." Some individual restaurant owners also criticized the Department because it did not explain what non-tipped occupation a tipped employee engages in when they perform more than a substantial amount of directly supporting work.

The Department also received many comments from employers raising concerns about the practical application of the definition of work that is part of the tipped occupation, particularly when tipped employees perform work that the commenters stated would be directly supporting work according to the Department's proposal, but that is performed in the course of performing their tip-producing customer service work. Additionally, some commenters stated that tipped employees may perform work that would be considered directly supporting under the Department's proposal when they are also actively engaged in work that would be considered tip-producing. These comments, discussed in more detail in Section E, asserted the Department's proposal would oblige employers to carefully distinguish between and monitor the time employees spend performing tip-producing work and directly supporting work, and that doing so would be difficult and burdensome. *See, e.g.,* AHLA; CWC; Chamber of Commerce; Franchise Business Services; WPI; NFIB; Landry's.

As an alternative to the Department's proposal, some commenters representing employers asked that the Department eliminate the proposed

limits on directly supporting work entirely, and define work that is part of the tipped occupation to include all tip-producing and directly supporting work. See Chamber; NFIB. The Chamber of Commerce, for instance, asserted that “[t]ip-supporting work is tip-supporting work, regardless of how long it occurs, and constitutes a legitimate aspect of a tipped occupation.” Employer representatives argued that the limits on related duties in the Department’s 80/20 guidance led to significant litigation for employers in the past, and that the limitations on directly supporting work in the proposal will lead to more litigation in the future. See, e.g., WPI, Seyfarth.

Seyfarth Shaw and CFCBA urged the Department to create an exception from its proposed limitation on directly supporting work for employees who regularly earn tips that bring their total earnings above the Federal minimum wage. Seyfarth recommended that the Department create a presumption of compliance with the FLSA’s minimum wage requirements for employees who earn at least \$29.00 per hour in cash wages plus tips. CFCBA stated that employers that are required by State law to or otherwise “guarantee to bring the tipped employees’ average pay, inclusive of tips, for the week up to 25% more than Federal minimum should be exempt from this extra administrative burden” of ensuring that they pay employees who perform as substantial amount of non-tipped, directly supporting work a direct cash wage equal to the full minimum wage.

In addition, commenters representing employers generally asserted that the Department’s proposed test distinguishing between work that is and is not part of the employee’s tipped occupation failed to provide clear guidance about the types of work that would fall into each definitional category and as a result would prompt significant litigation over the scope of the terms. See, e.g., AHLA, Chamber, Seyfarth. For example, Seyfarth commented that the proposed rule “lacks clear guidance defining and distinguishing [the three categories of work],” and that “[a]bsent clear guidance as to each category, it will be difficult to reliably structure, schedule, and supervise tipped employees’ job duties to ensure that they do not run afoul of the proposed time-based limitations on the amount of ‘directly supporting’ work that may be performed when the tip credit is claimed.” RLC/NRA challenged the Department’s basis for distinguishing between these categories of work, and commented that WHD does not have any evidentiary

support for its conclusion that certain tasks are either tip-producing, directly supporting, or not part of a tipped occupation. A number of groups representing employers, such as the Chamber of Commerce, criticized the proposed rule’s test, and particularly its definitions, as being “administratively unworkable” and said that the uncertainty would lead to litigation over the scope of the terms used within the test. Groups such as the AG Coalition, on the other hand, commented that because the rule did not identify every tipped occupation, such as delivery drivers and baristas, employers with workers in such “unidentified tipped occupations” may believe that DOL’s revised regulation does not apply to its employees. The AG Coalition urged the Department to preface the rule, if finalized as proposed, with a disclaimer that the regulatory list of tipped occupations and list of tasks within those occupations under each definitional category are illustrative, not exhaustive.

Commenters that opposed the proposed rule also generally preferred the 2020 rule’s use of O\*NET to identify duties related to a particular tipped occupation. See Seyfarth, CFCBA, WPI. Landry’s, for example, argued that DOL should retain the 2020 rule and its use of O\*NET because O\*NET is a list of tipped duties compiled by surveying employees in the restaurant industry and reflects the tasks that they perform. RLC/NRA similarly argued that DOL’s line-drawing between categories of work in the proposed rule was arbitrary compared to O\*NET. Seyfarth noted that the 2020 Tip Rule’s incorporation of O\*NET offers employers an “objective and consistent *up-front* tool for managing tip credit compliance.” See also AHLA.

Landry’s stated that “[i]f the DOL finds O\*NET imperfect, it should convene subject matter experts to refine those duties.” Similarly, RLC/NRA asserted that “[t]he Department has never undertaken a factual examination or study of the tasks performed by these occupations[.]” Employer groups also made various suggestions for alternative ways of using O\*NET. CFCBA suggested that DOL “freeze the responsibilities [on O\*NET] that the DOL currently agrees with,” and proposed that “[t]he list can be updated since jobs can evolve.” The Chamber of Commerce suggested that the final rule allow employers and employees to use O\*NET as a resource for determining whether work performed by an employee is part of a tipped occupation.

On the other hand, NELP and NWLC argued that the 2020 rule is problematic

because it used O\*NET as a tool for identifying duties related to a particular tipped occupation. Those groups argued, among other things, that O\*NET improperly reflects some duties as tip-producing but for which the full minimum wage should be paid, and endorsed the decision to not use it in the proposed rule. As Texas RioGrande Legal Aid commented, “the folly of relying on O\*NET for determining related duties is graphically illustrated by O\*NET’s inclusion of bathroom cleaning as a task for servers. Certainly, the DOL should not promulgate rules that *incentivize* restaurants to have servers contemporaneously cleaning bathrooms and carrying food to tables.”

A few commenters challenged what they perceived as the proposed rule’s specific assignment of tasks to certain definitional categories. MRA, for example, said that the proposed examples of work that fall within the various categories were “profoundly unhelpful and internally contradictory,” and asked “[i]f nail technicians can clean pedicure baths between customers to avoid customer waits, why cannot servers clean tables, dishes, and glasses to avoid customers having to wait for those items[?]” Hospitality Maine offered a variation of this argument, noting that the type of work performed by a tipped employee might depend on which *shift* they are working, such as a server toasting bread during a breakfast shift.

Several commenters representing employers, such as WPI, Seyfarth, AHLA, NRF/NCCR, Landry’s, and CFCBA, included specific examples of work performed by tipped employees that they believed were not addressed by the proposed rule and in some cases asked the Department to address those scenarios in a final rule. CFCBA noted that the rule might not address evolving occupations and tasks; as CFCBA observed, tasks now performed by servers and bussers, such as verifying that a patron does not have food allergies, are somewhat new in the industry.

Also, in response to the statement in the NPRM that food preparation is not part of a server’s tipped occupation but that garnishing a plate can be, commenters identified a number of basic, non-cooking tasks regularly performed by servers in the kitchen, and asked whether those tasks are sufficiently similar to garnishing plates such that they can be considered part of the tip producing work, including toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made

soup into bowls, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets.

Commenters such as CFCBA, AHLA, RLC/NRA and WPI also expressed confusion about application of the definitions in specific circumstances, including how they would apply to employees such as bussers and barbacks who receive tips from other tipped employees for the customer service support that they provide to them. Hospitality Maine observed that the rule could be read to state that a busser's tip-producing activity might exclude cleaning tables, and asked "[w]hat is a busser for if not to clean tables and reset them." Comments submitted by restaurant owners alleged that the proposed rule would limit employers' ability to take a tip credit for those employees who work in a supporting role because under the proposed rule all of their work would be categorized as directly supporting, rather than tip-producing. Several commenters, including WPI and AHLA, asked how employees in positions that both prepare and serve food, such as counterpersons and certain sushi chefs, would be treated under the proposed rule.

Several commenters, including some that opposed the rule, said that their concerns would be somewhat alleviated and that the Department's test would be strengthened if the Department added more examples of tasks that fall within each of the definitional categories. *See, e.g., Seyfarth, CWC, NWLC, Scott letter.* The Chamber of Commerce, for example, commented that if the Department finalized the rule, it should broaden and make clearer the distinction between "tipped work and tip supporting work." The commenters said that additional clarification of tasks that fit within each definitional category would reduce the likelihood of litigation over that issue and provide the clarity promised by the Department in the proposed rule. CWC urged the Department to include regulatory language or specific examples in the final rule showing how employers could comply in a more practical way and that would not create a significant disincentive toward use of the tip credit. Seyfarth urged the Department to provide clearer definitions and more specific examples regarding what does and does not constitute tip-producing work, and what constitutes the proposed temporally limited category of work that 'directly supports' tip-producing work, and noted that "[w]ithout such objective guidance, each employer will, in effect, be forced inappropriately to gamble that courts

will accept their interpretations and wage payments based on them."

## 2. Discussion of Comments and Explanation of Final Rule Modifications

### a. Work That Is Part of the Tipped Occupation—§ 531.56(f)(1).

The Department proposed in § 531.56(f) to clarify that an employer may take a tip credit only for time when the employee performs work that is part of the tipped occupation. Under the Department's proposal, an employee performs the work of their tipped occupation when they either perform work that produces tips, or perform work that directly supports the tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. After careful consideration of all of the comments and the practical realities of work in tipped industries, the Department finalizes this definition as proposed.

Since 1967, the Department has recognized in its dual jobs regulation, § 531.56(e), that an employee may be employed by the same employer in both a tipped occupation and in a non-tipped occupation. A straightforward dual jobs scenario exists when an employee is hired by the same employer to perform more than one job, only one of which is in a tipped occupation—for example, when an employee is employed by the same employer to work both as a server and a maintenance person. A dual jobs scenario also exists when an employee is hired to do one job but is required to do work that is not part of that occupation—for example, when an employee is hired as a server but is required to do building maintenance.

The Department has also recognized another dual jobs scenario, which is the main focus of this rulemaking, in which an employee is hired to work in a tipped occupation but is assigned to perform non-tipped work that directly supports the tipped producing work for such a significant amount of time that the work is no longer incidental to the tipped occupation and thus, the employee is no longer engaged in the tipped occupation. From 1988 to 2018, in recognition of the fact that every tipped occupation usually includes a limited amount of related, non-tipped work, the Department interpreted § 531.56(e) to provide a tolerance whereby employers could continue to take a tip credit for a period of time when a tipped employee performed non-tipped work that was related to the tipped occupation. The Department's 80/20 guidance interpreting § 531.56(e) also recognized, however, that it was necessary to limit the amount of time that an employer

could require a tipped employee to perform non-tipped work, because at some point, if a tipped employee performs too much non-tipped work, even if that work is related to the tipped occupation, the work is no longer incidental to the tipped work and thus the employee is no longer engaged in a tipped occupation. As the Department explained in legal briefs defending its 80/20 guidance, particularly where the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, providing protections to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute is essential to prevent abuse.

Multiple circuit courts have deferred to the 1967 dual jobs regulation and the 80/20 guidance, upholding the Department's determination that an employee is not engaged in a tipped occupation when they perform any non-tipped work that is outside of a tipped occupation or when they perform so much non-tipped work that is typically involved in their occupation that the employee is unable to earn tips for a substantial portion of their time. *See Marsh*, 905 F.3d at 633; *Fast*, 638 F.3d at 879; *see also Rafferty*, 2021 WL 4189698 at \*18 (independently affirming the reasonableness of a 20 percent limit on related non-tipped duties). The necessity of limiting employers' ability to take a tip credit to those times when an employee has an opportunity to earn tips was recently affirmed by the Eleventh Circuit, which, as noted in the Background section above, declined to defer to the Department's 2018–2019 guidance and concluded independently that a 20 percent limit on related duties was a reasonable interpretation of the dual jobs regulation and section 3(t). *See Rafferty*, 2021 WL 4189698 at \*18. As the court stated, the key is "to ensure that the reduced direct wage for tipped employees is available to employers only when employees are actually engaged in a tipped occupation" such that they can "earn the remainder of at least the minimum wage."<sup>23</sup> The Department therefore disagrees with commenters asserting that the FLSA

<sup>23</sup> Some commenters representing employers argued that a circuit split on this issue—referencing the earlier unpublished Eleventh Circuit *Pellon* decision—caused confusion for employers. *See, e.g., Seyfarth; Landry's.* Any confusion stemming from the unpublished *Pellon* decision should be resolved by the publication of the *Rafferty* decision, which reaches the same conclusion as the Eighth and Ninth Circuits, concluding that a 20 percent limitation on related duties is a reasonable interpretation of § 531.56(e).

precludes the Department from placing limits on the amount of non-tipped work that an employee may perform and still be considered to be engaged in a tipped occupation. *See, e.g., NRA/RLC.*<sup>24</sup>

As the Department stated in the NPRM, an employer may take a tip credit only for time when an employee performs work that is part of the employee's tipped occupation, because the tip credit provision allows employers to pay reduced direct cash wages based on the assumption that a worker will earn additional money from customer-provided tips. If tipped employees spend a substantial amount of time performing work in which they cannot earn tips, they have ceased to perform the work of a tipped occupation and are therefore not engaged in a tipped occupation. An employer cannot take a tip credit when a tipped employee performs work that is not part of the tipped occupation.

Accordingly, the Department declines to modify its definition of work that is part of a tipped occupation to remove any limitations on directly supporting work whatsoever. The final rule permits an employer to take a tip credit only for time spent performing directly supporting work if it is not performed for a substantial amount of time. The Department believes that this limitation on directly supporting work performed when an employee does not have the ability to earn tips is an essential backstop to prevent abuse of the tip credit.

The Department also disagrees with restaurant commenters' argument that the proposal is flawed because the Department failed to explain what non-tipped occupation tipped employees engage in when they perform a substantial amount of non-tipped, directly supporting work. When an

employee performs a substantial amount of non-tipped directly supporting work, it will sometimes be clear that they have become engaged in a well-established non-tipped occupation with a distinct title. This is the case, for example, when a bellhop spends several hours of a shift cleaning the hotel lobby. In such a scenario, the employee has stepped into the occupation of a hotel janitor. Other times, an employee may have performed so much non-tipped work that they have ceased to be engaged in their tipped occupation, but a well-established non-tipped occupational title may not exist to describe the work in which they are engaged. This is the case, for example, when a server spends several hours of a shift rolling silverware. If an employer hires someone solely to roll silverware, there would not be a well-established occupational title to describe that position, but it would defy common sense to suggest that the employee is engaged in an occupation that customarily and regularly receives tips. The Department is determining when an employee is engaged in a tipped occupation and when that employee has ceased to be engaged in the tipped occupation for which they were hired, not identifying which additional occupation the employee is now performing.

Finally, the Department also declines to adopt an exception from its definition of work that is part of the tipped occupation for employers whose tipped employees' average earnings, inclusive of tips, exceed 25 percent of the minimum wage, or a broad presumption of compliance with the FLSA's requirements for highly-tipped employees.<sup>25</sup> The Department does not believe that the statute permits an exception from the wage payment requirements in section 3(m) for employees who earn a significant amount in tips. As noted above, an employer may take a tip credit of no more than \$5.12 per hour towards its minimum wage obligation for only tipped employees, defined in section 3(t) as an employees engaged in a tipped

occupation. Otherwise, employers must pay the full minimum wage of \$7.25 per hour. As explained in this final rule, an employee is not engaged in a tipped occupation when they perform any work outside of a tipped occupation or a substantial amount of directly supporting work, notwithstanding the amount of tips they earn while they are engaged in a tipped occupation. Permitting employers to pay a direct wage of less than \$7.25 per hour for an employee who performs work outside of their tipped occupation or performs a substantial amount of directly supporting work would thus be contrary to section 3(t) and the requirements of the FLSA. This is the case regardless of the amount of tips the employee earns when they are engaged in a tipped occupation.

At the same time, the Department also declines to amend the final rule, as requested by some commenters representing employees, to state that an employer cannot take a tip credit for *any* time during which a tipped worker is not earnings tips. As explained above, the Department has long recognized, as far back as the 1967 regulation, that a tipped occupation usually includes a limited amount of related, non-tipped work, and therefore, a tipped employee may still be engaged in a tipped occupation while performing a limited, incidental amount of such work. The Department believes that the final rule provides strong protections that prevent tipped employees from performing more than an incidental amount of non-tipped work.

Finally, the Department also declines to adopt NWLC's recommendation to define work that is part of the tipped occupation to exclude any work an employee performs "when the employer's establishment is not open for service to customers." The Department declines to make such a change, but notes that, as discussed further below, because tipped employees cannot be serving customers when the establishment is not open to customers, they cannot be performing tip-producing work during that time. Therefore, if a tipped employee is performing directly supporting work when the establishment is not open to customers, the employer can only take a tip credit so long as that directly supporting work is not performed for a substantial amount of time.

#### b. Tip-Producing Work and Directly Supporting Work—§ 531.56(f)(2) and (3)

As explained in more detail below, the Final Rule amends the definitions of *tip producing work* and *directly supporting work* in response to the

<sup>24</sup> The RLC/NRA argued that "Congress has already spoken to how the law should treat a worker's status as a tipped employee" in a dual jobs situation, quoting the 1974 Senate Report as saying "[W]here the employee performs a variety of different jobs, the employee's status as one who 'customarily and regularly receives tips' will be determined on the basis of the employee's activities over the entire workweek." *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974). However, the sentence cited by RLC/NRA addresses which employees can participate in traditional tip pools under (now) section 3(m)(2)(A), not how to determine whether an employee is engaged in a tipped occupation pursuant to section 3(t). The Ninth Circuit rejected the RLC/NRA's precise argument in *Marsh*, noting that "the legislation accompanying the 1974 report did not make any changes to section 203(t). Further, the report expressly recognized 'the ethical question involved in crediting tips toward the minimum wage' and emphasized that tipped employees 'should have stronger protection to ensure the fair operation' of the tip credit provision. S. Rep. No. 93-690 at 42-43." *Marsh*, 905 F.3d at 622.

<sup>25</sup> Some commenters asserted that tipped workers are significantly better off than their non-tipped counterparts. *See* RLC/NRA; Chamber of Commerce; WPI. Although this may be true for some tipped workers at higher-end establishments, the Department does not believe that is the case at all establishments. The Department looked at data from the Current Population Survey and found that in 2020, the median usual weekly earnings (which includes tips) for waiters and waitresses was \$514. Comparing that to non-tipped restaurant workers, the median usual weekly earnings of dishwashers was \$528 and the median usual weekly earnings of cooks was \$510, while chefs and head cooks earned \$696. On average, waiters and waitresses do not earn more than non-tipped workers in the same establishment.

comments received to make the definitions clearer and more distinct from each other, to better explain the relationship between customer service and tip-producing work, and to provide more examples of the tasks that fall within each category of work and for additional occupations. In particular, the final rule provides that tip-producing work encompasses all aspects of the customer service for which a tipped employee receives tips. The Department believes that these amendments to the regulatory definitions to explain the relationship between customer service and tip-producing and directly supporting work, as well as the additional examples of the tasks that fall within each category of work, will assist employers and employees to make up-front determinations about the nature of the work. The Department believes that these clarifications should address many of the concerns raised by commenters representing employers about the administrability of the Department's test.

As discussed in greater detail below, the Department modifies the definition of tip-producing work to be "any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips." The final rule also makes clear that the Department intended tip-producing work to encompass all aspects of the service to customers for which the tipped employee receives tips. Therefore, in the proposal's example of "waiting tables," the Department intended to encompass any task logically included within the scope of that tip-producing work. This would include a server serving food and drink, as well as filling water glasses for their table, verifying whether a customer has food allergies, or cleaning a spill on their customer's table. However, the Department does not agree with the assertion made by RLC/NRA that "[a]ll tasks in a full-service restaurant . . . produce tips." A tipped employee must still be performing work for which he or she "customarily and regularly receives . . . tips." 29 U.S.C. 203(t); see *Rafferty*, 2021 WL 4189698 at \*18 ("[F]or the employer to qualify to take the tip credit, the employee's job must, by tradition and in reality, be one where she consistently earns tips."). A server receives tips for waiting on customers' tables, not for cleaning the restaurant. The Department believes that the clarifications to the definition of tip-producing work reflect the necessary nexus between the tipped employee's tip-producing work and the service to

customers that reflects that tipped employee's customary and regular work.

After considering comments, the final rule also modifies the definition *directly supporting work* to better distinguish it from tip-producing work, to reflect that this category of work is either performed in preparation of or otherwise assists the tip-producing customer service work. The Department believes that this modification, and the illustrative examples included, provide greater clarity and guidance to employers. The final rule as revised clarifies that "tip-producing work" includes all aspects of the work performed by a tipped employee when they are providing service to customers. "Directly supporting work" is either performed in preparation of or otherwise assists such tip-producing customer service work. Directly supporting work is the kind of work that is generally more foreseeable to employers and that employers are more likely to specifically assign. Thus, as explained in greater detail below in Section E, the Department believes that the clarified definitions of tip-producing and directly supporting work will address many of the commenters' concerns that it would be impossible to categorize and monitor the many variable tasks that tipped employees perform in the course of providing service to customers under the Department's proposal.

In the proposal, the Department noted that it was particularly concerned with time tipped employees spend performing tasks that do not produce tips, such that the employee was "no longer earning tips during that time." See 86 FR 32830. Many of the comments the Department received from tipped workers echoed this concern. Thus, when a tipped employee is not performing tip-producing work, but is instead performing directly supporting work, there are limitations on the amount of time the employee can perform that work because the employee's work is not generating tips. Specifically, employees may not perform directly supporting work for more than 20 percent of the work week or 30 continuous minutes.

The dual jobs test set out in this final rule is not, as RLC/NRA and other commenters asserted, a fixed list of tip-producing and directly supporting duties, but a functional test to determine when a tipped employee is engaged in their tipped occupation because they are performing the work of the tipped occupation, and therefore the employer may take a tip credit against its minimum wage obligations. Employers and employees can determine whether an employee's activity is tip-producing

by applying the definition of tip-producing work—that is, as explained below, by asking whether the task is "work that provides service to customers for which tipped employees receive tips." Likewise, employers and employees can determine whether an employee's activity is directly supporting by applying the definition of directly supporting work—that is, as explained below, by asking whether the task "is either performed in preparation of, or otherwise assists, the tip-producing customer service work." If a task is not tip-producing or directly supporting, then it is not part of the tipped occupation.

This functional test applies to all manner of tipped occupations, a feat that would be difficult, if not impossible, to achieve with a fixed list of duties for particular tipped occupations. Moreover, as new duties emerge, this functional test allows for better flexibility and adaptability to categorize those duties than would a fixed list of tip-producing and directly supporting duties. For example, some commenters representing both employers and employees noted that employees are receiving tips for different activities than they typically perform because of changes to restaurant's service models in response to the COVID-19 pandemic. See WPI (commenting that "a more robust 'to go' business" in restaurants "is now part of the new normal" and "significant tips [are] being received from patrons for 'to go' services, even when the guest receives none of the traditional 'waiter-type' services"); see also AHLA; ROC. If the Department were to publish a fixed list of duties, this list could not reflect such changes as they developed; likewise there would inevitably be a delay before a general resource such as O\*NET would be updated to accommodate such changes. The Department's functional test, however, means that employers and employees can apply the flexible definitions as needed if and when the landscape of tip-producing work changes. If during the COVID-19 pandemic, a server receives tips from serving customers by taking their phone orders and providing them with carry-out meals, employers can properly categorize those tasks as tip-producing. Similarly, the Department's functional test is sufficiently flexible to capture duties that might arise unexpectedly or infrequently in the course of serving customers, but are tip-producing, such as when a family checking in for vacation asks a bellhop who has carried

their luggage to their hotel room to take their photograph.

The Department appreciates the comments from employers that its dual jobs test should rely on or use O\*NET as guidance to determine what work is part of and not part of, or directly supporting of, a particular tipped occupation. However, these commenters misapprehended the nature of the Department's test. As explained above, the dual jobs test set out in the final rule, including the definitional section setting out examples for each category of work for various tipped occupations, is not intended to be a substitute for O\*NET's fixed list of duties that tipped employees are required by their employers to perform as part of their work. Rather, the final rule creates a functional test to measure whether a tipped employee is engaged in their tipped occupation, and uses examples to explain the application of that functional test. The Department believes that its revised test allows employers to determine the nature of their tipped employees' work prior to that work being performed, and, as explained above, is also flexible enough to be applied to new variations on tipped work. As the NPRM noted, O\*NET was not created to identify an employer's legal obligations under the FLSA. See 86 FR 32825. Further, as groups representing employees also pointed out, O\*NET only reflects what tipped employees are required to do by their employers, not the tasks that actually make up part of their tipped occupation, and is consequently not a helpful tool to use in determining whether an employee is engaged in their tipped occupation, even if, as under the 2020 rule, it is only used as a guide. As the Eleventh Circuit noted in *Rafferty v. Denny's*, using O\*NET to define what duties are part of a tipped occupation risks creating "a fox-guarding-the-henhouse situation" whereby employers, by regularly assigning certain non-tipped duties to their tipped workers, could "effectively render" such duties part of a tipped occupation, "whether those duties are, in fact, related or not to their [employees'] tipped duties." See 2021 WL 4189698 at \*18. In addition, unlike the Department's functional test, O\*NET does not distinguish between tip-producing and directly supporting duties. For these reasons, the Department believes that its revised test is clearer and more accurate to use than the 2020 rule's dual jobs test and in particular its use of O\*NET.

i. Tip-Producing Work—§ 531.56(f)(2)<sup>26</sup>

The NPRM proposed to define *tip-producing work* as "[a]ny work for which tipped employees receive tips," and included a number of examples illustrating the application of this definition to a number of occupations. The proposed rule explained, for example, that "[a] server's tip-producing work includes waiting tables [and] a bartender's tip-producing work includes making and serving drinks and talking to customers." The final rule adopts the definition of tip-producing work as proposed with slight modifications to reflect comments received on the proposed rule and to include additional examples of work that fit within that definitional category.

(a.) Comments

As explained above, the Department received a number of comments about the definition of tip-producing work, arguing that it did not provide enough clarity about the kinds of tip-producing work that are included within the occupations listed as well as other occupations that were not listed, and that it was unclear what tasks were encompassed within the examples of tip-producing work listed in the NPRM. Several commenters representing employers said that the proposed rule's references to types of tip-producing work, such as its reference to "waiting tables" as an example of a server's tip-producing work, were vague, and asked the Department in a final rule to set forth specific examples of tasks that are encompassed within those broad categories of work. For example, several commenters noted that the proposal's example of the tip-producing work of a server, waiting tables, was insufficiently clear. See, e.g., Littler ("For example, the Proposed Rule states that 'waiting tables' by a server is tip-producing, but nowhere does it explain what is encompassed by 'waiting tables.'"); AHLA ("DOL's categorization . . . of servers into a single duty of 'waiting tables' . . . comes with no reference or explanation"). WPI noted, for example, that tasks logically included within the scope of table service includes walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers; filling and refilling drink glasses; attending to customer spills or items dropped on the floor adjacent to customer tables; processing credit card and cash payments; and removing plates, glasses, silverware, or other items on the table during the meal service. NELP proposed

that the Department should clarify in a final rule that "tip producing" work must "be customer-facing, to ensure that workers paid a subminimum wage are truly in a position to earn tips that would bring them up to the minimum wage," arguing that without such a bright-line clarification, employers could continue to pay its tipped employees \$2.13 an hour for work that is not tip-producing.

As noted above, commenters stated that tipped employees may perform work that would be considered directly supporting under the proposal while they are also actively engaged in work that would be considered tip-producing, and expressed concern with the difficulty of categorizing such time. See Landry's; WPI; Small Business Administration (SBA) Office of Advocacy. For instance, Landry's noted that bartenders may perform tasks such as cleaning bar glasses and preparing drink garnishes while they are also taking orders from customers. See also SBA Advocacy (referring to a bartender serving drinks while cleaning and stocking the bar area).

As also noted above, commenters asked how the definition of tip-producing work applies to tipped employees such as bussers and service bartenders, who do not receive tips directly from customers but from the tipped employees that they support, such as servers. Relatedly, commenters asked the Department to identify tip-producing work for employees such as counterpersons and certain sushi chefs who both prepare and serve food to customers.

(b.) Discussion of Comments and Final Rule Modifications

In response to the comments received, the final rule modifies the definition of *tip-producing work* to clarify that customer service is a necessary predicate to a tipped employee's receipt of tips. The final rule defines *tip-producing work* as "any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips." The Department believes that the final rule's reference to customer service lends additional and important clarification about the types of work that qualify as tip-producing work under this test. Also in response to comments, § 531.56(f)(2)(ii) of the final rule includes more examples of tip-producing work, including for additional occupations, to illustrate the scope and application of this regulatory term. This list of examples is illustrative only and is not exclusive. The final rule also clarifies that the types of tip-

<sup>26</sup> Proposed § 531.56(f)(1)(i).

producing work on the list include all aspects of the service to customers for which the tipped employee receives tips. Although the NPRM listed a number of examples of tip-producing work for several tipped occupations, commenters expressed confusion and concern about the scope of the tasks encompassed in the tip-producing work identified in the proposed rule and also asked for examples of additional tip-producing work for those and additional occupations.

With respect to the scope of the tasks that are included within the category of work identified as tip-producing, the Department notes, as it explained above, that it intended this category of work to be broadly construed to logically include all activity within that category. The final rule thus clarifies that tip-producing work “includes all aspects of the service to customers for which the tipped employee receives tips.” The Department agrees with commenters who proposed that the tip-producing work of “waiting tables,” which can also be described as “providing table service,” encompasses the many different tasks in which the server engages in order to provide the table service, and changes the regulatory text to clarify that a server’s tip-producing work “includes providing table service, such as taking orders, making recommendations, and serving food and drink.” The Department also agrees with those commenters that suggested that a server’s tip-producing activity of waiting tables, or providing table service, generally encompasses the activities included within the scope of that table service: Walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers; filling and refilling drink glasses; attending to customer spills or items dropped on the floor adjacent to customer tables; processing credit card and cash payments; and removing plates, glasses, silverware, or other items on the table during the meal service.

The Department agrees with Seyfarth’s comment that in the hospitality industry, tip-producing work for servers, bartenders, and nail technicians is broader than simply serving food and drinks, or performing manicures. Thus, the Department agrees with the assessment that a bartender’s tip-producing work of preparing drinks may include generally talking to the customer seated at the bar and ensuring that a patron’s favorite game is shown on the bar television, a server’s tip-producing work includes bringing a highchair and coloring book for an infant seated at their table, and a nail

technician’s tip-producing work would include helping their customer pick out a complementary shade of polish, or taking their own customer’s payment. In response to comments asking how to categorize the time that a tipped employee spends performing directly supporting work when they are also actively engaged in tip-producing work, such as a bartender who organizes the bar while preparing drinks and chatting with customers, the Department notes that this rule does not limit the amount of time for which an employer may take a tip credit when a tipped employee is performing tip-producing work. Therefore, an employer may take a tip credit when a worker is performing tip-producing work even if the worker is also performing directly supporting work. This situation is in contrast to a tipped employee who performs directly supporting work while there is a lull in service, such as a server who folds napkins while waiting for her last table to pay their bill. In this situation, the server is not actively engaged in tip-producing work, and thus the time is properly categorized as directly supporting.

Moreover, as revised and described herein, the *tip-producing work* of some tipped employees would also include tasks that were identified as *directly supporting work* in the proposed rule, if those tasks are performed as part of service that the tipped employee is providing to a customer. The determination is whether the tipped employee can receive tips because they are performing that task for a customer. For example, a bartender who retrieves a particular beer from the storeroom at the request of a customer sitting at the bar, is performing tip-producing work, even though a bartender who retrieves a case of beer from the storeroom to stock the bar in preparation for serving customers, would be performing directly supporting work, as explained in the NPRM. *See* 86 FR 32829. A server adding a garnish to a plate of food in the kitchen before serving the prepared food to the customer, or wiping down a spill on a customer’s table, is performing the tip-producing customer service work of serving tables. In contrast, a server assigned to clean around the beverage station is performing work in preparation of or otherwise assisting tip-producing work and thus is performing directly supporting work.

The Department’s longstanding position has been and continues to be that general food preparation, including salad assembly, is not part of the tipped occupation of a server.<sup>27</sup> However, a

server’s tip-producing table service may include some work performed in the kitchen for their customer akin to garnishing plates before they are taken out of the kitchen and served, such as toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made soup, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets. The Department does not consider those tasks to be “food preparation” that is not part of the tipped occupation of a server when they are performed as part of the customer service work for which the tipped employee receive tips. This work is distinguishable from a server being assigned to perform general food preparation work in the kitchen, such as slicing fruits and vegetables, which is not part of the tipped occupation of a server.

Commenters also asked the Department to explain in the final rule how its definitional tests applied to tipped employees such as bussers, whose tip-producing work is performed in assistance of other tipped employees’ work. A busser’s tip-producing work includes assisting servers with their customer service work that produces tips, such as providing table service, just as a barback’s tip-producing work includes assisting bartenders with their customer work that produces tips, such as making and serving drinks. As revised, the definition of *tip-producing work* clarifies that this category applies to work, such as bussing tables, performed by tipped employees like bussers who do not directly receive tips from customers, because this work provides service to customers for which the tipped employee (*i.e.*, the busser) receives tips, even though they usually receive the tips from other tipped employees (*i.e.*, servers).<sup>28</sup> The tip-producing work of a busser would include, for example, resetting tables during table service in between customers, because this work is not done in preparation of the tip-producing work but *is* the busser’s tip-producing work, as compared to the busser’s work of setting tables, folding napkins and rolling silverware before the restaurant

<sup>28</sup> Several commenters commented that the proposed rule’s test was flawed because, *e.g.*, it catalogued the same work performed by a server and a busser in different definitional categories (*i.e.*, tip-producing and directly supporting). To the extent that this is true under the revised test, this categorization of tasks merely reflects the unique nature of some tipped employees’ tip-producing work, such as bussers and service bartenders, who receive tips from other tipped employees such as servers because they are supporting their customer service, tip-producing work.

<sup>27</sup> *See, e.g.*, 1979 Opinion Letter.

is open to customers, which is done in preparation of the tip-producing work of resetting tables during table service.<sup>29</sup> The definition of *tip-producing work* also applies to service bartenders, who are tipped by servers because they prepare drinks for servers to bring to tables and therefore perform customer service work even if their work is not customer facing.<sup>30</sup>

The final rule also expands the list of examples of work that would meet the definition of tip-producing work, including for additional occupations, in response to comments asking for more examples to illustrate the regulatory definition. This list of tasks that are encompassed within the tip-producing activities identified in the regulatory definition is not exhaustive and can be fact-specific. As noted above, the final rule also explains that tip-producing work, including the types of work on that list, includes all aspects of the service to customers for which the tipped employee receives tips. The final rule explains, for example, that a bartender's tip-producing work of making and serving drinks includes the customer-service work of talking to customers at the bar and, if the bar includes food service, serving food to customers. The tip-producing work of a nail technician at a nail salon includes, for example, the customer service work of performing manicures and pedicures but would also include customer service work such as assisting the patron to select the type of service, including the right shade of polish. The tip-producing work of a parking attendant includes, for example, the customer service work of parking and retrieving cars and moving cars in order to retrieve a car at the request of customers. The tip-producing work of a service bartender includes, for example, the customer service work of preparing drinks for table service. The tip-producing work of a hotel housekeeper includes, for example, the customer service work of cleaning hotel rooms. The tip-producing work of a busser includes, for example, assisting servers with their tip-producing work, such as table service,

<sup>29</sup> Further illustrating this point, a housekeeper's work of cleaning a room to get it ready for a customer is not *directly supporting work* done in preparation of the tip-producing work of cleaning hotel rooms for customers, but *is* the tip-producing work, as compared with work that directly supports the room cleaning, such as stocking the housekeeping cart.

<sup>30</sup> As noted above, both bussing and service bartending have long been considered to be occupations that customarily and regularly receive tips, as opposed to cooks or dishwashers, for example. See S. Rep. No. 93-690, at 43. This final rule does not disturb these longstanding understandings.

including filling water glasses, clearing dishes from tables, fetching and delivering items to and from tables, and bussing tables, including changing linens and setting tables. The tip-producing work of a hotel bellhop includes, for example, the customer service work of assisting customers with their luggage. All of this work is work that provides service to customers for which tipped employees receive tips. Also in response to comments, the final rule clarifies that the tip-producing work of a tipped employee who both prepares and serves food to customers, such as a counterperson or certain types of sushi chefs, includes all tasks that are performed in order to provide the customer service work of preparing and serving the food.

For these reasons, the Department finalizes the definition of *tip-producing work* with slight modifications and renumbers that provision as § 531.56(f)(2).

ii. Directly Supporting Work—  
§ 531.56(f)(3)<sup>31</sup>

Proposed § 531.56(f)(1)(ii) addressed work that does not itself generate tips but that supports the tip-producing work of the tipped occupation because it assists a tipped employee to perform the work for which the employee receives tips. The NPRM proposed to define this *directly supporting work* as work that is part of the tipped occupation provided it is not performed for a substantial amount of time, and defined the term as “work that assists a tipped employee to perform the work for which an employee receives tips.” The final rule adopts the definition of directly supporting work as proposed with slight modifications to reflect comments received on the proposed rule, clarify the scope of the definition, and to add additional examples of work that fit within that definitional category.

(a.) Comments

Chairman Bobby Scott and several other Members commented that the proposed rule's reference to “directly supporting” work was preferable to the “related duties” terminology used in previous Departmental dual jobs guidance because “related duties” potentially captured work that was only remotely related to the tipped occupation. As with tip-producing work, commenters criticized the proposed rule's definition of directly supporting work as unclear, and asked the Department to either abandon its new test or to make its definitions clearer and easier to use. A few

<sup>31</sup> Proposed § 531.56(f)(1)(iii).

commenters asked the Department to add more examples of work that fell within this definition for additional tipped occupations. MRA asked whether the proposed rule's list of directly supporting work was finite, such as, for example, whether “slicing and pitting fruits for drinks” is the only permissible “side work” for bartenders.

Commenters also asked the Department how the proposed rule applied to down time, where employees do not have any customers to serve. The CFCBA, for example, provided an example of a server who spends 15 minutes performing directly supporting work before the restaurant opens and then does no work for the next 30 minutes waiting for her first table. MRA similarly asked how the test would apply to periods of time when a tipped employee does not have a customer to serve and is “sit[ting] or stand[ing] idle.” See also SBA Advocacy (“Small restaurants commented that a typical workday there may include a wave of customers, followed by a slowdown.”).

(b.) Discussion of Comments and Final Rule Modifications

In response to comments, § 531.56(f)(3) of the final rule modifies the proposed rule's definition of *directly supporting work* to clarify the scope of work that fits within this category and adds additional examples to further illustrate the application of the definition. The final rule explains that directly supporting work is work that is part of the tipped occupation, provided it is not performed for a substantial amount of time. As revised, the final rule also explains that directly supporting work is work which is performed by a tipped employee in preparation of, or to otherwise assist tip-producing customer service work, and the examples illustrate this concept. *Directly supporting work* would include, for example, work performed by a tipped employee such as a server or busser in a restaurant before or after table service, such as rolling silverware, setting tables, and stocking the busser station, which is done in preparation of the tip-producing customer service work.

By clarifying in the final rule that the definition of tip-producing work is work that provides service to customers—including all aspects of that service—for which the tipped employee receives tips, and directly supporting work is performed in preparation for that work, it is easier to distinguish between tip-producing and directly supporting work, and it is easier for employers to keep track of work included in the 20 percent and 30-minute limits. As



explained above, the tip-producing work of some tipped employees may also include tasks that are identified as examples of directly supporting work when those tasks are performed as part of service that the tipped employee is providing to a customer. For example, a bartender who in the course of providing tip-producing service to customers, wipes down the surface of the bar and tables in the bar area where customers are sitting, and cleans bar glasses and implements used to make drinks for those customers, is performing tip-producing work because she is performing service to customers for which the bartender receives tips. If the bartender performs these same tasks before or after the restaurant is open, these same tasks would be directly supporting work because they are not performed as part of service to customers for which the tipped employee receives tips.

In response to comments asking how to categorize a tipped employee's down time, when the employee has started their shift and is waiting for customer service to commence but is otherwise not performing any customer service work or work in support of customer service work, the Department notes that this question is answered by the revised definitions in the final rule. In this circumstance, where the employee is not providing service to customers for which the tipped employee receives tips, that time cannot be categorized as tip-producing work under the revised definition. Because the tipped employee is available to immediately provide customer service when the customer arrives, however, the time is being spent in preparation of the customer service, and is therefore properly categorized as directly supporting work.

Also in response to comments, the final rule adds examples of directly supporting work, including for additional occupations, to illustrate the scope and application of this regulatory term. The examples illustrate tasks performed by a tipped employee that are *directly supporting work* when they are performed in preparation of or to otherwise assist the tip-producing customer service work and when they do not provide service to customers. This list is illustrative but not exhaustive.

The final rule explains, for example, that when performed in preparation of or to otherwise assist tip-producing customer service work, a server's directly supporting work includes dining room prep work, such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under

tables in the dining area, and setting and bussing tables. The final rule also clarifies that a bartender's directly supporting work, when performed in preparation of or to otherwise assist tip-producing customer service work, includes work such as slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies, and vacuuming under tables in the bar area. A bartender's directly supporting work, when performed in preparation of or to otherwise assist tip-producing customer service work, would also include, for example, cleaning ice coolers and bar mats, and making drink mixes and filling up dispensers with drink mixes. If a bartender works at a bar that includes food service to customers seated in the bar area, the bartender's directly supporting work would include, for example, work that is done in preparation of or otherwise assists the bartender's tip-producing work of providing table service, including the basic food preparation work identified for servers, above. A nail technician's directly supporting work includes, for example, cleaning pedicure baths between customers, cleaning and sterilizing private salon rooms between customers, and cleaning tools and the floor of the salon. The directly supporting work for a parking attendant includes, for example, cleaning the valet stand and parking area, and moving cars around the parking lot or garage to facilitate the parking of patrons' cars. The directly supporting work of a service bartender includes, for example, slicing and pitting fruit for drinks, cleaning bar glasses, arranging bottles, and fetching liquor or supplies before or after the bar is open to customers. The directly supporting work of a hotel housekeeper includes, for example, stocking the housekeeping cart. The directly supporting work of a busser includes, for example, pre- and post-table service prep work such as folding napkins and rolling silverware, stocking the busser station, and vacuuming the dining room, as well as wiping down soda machines, ice dispensers, food warmers, and other equipment in the service alley. The directly supporting work of a hotel bellhop includes, for example, rearranging the luggage storage area and maintaining clean lobbies and entrance areas of the hotel.

For these reasons, the final rule makes slight modifications to the definition of *Directly supporting work* and renumbers that provision as § 531.56(f)(3).

c. Work That Is Not Part of the Tipped Occupation—§ 531.56(f)(5)<sup>32</sup>

The NPRM proposed to define *work that is not part of the tipped occupation* as “any work that does not generate tips and does not directly support tip-producing work.” Consistent with the other revisions to the definitional section, § 531.56(f)(5) of the final rule slightly modifies the proposed rule's definition of work that is not part of the tipped occupation to also reflect its relationship to customer service. The Department also slightly modifies the definition of work that is not part of the tipped occupation to reflect the changes to the definitions of tip-producing work and directly supporting work. As finalized, the rule explains that work that is not part of the tipped occupation is any work that does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. The final rule also adds examples of work from additional occupations that fall within this definitional category to illustrate the scope and application of this regulatory term. As in the proposal, and consistent with longstanding Department enforcement, an employer may not take a tip credit for any time spent on work that is not part of the tipped occupation.

#### i. Comments

Employees and groups representing employees generally supported the NPRM, including its definition of work that is not part of the tipped occupation. As discussed above, some commenters representing employers commented that the proposed rule's definition of work that is not part of the tipped occupation was flawed because the Department lacked statutory authority to limit an employer's ability to take a tip credit for employees who are engaged in a tipped occupation irrespective of the type of work those employees are performing. Relatedly, some commenters representing employers argued that the NPRM's examples of work that is not part of the tipped occupation improperly included work that should be categorized as work that is part of the tipped occupation.

Commenters representing employers also proposed that certain tasks highlighted by the Department as work that is not part of the tipped occupation were more nuanced than the Department realized. For example, the NPRM stated that food preparation is not part of a server's tipped occupation because it is not tip-producing work and

<sup>32</sup> Proposed § 531.56(f)(2).

does not directly support the tip-producing work, but that garnishing a plate is directly supporting work for the tipped occupation of server. As explained above, commenters identified a number of other basic, non-cooking tasks regularly performed by servers in the kitchen as part of their customer service, such as toasting bread to accompany prepared eggs, and asked whether those tasks are sufficiently similar to garnishing plates such that they can be considered directly supporting work.

A few employer-side commenters also asked the Department to distinguish bathroom cleaning, which WPI identified as work that is *not* part of a server's tipped occupation, from the work that those commenters identified as regularly performed by servers: Monitoring bathrooms to ensure that they are tidy and stocked with supplies, and/or to consider such work to be *de minimis*. RLC/NRA objected to the Department's statement that the task of cleaning bathrooms is not related to the tipped occupation of a server, stating that "[t]ipped employees, including servers and hosts, can and do spend time cleaning bathrooms. This does not typically mean conducting a deep clean or scrubbing toilets during a meal service, but . . . monitoring the cleanliness and readiness of the bathrooms while the restaurant is open. This can include wiping up water on the counters, picking up paper on the floors, quick mopping of the floors to address spills, or making sure that there is an adequate supply of toilet paper, paper towels, and hand soap." WPI opined that while it is completely reasonable that cleaning bathrooms should be compensated at the full minimum wage, the final rule should create a *de minimis* exception for servers who might clean up a spill in the restroom or pick up a piece of paper off the floor. Groups representing employees, on the other hand, commented that the proposed rule properly concluded that cleaning bathrooms is not part of a server's tip-producing work.

#### ii. Discussion of Comments and Final Rule Modifications

Consistent with the revisions to the definitions of tip-producing work and directly supporting work, § 531.56(f)(5) of the final rule slightly modifies the proposed rule's definition of *work that is not part of the tipped occupation* to also reflect its relationship to customer service and to reflect the changes in the final rule to a few of the other definitions. As finalized, the rule explains that work that is not part of the

tipped occupation is any work that does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work.

In response to comments, the final rule also expands upon its existing examples of work that is not part of the tipped occupation and includes additional occupations. This list is illustrative only and is not exclusive. As explained in more detail above, while the final rule states that food preparation is not part of the tipped occupation of a server, it also provides that certain types of work performed by a server in the kitchen, such as toasting bread to accompany prepared eggs, is sufficiently similar to garnishing plates such that it can be considered part of the server's tip-producing table service rather than food preparation. As revised, the final rule also explains, for example, that preparing food, including salads, and cleaning the kitchen and bathrooms, is not part of the tipped occupation of a server because that work does not provide service to customers for which those tipped employees receive tips, and does not directly support tip-producing work. The final rule's conclusion that salad preparation is food preparation and is therefore not part of the tipped occupation of a server is consistent with the Department's opinion letters providing that an employer cannot take a tip credit for any time servers spend preparing salads, a position that the Department reaffirms here. The Department appreciates the comments explaining that restaurant employers typically ask servers to monitor bathrooms for cleanliness. However, the Department's position for many years was that cleaning bathrooms is not part of the tipped occupation of a server, and it reaffirms that position here.<sup>33</sup> Because cleaning bathrooms is work for which the employer cannot take a tip credit against its minimum wage obligations, the Department also declines to adopt the suggestion that it create a *de minimis* exception for this limited amount of work because of concerns that such an exception would be ripe for abuse.

The final rule also provides the following examples illustrating *work that is not part of the tipped occupation* because the work does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. Preparing food, including salads, and cleaning bathrooms, is not part of the

tipped occupation of a server. Cleaning the dining room or bathroom is not part of the tipped occupation of a bartender. Ordering supplies for the salon is not part of the tipped occupation of a nail technician. Servicing vehicles is not part of the tipped occupation of a parking attendant. Cleaning the dining room and bathrooms is not part of the tipped occupation of a service bartender. Cleaning non-residential parts of a hotel, such as the exercise room, restaurant, and meeting rooms, is not part of the tipped occupation of a hotel housekeeper. Cleaning the kitchen or bathrooms is not part of the tipped occupation of a busser. Retrieving room service trays from guest rooms is not part of the tipped occupation of a hotel bellhop.

For these reasons, the Department finalizes the definition of *Work that is not part of the tipped occupation* with slight modifications and renumbers that provision as § 531.56(f)(5).

#### E. Substantial Amount of Time— § 531.56(f)(4)<sup>34</sup>

In the NPRM, the Department proposed to limit directly supporting work that is part of a tipped occupation to less than a substantial amount of time. The Department proposed to define *substantial amount of time* to include two categories of time. The Department proposed that an employee has performed directly supporting work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeded 20 percent of the hours worked during the employee's workweek or (2) was performed for a continuous period of time exceeding 30 minutes. Under the first prong, the Department proposed to provide a tolerance of 20 percent of an employee's workweek, such that an employer could not take a tip credit for any time spent performing directly supporting work that exceeded 20 percent of the workweek. Under the second prong, the Department proposed to establish a threshold of 30 continuous minutes of directly supporting work, such that, if an employee performed directly supporting work for a continuous, or uninterrupted period that exceeded 30 minutes, the employer could not take a tip credit for that entire continuous period of time that was spent performing the directly supporting work. As discussed in greater detail below, the Department finalizes its definition of substantial amount of time as proposed with modifications.

<sup>33</sup> See, e.g., Br. for Department of Labor as Amicus, at 18 n.6, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011).

<sup>34</sup> Proposed § 531.56(f)(1)(iii).

## 1. Comments

Commenters representing employees were generally supportive of including specific time limits in the definition of substantial amount of time and supported this approach over that taken in the 2020 Tip final rule. Commenters including NELP, Fish Potter Bolaños, Community Legal Services of Philadelphia, and ROC United argued that “bright-line rules” such as 20 percent of a workweek or 30 continuous minutes, would make it easier to comply with and enforce limits on directly supporting work. And they emphasized that such bright lines were an improvement over the “reasonable time” standard in the 2020 Tip final rule, which, they argued, gave “unscrupulous employers” too much latitude to abuse the tip credit because the term “reasonable time” was not specifically defined.

In contrast, several commenters representing employers expressed opposition to specific time limits on directly supporting work, urging “the Department to eschew the 80/20 rule (or any other mathematical formula) for determining tip credit eligibility for side work.” *See, e.g.,* MRA. Many employers and commenters representing employers expressed concern that it would be too difficult to monitor workers’ directly supporting duties to ensure they do not exceed the 20 percent tolerance or the 30-minute limit or distinguish such duties from duties outside the occupation. *See* AHLA; CWC; Landry’s; Chamber. Although the NPRM did not propose a new recordkeeping requirement, these commenters maintained that employers would need to track employees’ time performing various tasks in order to comply with the regulation and also to defend themselves against claims that the employer improperly took a tip credit when employees performed a substantial amount of directly supporting work. *See, e.g.,* WPI; RLC/NRA. The CWC warned that the Department’s new test would require “perpetual surveillance” of tipped workers to determine what type of work they were performing and to track the amount of time spent performing work in each definitional category. The SBA Office of Advocacy also stated that, according to the feedback it had received from small businesses, the proposal would require employers to “track their workers’ tasks minute to minute to utilize the tip credit wage,”

which would be burdensome for small employers.<sup>35</sup>

In particular, many commenters representing employers and individual employers expressed concern about the difficulty of tracking time when employees perform what the commenters understood to be directly supporting activities when the employee is also providing service to customers. *See, e.g.,* WPI (commenting on the “impracticalities” of tracking and recording time when employees “quickly pivot” between tip-producing and directly supporting work, or perform such work “contemporaneously”); RLC/NRA (stating that during a shift, a tipped employee might “toggle[] dozens or hundreds of times back and forth” between tip-producing and directly supporting activity); Landry’s (stating that it is “nearly impossible to track” tasks when employees “switch between them quickly throughout a shift,” or “possibly even perform some of the tasks simultaneously”). RLC/NRA stated, for example, that “[i]n a span of just five minutes, a waitress may take customer orders at a table, clear dishes from a second table, bring beverages to a third table, run a tub of dirty dishes back to the kitchen, pick up and deliver the entrées to the first table, and put on a fresh pot of coffee at the beverage station, before heading back to the second table to take customer orders.” RLC/NRA; *see also* MRA (stating that servers frequently perform “one or more” directly supporting tasks “between seating customers and waiting on tables.”).

For such tasks, which “must be performed on an immediate, time-sensitive basis,” Seyfarth Shaw disagreed with the Department’s statement in the NPRM that employers could “adjust their business practices and staffing to reassign such duties from tipped employees to employees in non-tipped occupations,” *see* 86 FR 32833. The NRF/NCCR asserted that because employees can complete many tasks that are interspersed with customer service in very little time—including sometimes only a “few seconds”—it will take employers “longer to track, quantify, and record many tasks than it would to actually do them.” The Chamber of Commerce and other commenters representing employers asserted that employees would need to “constantly enter their time spent on

specific activities into the payroll system,” in order to track tasks performed when the tipped employee is providing service to customers, which would disrupt workflow and productivity.

Because of these stated difficulties in tracking tasks performed during customer service, some commenters representing employers argued that the Department’s proposal would compel employers to stop taking advantage of the FLSA’s tip credit provision. *See e.g.,* CWC; AHLA. AHLA and other employer commenters claimed that the proposal would make it so difficult to use the tip credit as to effectively disallow it, contrary to Congressional intent. *See* AHLA (stating that the proposal “seems to ultimately eliminate the tip credit by regulatory fiat”); Chamber (“The DOL cannot substitute its [will] for that of Congress.”); NRF (claiming that the Department’s intention was to eliminate the tip credit “through the promulgation of a regulation with which even the best intentioned employer could not possibly comply”). CWC requested that if the Department maintains time limits on directly supporting work it include “regulatory language or specific examples showing how employers could comply in a more practical way that would not create a significant disincentive toward use of the tip credit.” CWC also suggested that the Department “consider borrowing concepts from other regulations interpreting the FLSA focusing on the importance of various job duties rather than focusing on the time spent performing specific tasks.”

Given concerns about tracking directly supporting work performed when the tipped employee is providing service to customers, Seyfarth Shaw urged the Department to adopt a “safe harbor” provision shielding employers from liability for a tip credit violation when an employee fails to promptly inform the employer that they spent a substantial amount of time on directly supporting work.

Several commenters also urged the Department to consider retaining the related duties test from the 2020 Tip final rule, which did not include bright-line quantitative limits on directly supporting work and which they asserted would be more workable for employers than the proposal. *See* AHLA; CWC; Landry’s; Chamber; *see also* CFCBA (arguing that “the average person” would find the NPRM proposal “more confusing” than the 2020 Tip final rule). As noted above, under the 2020 Tip final rule, an employer could continue to take a tip credit for “any hours” that an employee performed

<sup>35</sup> As discussed below, SBA Office of Advocacy also argued that the Department underestimated the impact of its proposal on small entities and encouraged the Department to produce an Initial Regulatory Flexibility Analysis with Regulatory Alternatives.

related, non-tipped duties either “contemporaneously” with their tipped duties,” or for “a reasonable time” immediately before or after performing the tipped duties.” See 85 FR 86790. In the NPRM to this final rule, the Department explained its concern that the 2020 Tip final rule failed to provide clear definitions of either “contemporaneously” or “for a reasonable time,” leaving unresolved the boundaries on non-tipped work that is part of an employee’s tipped occupation, and employers uncertain and employees unprotected as a result. 86 FR 32825. The Chamber of Commerce, however, asserted that “[w]hile some may question whether a ‘reasonableness’ standard would create greater predictability, a reasonableness standard at least allows for a less microscopic analysis of records.” WPI expressed a preference for the 2020 Tip final rule because it provided that a tipped employee could perform “any tasks that are usually and customarily part of the tipped occupation” and thus, “dispensed with the need to determine which duties count as ‘tip-producing’ or ‘related duties’.”

## 2. Discussion of Comments and Explanation of Final Rule Modifications

The Department has evaluated the comments it received and has decided to retain the proposed time limits on directly supporting work in its definition of substantial amount of time, with modifications. Under § 531.56(f)(4), as finalized, an employee has performed directly supporting work for a substantial amount of time if the tipped employee’s directly supporting work either (1) exceeds 20 percent of the hours worked during the employee’s workweek or (2) is performed for a continuous period of time exceeding 30 minutes.

The Department agrees with commenters representing employees that it is important to maintain bright-line limits on the amount of time an employer can pay an employee a cash wage of \$2.13 per hour during which the employee does not have an opportunity to earn tips. The Department believes, moreover, that the modifications to this final rule resolve employers’ practical concerns about complying with quantitative limits on directly supporting work. In particular, the Department clarifies in this final rule that some of the tasks that commenters representing employers may have understood as “directly supporting” tasks—which count toward the time limits—are tip-producing tasks when a tipped employee performs the task to serve their own customer—and

do not count toward the time limits. As explained above, the final rule provides that tip-producing work encompasses all aspects of the service performed by a tipped employee for their customers, for which the tipped employee receives tips. Directly-supporting work, in contrast, is performed either in preparation of or to otherwise assist the tip-producing customer service work. As explained above, the tip-producing work of some tipped employees may also include tasks that are identified as examples of directly supporting work when those tasks are performed as part of service that the tipped employee is providing to a customer.

For example, if a server takes customer orders at a table, sets the table she is serving, brings beverages to a third table, picks up a slice of pie, adds ice cream, and delivers it to the first table, and puts on a fresh pot of coffee at the beverage station for all of her tables, before heading back to the second table to take customer orders, the server is performing tip-producing work for the entire time. Accordingly, there is no need for the server’s employer to count any of this work toward the 20 percent or 30-minute limits. Likewise, if a bartender takes a customer’s order and prepares them a drink, takes a second customer’s order and leaves the bar area to retrieve a particular wine for the customer, returns to the bar area and wipes down the bar where customers are seated, the bartender is performing tip-producing work for the entire time and there is no need to count any of this work toward the 20 percent limit or 30-minute limit.

On the other hand, if a server folds napkins for the dinner rush after her lunch customers leave, or rolls silverware for 15 minutes at the end of the night while waiting for their last table to pay their bill, or if a bartender is assigned to stock the bar generally between serving customers (as opposed to more specifically retrieving a particular bottle of alcohol to fulfill a customer’s order), such side work would be categorized as directly supporting work because this work is not being performed as part of the tipped employee’s service to customers for which they receive tips. Similarly, if a server is assigned to a general task such as filling condiment containers to be completed during the breakfast shift during lulls in customer service, that would be directly supporting work since it is preparatory work and is not part of providing service to a customer for which the employee receives tips. As a result, these tasks would count against the 20 percent and 30-minute limits.

But employees do not perform such tasks on an “immediate, time-sensitive basis,” as they might perform tasks for their customers and for which they receive tips. See Seyfarth. Nor do employees need to “quickly pivot” or “switch” between such tasks while serving customers. See WPI; Landry’s. To the contrary, as mentioned above in Section D.1, many of the commenters who are tipped workers stated that they regularly performed such tasks in scheduled blocks of time. The Department believes, therefore, that employers can assign directly supporting work so that employees do not perform this work for more than a substantial amount of time. Alternatively, employers can monitor (or even track, if the employer so chooses) such tasks with relative ease, and without needing to account for employees’ duties minute-by-minute. Thus, by clarifying its definitions of tip-producing and directly supporting work, the Department believes that it has substantially alleviated employers’ concerns about complying with quantitative limits on directly supporting duties.

The Department declines to eliminate the time limits on directly supporting work and retain the qualitative limits on related duties test in the 2020 Tip final rule, as several commenters representing employers suggested. As the Department noted in the proposal, and as the AG Coalition and numerous employee advocates noted in their comments, the 2020 Tip final rule failed to define the key terms “contemporaneously” and “for a reasonable time immediately before or after.” See 86 FR 32855. This led to confusion and also failed to provide sufficient guidelines to determine when an employee ceased to be engaged in a tipped occupation. For instance, although the Department did not specifically define the term “reasonable time” in the 2020 Tip final rule, it stated that the standard still provides a “sufficiently intelligible” basis for distinguishing between duties for which an employer could and could take a tip credit; the Department also attempted to illustrate the reasonable time principle with an example. See 85 FR 86768 (comparing a hotel bellhop who spends 2 hours performing related non-tipped duties after spending their first 8 hours of their shift continuously performing tipped duties with one who spends 12 minutes of every hour over a 10-hour shift performing related duties). However, commenters representing employers and employees alike interpreted the 2020 Tip final rule’s

“reasonable time” language not as a means for determining when an employee has performed so much related non-tipped duties that they may no longer be paid with a tip credit but as an authorization to employers to take a tip credit for essentially *any* related non-tipped duties. *See, e.g.*, WPI (“The December 2020 Rule dispensed with the need to determine which duties count as ‘tip-producing’ or ‘related duties,’ and provided that a tipped employee could perform any tasks that are usually and customarily part of the tipped occupation.”); NWLC (arguing that the “‘reasonable time’ language” in the 2020 Tip final rule “removed any meaningful temporal restriction on the non-tipped duties for which an employer may claim a tip credit.”).

The Department did not intend the 2020 Tip final rule to provide no limits at all on the amount of non-tipped duties that a tipped employee can perform and for which an employer can a tip credit. However, given that the 2020 Tip final rule did not specifically define its key terms and did not have any of the quantitative limitations on non-tipped work that the Department is adopting in this final rule, the Department believes that, under the 2020 Tip final rule, employers would have been able to require tipped employees to perform a substantial amount of non-tipped work, preventing those employees from either earning tips or in the alternative, earning the full minimum wage as the cash wage. Such an outcome is contrary to the Department’s longstanding interpretation of the section 3(t) of the FLSA, affirmed by multiple circuit courts, pursuant to which an employee is no longer engaged in a tipped occupation when they perform so much non-tipped work that the employee is unable to earn tips for a substantial portion of their time. *See Rafferty*, 2021 WL 4189698 at \*18; *Marsh*, 905 F.3d at 633; *Fast*, 638 F.3d at 881. The Eleventh Circuit has also suggested that, by removing quantitative limits on non-tipped duties that a tipped employee can perform, the 2020 Tip final rule is in tension with the fundamental protective purpose of the FLSA. *See Rafferty*, 2021 WL 4189698 at \*16 (concluding that the 2018–2019 guidance, which the 2020 Tip final rule largely codified, “tramples the reasons for the dual-jobs regulation’s existence and is inconsistent with the FLSA’s policy of promoting fair conditions for workers” because, as the Department acknowledged in the NPRM for the 2020 Tip final rule, it could lead to a loss of earnings for tipped workers).

By replacing inadequately-defined, qualitative limits on non-tipped work (“contemporaneous” and “reasonable time”) with bright-line quantitative limits, this rule will ensure that employees compensated with the tip credit do not perform a substantial amount of non-tipped, directly supporting work. This rule thus accords with the Department’s longstanding interpretation of section 3(t) and better effectuates the purpose of the statute. The Department agrees with commenters such as NELP, WLP, and ROC that clear, bright-line limits on the amount of directly supporting work that can be performed by a tipped employee facilitate compliance by helping make employees aware of their rights and helping make employers aware of their responsibilities. The Department also believes that bright-line limits on employers’ use of the tip credit are important to protect both protect vulnerable tipped employees and well-meaning employers from unscrupulous employers that might abuse the tip credit by shifting significant amounts of non-tipped work onto tipped workers.

The Department also declines to specifically adopt the proposal by two commenters that the Department lift any “temporal limit or cap” on directly supporting work that is performed “contemporaneously with customer service.” The Department believes that clarifying its definitions of tip-producing and directly supporting work in the final rule will address the concerns animating this request.

The Department does not agree with commenters that argued that its proposal would have effectively eliminated the tip credit. The Department cannot amend the FLSA, but is tasked with enforcing it. As the Department stated in the NPRM, because employers can pay as little as \$2.13 in direct cash wages, it is important to ensure that this reduced direct cash wage is only available to employers when their employees are actually engaged in a tipped occupation. However, to the extent that commenters argued that overly burdensome tracking and task-by-task monitoring would have effectively disallowed the tip credit, the Department believes that the modifications in the final rule that more clearly explain and distinguish between tip-producing and directly supporting work resolve those concerns.<sup>36</sup>

<sup>36</sup> The Department also disagrees with those commenters representing employers who suggested that the proposal is in tension with *Encino Motorcars, LLC v. Navarro*, which provides that the FLSA’s exemptions should be given a fair, rather than narrow, reading, 138 S.Ct. 1134, 1142 (2018). *See* AHILA; WPI. The tip credit is not an exemption

Likewise, the Department declines to adopt a “safe harbor” provision requiring employees to promptly notify their employers that they have spent a substantial amount of time on directly supporting work or forfeit their right to be paid a cash wage equal to the full minimum when they are no longer engaged in a tipped occupation. Such a policy would improperly place the burden for compliance with employer’s minimum wage obligations on employees, and is inconsistent with the FLSA. *See, e.g., Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (quoting *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 707 (1945)) (“FLSA rights cannot be . . . waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”). Moreover, the Department believes that the concerns motivating this request from commenters representing employers—namely, the difficulty of tracking tasks performed while tipped employees are serving customers—are ameliorated by the modifications the Department made described above.

a. 20 Percent of the Workweek—  
§ 531.56(f)(4)(i)

Multiple commenters representing employees supported the Department’s proposal to apply a 20 percent workweek tolerance to non-tipped, directly supporting work. *See, e.g.*, IWPR; ROC; WLP (describing it as a “crucial limit” when employers are paid a direct cash wage as low as \$2.13 an hour). In addition, the Scott letter stated that 20 percent of the workweek was “a reasonable standard for restricting the use of the tip credit.” Other commenters representing employees, however, urged the Department to reduce the tolerance to five or 10 percent, arguing that the FLSA permits “a more stringent threshold for the tasks for which an employer can pay a worker just \$2.13 an hour.” *See, e.g.*, Network; CLASP. NWLC asked the Department to consider the relative share of tipped and non-tipped duties “on a per-shift, rather than per-workweek, basis” or to prohibit an employer from taking a tip credit on any day in which the employee spends more than 20 percent of their time in a non-tipped occupation. On the other hand, the RLC/NRA and some individual restaurant employers argued

to the minimum wage and *Encino* does not disturb circuit court precedent affirming that it is within the Department’s broad delegated authority to define when an employee is engaged in a tipped occupation based on an analysis of the employee’s duties, as it has done here. *See Applebee’s*, 638 F.3d at 876, 879; *Marsh*, 905 F.3d at 623.

that “circumstances may dictate that tipped employees spend more than 20” percent of the workweek on directly supporting work because “[c]ustomer flow is often unpredictable in full-service restaurants.” The Chamber of Commerce urged the Department to increase the tolerance for directly supporting work beyond 20 percent, arguing that this would reduce litigation and costs by “avoiding arguments over the specifics of tasks that were performed during extremely small amounts of time.”

In addition, some commenters asked for further clarification about how to calculate when directly supporting work has exceeded 20 percent of the workweek. See CFCBA. WPI asked the Department to clarify whether the “hours worked during the workweek” refers “only to the hours worked as a tipped employee,” or whether it would include, for example, “any hours worked as a cook or in another non-tipped position.”

After considering the comments, the Department finalizes the 20 percent workweek tolerance for identifying a substantial amount of directly supporting work. The Department continues to believe that a 20 percent tolerance appropriately approximates the point in a given workweek at which an employee’s aggregate non-tipped, directly supporting work is no longer incidental to the employee’s tip producing work, and thus, the employee is no longer engaged in a tipped occupation. The 20 percent tolerance is consistent with the Department’s longstanding guidance prior to 2018, the reasonableness of which both the Ninth and Eighth Circuit Courts of Appeal have upheld. See *Marsh v. J. Alexander’s*, 905 F.3d 610, 625 (9th Cir. 2018) (en banc) (“The DOL’s interpretation is consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself.”); *Fast v. Applebee’s Int’l*, 638 F.3d 872, 881 (8th Cir. 2011) (describing the 20 percent tolerance as “reasonable.”) In addition, even after the Department rescinded the 80/20 guidance in 2018, multiple Federal courts have independently determined that a 20 percent tolerance is reasonable, and applied a 20 percent tolerance to the case before them. See, e.g., *Rafferty*, 2021 WL 4189698 at \*18. A 20 percent limitation is also consistent with various other FLSA provisions, interpretations, and enforcement positions setting a 20 percent tolerance for work that is incidental to but distinct

from the type of work to which an exemption applies.<sup>37</sup>

For these reasons, the Department declines to increase the limit on directly supporting work beyond 20 percent as requested by some commenters representing employers. First, the Department believes that by clarifying its definitions of tip-producing and directly supporting work, it has substantially alleviated employers’ concerns about complying with quantitative limits on directly supporting duties. Furthermore, 20 percent of an employee’s workweek is already a significant amount of time: Equal to a full 8-hour workday in a 5-day, 40-hour workweek. At the same time, although the Department does not disagree with commenters representing employees that the FLSA would permit the Department to adopt a lower tolerance, the Department declines to do so because the 20 percent workweek tolerance, particularly when combined with the 30-minute limit, protects workers from abuse. The Department also declines to apply the 20 percent limit on daily or per-shift basis as suggested by NWLC, because the proposal is more consistent with longstanding FLSA enforcement.

Once an employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any additional time spent on directly supporting work in that workweek and must pay a direct cash wage equal to the full minimum wage for that time. As the Department noted in the NPRM, work paid at the full minimum wage would not count towards the 20 percent workweek tolerance. See 86 FR 32830. The final rule now states this expressly.

In response to commenters’ requests for guidance on how to determine the workweek for the purposes of calculating the 20 percent tolerance, the final rule clarifies that the 20 percent workweek tolerance is calculated by determining 20 percent of the hours in the workweek for which the employer has taken a tip credit. Thus, when an

<sup>37</sup> See, e.g., 29 U.S.C. 213(c)(6) (permitting 17-year-olds to drive under certain conditions, including that the driving be “occasional and incidental,” and defining “occasional and incidental” to, inter alia, mean “no more than 20 percent of an employee’s worktime in any workweek”); 29 CFR 786.100, 786.150, 786.1, 786.200 (nonexempt work for switchboard operators, rail or air carriers, and drivers in the taxicab business will be considered “substantial if it occupies more than 20 percent of the time worked by the employee during the workweek”); 29 CFR 552.6(b) (defining “companionship services” that are exempt from FLSA requirements to include “care” only if such “care . . . does not exceed 20 percent of the total hours worked per person and per workweek”).

employee is employed in dual jobs pursuant to § 531.56(e), such as being employed as both a hotel janitor—for which she receives a direct cash wage equal to the full minimum wage—and a bellhop—for which her employer takes a tip credit for all hours—the employee’s hours as a hotel janitor would not be included in calculating the 20 percent tolerance for non-tipped directly supporting work. If the employee works in each role for 20 hours a week, for example, the employee could perform up to 4 hours (20 hours × 0.20 = 4 hours) of directly supporting work as a bellhop without exceeding the 20 percent tolerance. Likewise, as explained further below, any time paid at the full minimum wage because it exceeds the 30-minute tolerance would also be excluded from the workweek before calculating the 20 percent tolerance for non-tipped directly supporting work.

Calculation of 20 percent is made by subtracting the hours in that workweek for which an employer does not take a tip credit, either because the employee is engaged in a non-tipped occupation, the employer decides not to take the tip credit for those hours, or because, as explained below, those hours exceed the 30-minute threshold. Any time that is compensated at the full minimum wage because it exceeds the 20 percent limit, however, is not excluded from the workweek in calculating the 20 percent tolerance. The employer only has to calculate the 20 percent tolerance once during the workweek.

To further illustrate these concepts, the Department provides the following examples:

*Example 1.* A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a direct cash wage at the full minimum wage. The server also performs 18 minutes of non-tipped directly supporting work twice a day, for a total of three hours a week. The employer may take a tip credit for all of the time the employee spends performing directly supporting work, because this time does not exceed 20 percent of the workweek. Because this employee has been paid the full minimum wage for a total of five hours a week, the employee could perform up to seven hours of directly supporting work (35 hours × 20 percent = 7 hours) without exceeding the 20 percent tolerance.

*Example 2.* A server is employed for 40 hours a week and performs 5 hours of work that is not part of the tipped occupation, such as cleaning the kitchen, for which the server is paid a

direct cash wage at the full minimum wage. The server also performs 10 hours a week of non-tipped directly supporting work, in increments of time that do not exceed 30 minutes. The 5 hours of work paid at the minimum wage is excluded from the workweek for purposes of the 20 percent calculation. Therefore, the employer may take a tip credit for 7 hours of the directly supporting work (35 hours × 20 percent = 7 hours), but must pay the server a direct cash wage equal to the minimum wage for the remaining three hours.

Accordingly, § 531.56(f)(4)(i) of the final rule provides that an employer can only take a tip credit for directly supporting work for up to 20 percent of the hours in an employee's tipped workweek. When an employee performs non-tipped directly supporting work for more than 20 percent of those workweek hours, the employee has performed that work for a substantial amount of time, and is no longer performing work that is part of their tipped occupation. If a tipped employee spends more than 20 percent of those workweek hours on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the hours.

**b. 30 Minutes—§ 531.56(f)(4)(ii)**

In addition to the 20 percent limitation, the Department proposed to define a “substantial amount of time” to include any continuous, or uninterrupted, period of time exceeding 30 minutes. The Department explained that the 30-minute limitation on non-tipped, directly supporting work “is premised on the concept that the work is being performed for such a significant, continuous period of time that the tipped employee's work is no longer being done in support of their tip-producing work,” and therefore the employee is no longer performing work that is part of the tipped occupation. *See* 82 FR 32830.

Under the proposal, if an employee spent a continuous, or uninterrupted, period of time performing directly supporting work that exceeds 30 minutes, the employer could not take a tip credit for that entire period of time. The Department finalizes its proposal to treat a period of continuous non-tipped work exceeding 30 minutes as “substantial,” with one modification. Under the final rule, an employer may no longer take a tip credit once an employee has performed more than 30 minutes of continuous non-tipped work. However, the final rule provides a tolerance for the first 30 minutes of non-tipped, directly supporting work, and the employer may take a tip credit for this time that does not exceed 30

minutes, subject also to the 20 percent workweek limit.

The Department received several comments on its proposal to add a 30-minute limit on the amount of uninterrupted, non-tipped directly supporting work that an employee can perform in a continuous block of time and still be paid with a tip credit. Many commenters supported this definition of a “substantial amount of time.” Commenters representing employees' interests supported the proposal because “bright-line rules” such as the 30-minute limit “enhance clarity and compliance with minimum wage and overtime rules.” *See, e.g.,* NELP, ROC, Network, CLS of Philadelphia, CLASP, NELA. Chairman Bobby Scott and other members of the House Committee on Education and Labor stated that the 30-minute limitation is needed “to ensure employers are not paying employees the tipped subminimum wage for an hour of work in which the employee has limited or no opportunity to actually earn tips.”

NWLC stated that performing 30 continuous minutes of non-tipped, directly supporting work is a “reasonable” indication that a tipped employee is no longer engaged in a tipped occupation. NWLC also stated that it “appropriately closes [the] loophole” under which a restaurant server could “spend three hours of a six-hour shift cleaning tables, rolling silver, and performing other such side work for just \$2.13 an hour, so long as their remaining shifts in the week included enough tipped duties to fall below the 20 percent threshold.” EPI stated that a 30-minute limit would provide “protections for tipped workers' earnings.” Some commenters who supported the proposal, however, also suggested that the Department consider a shorter threshold for non-tipped, directly supporting work, such as 20 minutes. *See* NELP, NWLC.

Many individual commenters who worked as tipped employees stated that their employers frequently scheduled them to perform long continuous blocks of uninterrupted non-tipped work. These tipped workers noted that their employers often scheduled them to perform directly supporting work for periods of an hour or longer both before and after their establishment was open to customers. For example, one commenter stated, “I have spent years working in restaurants and bars where my ‘side work’ amounted to hours every shift of scheduled labor when the restaurant or bar was closed. This means I might spend 3 hours of a 6 hour shift cutting fruit, juicing, setting up the bar, deep cleaning, sweeping, all while the bar is closed and doors are locked,

meaning I have zero potential to make tips.” Another commenter described spending “hours doing tasks . . . that were not customer-facing. There have been so many times where I was doing tasks that workers who do make a full wage should have been doing, but instead it was cheaper to have the tipped workers such as myself do.”

Other commenters opposed the proposal. RLC/NRA argued that “there is no factual basis” for the Department's proposal, and that “there is no industry norm suggesting that . . . 30 minutes is a hard cap . . . such that side work performed beyond those levels is outside the standards for tipped occupations.” The MRA stated that the Department had “provide[d] no justification” for the 30-minute limitation, but nevertheless acknowledged that “[i]t is common in the restaurant industry for servers to assist in ‘opening’ the store before customers arrive; which often involves 30 minutes or more of non-tip-generating work.”

Several commenters representing employers argued that it would be burdensome for employers to implement a 30-minute threshold. *See* Seyfarth Shaw (30-minute limitation “would impose immense compliance challenges”); CFCBA (stating that [t]his new concern of monitoring 30-minute blocks of time for multiple servers is a burden”); MRA (describing the threshold as “a new and exceptionally burdensome limitation” that will require employers to “police” employees); Landry's. These employers expressed particular concern about the Department's proposal to prohibit employers from paying a reduced direct cash wage for an entire block of work once the block of work exceeds 30 minutes. Landry's, for example, noted that if an employee “performs non-tipped work for 29 minutes . . . the employer has not violated the law, however, if for some reason the tasks take 31 minutes, now the pay rate must change for the prior half-an-hour,” or else the employer will be liable, even if it was unaware that the employee had worked the extra 2 minutes. Seyfarth Shaw asserted that “[o]ver time, and multiplied by hundreds of employees,” such “inadvertent violations” of the 30-minute tolerance “by just a minute or two” might “yield substantial liability.”

After considering all the comments, the Department finalizes the proposal for a 30-minute limit on periods of continuous non-tipped directly supporting work, with the modification described above. When an employer assigns an employee to perform non-tipped duties continuously for a

substantial period of time, such as more than 30 minutes, the employee's non-tipped duties are not being performed in support of the tipped work, and the employee is no longer earning tips during that time. The employee thus ceases to be performing the work of a tipped occupation, and their employer therefore must pay a direct cash wage equal to the full Federal minimum wage for the time that exceeds 30 minutes. This will both prevent employers from using tipped employees, whom the employer pays as little as \$2.13 an hour, to perform substantial periods of non-tipped work, and the displacement of employees who normally perform this non-tipped work as part of their non-tipped occupation and who must be paid a higher direct cash wage, as the individual commenters above described. This also addresses concerns, which the Department identified in the 2020 Tip final rule, and reiterated in the NPRM, that the 20 percent limit alone does not adequately address the scenario where an employee performs non-tipped, directly supporting work for an extended period of time, but this work does not exceed 20 percent of their workweek. See 85 FR 86769; 86 FR 32830. Without some limitation on continuous blocks of non-tipped work, an employer could require a tipped employee to spend an entire 8-hour shift—20 percent of a 40-hour workweek—performing non-tipped, directly supporting tasks and no tip-producing work, and still pay the employee a reduced direct cash wage for the entire shift. The 2020 Tip final rule provided an example of a bellhop who performed tipped duties for 8 hours, and worked for an additional 2 hours “cleaning, organizing, and maintaining bag carts.” The Department noted that under the 80/20 guidance, the employer could potentially take a tip credit for the entire 2-hour block of time, even though the bellhop was “engaged in a tipped occupation (bellhop) for 8 hours and a non-tipped occupation (cleaner) for 2 hours.” *Id.* The final rule addresses this concern by requiring employers to pay employees the full cash minimum wage whenever they perform non-tipped directly supporting work for a continuous block of time that exceeds 30 minutes.

The Department believes that 30 minutes is a reasonable limitation to set, and agrees with the commenters that stated that bright-line rules such as this help both employers and employees with compliance. Many individual commenters who worked as tipped employees, as well as the MRA, acknowledged that tipped employees

are frequently required to perform non-tipped work for blocks of time 30 minutes or longer. Thirty minutes is a substantial period of time for a tipped employee to spend exclusively performing non-tipped, directly supporting work. In the context of bona fide meal periods, see 29 CFR 785.19(a), the Department has previously recognized that 30 minutes is a discrete and significant block of time that can be set apart from the work around it. Similarly to a meal period, moreover, a 30-minute uninterrupted block of time during which an employee continuously performs non-tipped work can be readily distinguished from the work that surrounds it. Because the Department believes that 30 minutes is reasonable, substantial, and provides an important protection for tipped employees, the Department declines to remove the limitation, as some commenters representing employers requested. The Department also declines to shorten the limit to 20 minutes, as some commenters representing employees requested.

At the same time, the Department acknowledges commenter's concerns that employers may find it challenging to comply with the Department's proposal to prohibit them from taking a tip credit for the entire block of time spent on non-tipped, directly supporting work, once that block of time reaches 31 minutes. In light of these concerns, the Department has decided to provide for a tolerance for the first 30 minutes of non-tipped, directly supporting work. When an employee performs non-tipped, directly supporting work for up to 30 minutes, the employer can take a tip credit for that time, subject to the 20 percent workweek limit. This modification aligns the 30-minute limit with the 20 percent limit, which similarly provides a tolerance allowing an employer to pay a reduced direct cash wage for non-tipped, directly supporting work, up to 20 percent of the workweek. This uniform application will make it easier for employers to comply with both limits, and providing a tolerance for the first 30 minutes of directly supporting work should alleviate any need employers might feel to “police” their employees' work on a minute-by-minute basis. See MRA.

Under the final rule, employers must begin to pay a direct cash wage equal to the full minimum wage whenever an employee performs more than 30 minutes of uninterrupted non-tipped work, or whenever periods of continuous non-tipped work, along with other non-tipped directly supporting work in the aggregate, exceed 20 percent

of the tipped workweek. The employer may, however, take a tip credit for the first 30 continuous minutes of work, although that work would count toward the 20 percent workweek tolerance. For example, if a tipped employee is required to perform directly supporting work continuously for two hours after the establishment is closed to customers, the employer may take a tip credit for the first 30 minutes, but must pay the full Federal minimum wage for the remaining hour and a half. The first 30 minutes of directly supporting work, for which the employer took a tip credit, would count toward the 20 percent workweek limit.

Although there is no recordkeeping requirement, some employers may choose to track periods of uninterrupted non-tipped work to ensure compliance. The Department believes that such tracking will be manageable, especially in light of the tolerance provided in the final rule, and given that the Department has clarified in the final rule that tip producing work is defined broadly to include all aspects of the work that a tipped employee performs that provides service to customers and for which the employee receives tips. Indeed, uninterrupted blocks of time of 30 minutes or more during which employees perform non-tipped directly supporting work are likely to be scheduled or foreseeable to employers, such as when tipped employees are asked to arrive early to set up, stay late to close up after customers have left, as described by many individual commenters, or during slow periods with no or few customers. See Landry's (noting that 30 minutes of directly supporting work performed during “pre or post shift . . . could be tracked more readily and paid minimum wage”).

The AG Coalition asked the Department to “clarify that ‘continuous period of time’ means more than 30 minutes per hour rather than 30 consecutive minutes.” The Department also declines to do so. The final rule is clear that the 30-minute limit for non-tipped, directly supporting work only applies to continuous blocks of uninterrupted time spent performing those duties, during which time the employee has no ability to earn tips. Directly supporting work performed for shorter amounts of time is counted toward the 20 percent tolerance.

In response to commenters' requests for further explanation about the interaction between the 30-minute limitation and the 20 percent tolerance, the final rule expressly states that time for which an employer does not take a tip credit because the employee has performed non-tipped work for more



than 30 minutes is excluded from the workweek used to calculate the 20 percent tolerance. To illustrate, the Department provides an example of a tipped employee who works five eight-hour shifts (40 hours a week) and who is required to perform one continuous hour of directly supporting work at the beginning and end of each shift. The employee must be paid a direct cash wage of the full minimum wage after the first 30 minutes of each hour. A total of five hours a week (30 minutes \* 2 blocks \* 5 shifts) is excluded from the total hours worked for the purposes of calculating 20 percent, because the employee has been paid the full minimum wage for that time. Therefore, the employee may perform 7 hours of directly supporting work (35 hours \* 20 percent = 7 hours) without exceeding the 20 percent tolerance. Because in this scenario the employee has already performed 5 hours of directly supporting work for which the employer has taken a tip credit (the first 30 minutes of each one-hour block), this employee may perform an additional two hours of directly supporting work (in increments of 30 minutes or less) before she exceeds the 20 percent tolerance.<sup>38</sup>

While TRLA raised concerns that the 30-minute limit “may incentivize restaurant employers to schedule tipped servers for a . . . half-hour period of cleaning the restaurant at the end of their shift,” as the Department noted in the NPRM, *see* 82 FR 32830, employers were already able to do so under both the 2018–19 guidance and the previous 80/20 guidance. The 30-minute limit instead provides a new protection for tipped employees, meaning they cannot be required to perform such non-tipped, directly supporting work for more than 30 consecutive minutes while only earning as little as \$2.13 an hour.

Therefore, when tipped employees are required to perform non-tipped work for a substantial amount of time, such as 30 or more consecutive minutes, such work is no longer supporting the employee’s tip-producing work, and they are no longer engaged in a tipped occupation. Accordingly, § 531.56(f)(4)(ii) of the final rule provides that an employee has performed directly supporting work for a substantial amount of time when the directly supporting work exceeds 30

minutes for any continuous period of time. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer must begin to pay the employee a direct cash wage equal to the full Federal minimum wage. The final rule also clarifies, as noted above, that time in excess of 30 minutes, which is paid at the full minimum wage, is excluded from the hours worked in the workweek before calculating the 20 percent tolerance.

#### F. § 10.28(b)

The Department also proposed to amend the provisions of the Executive Order 13658 regulations, which address the hourly minimum wage paid by contractors to workers performing work on or in connection with covered Federal contracts. *See* E.O. 13658, 79 FR 9851 (Feb. 12, 2014). 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. The Department proposed to amend § 10.28(b) consistent with its proposed revisions to § 531.56(e) and (f). The Department received no comments specifically addressing proposed § 10.28(b) and therefore finalizes it with amendments consistent to those made to § 531.56(e) and (f).

#### G. Withdrawal of the Dual Jobs Provisions of the 2020 Final Rule

In proposing to revise §§ 531.56(e) and 10.28(b) and add a new § 531.56(f), the Department also proposed to withdraw the dual jobs portion of the 2020 Tip final rule, the effective date of which the Department has delayed until December 31, 2021. 86 FR 32818. The Chamber of Commerce alleged that the Department’s “withdrawal of the dual jobs provision in the 2020 Tip Final Rule is procedurally flawed.” According to the Chamber of Commerce, the Department “arbitrarily halted the effective date of” the dual jobs portion of the 2020 Tip final rule “simply because the administration has different policy preferences” and the Department should have “let the rule go into effect and then gather data on its impact and effectiveness” rather than undertaking further rulemaking “without any evidence of a problem.” As noted above, several commenters representing employers also urged the Department to retain the dual jobs portion of the 2020 Tip final rule rather than finalizing the proposed revisions to §§ 531.56(e) and (f) and 10.28. *See* AHLA; CWC; Landry’s; Chamber of Commerce; NRA.

Given its concern with the Department’s decision to delay the

effective date of the dual jobs portion of the 2020 Tip final rule, it is unclear if the Chamber of Commerce’s comment is directed towards the Department’s final rule delaying the effective date of the 2020 Tip final rule’s dual jobs revisions to December 31, 2021, 86 FR 22597 (April 30, 2021), or its proposal to withdraw these revisions. To the extent the Chamber’s comment is regarding the delay, it is outside of the scope of this rulemaking. With respect to the proposed withdrawal of the 2020 dual jobs revisions, the Department has determined, for the reasons stated above, that revisions to § 531.56(e) and (f) (and § 10.28) are necessary in order to ensure that there are protections for tipped employees and limitations on the amount of non-tipped work that employers can shift to tipped workers while still relying on tips to cover their minimum wage obligations. And, as explained above, the Department has made revisions to its proposal to take into consideration the practical concerns raised by employers in their comments. Withdrawal of the 2020 Tip final rule’s revisions to § 531.56(e) and § 10.28(b) is necessary in order to finalize this rule’s changes to §§ 531.56(e) and (f) and 10.28. Accordingly, the Department finalizes its withdrawal of the dual jobs portion of the 2020 Tip final rule.

#### H. Effective Date

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA) requires agencies to publish major rules<sup>39</sup> in the **Federal Register** 60 days before they take effect. *See* 5 U.S.C. 801(a)(3)(A); *see also* 5 U.S.C. 553(d) (Administrative Procedure Act requires a 30-day delay between publication and the effective date of a substantive rule). Some commenters representing employers stated that given the impact of the COVID–19 pandemic on industries with large numbers of tipped workers, the Department should consider further delaying the effective date of any new regulations or postponing its rulemaking. *See* AHLA; Seyfarth; Chamber. The Chamber of Commerce recommended that the Department “[r]efrain from issuing a Final Rule until the pandemic has passed” or to “[p]rovide a six-month to twelve-month window between the publication date and the effective date

<sup>38</sup> If this employee ultimately performs more than two additional hours on directly supporting work (in increments of time that do not exceed 30 minutes), those additional hours are not excluded in calculating the 20 percent tolerance. This is because, as explained above in section E.2.a, any time that is compensated at the full minimum wage solely because it exceeds the 20 percent limit is not excluded from the workweek for the purposes of calculating the 20 percent tolerance.

<sup>39</sup> Under the CRA, a major rule includes any rule that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds is likely to have an annual impact on the economy of \$100 million or more. 5 U.S.C. 804(2). OIRA has found that this rule is a major rule.

of any Final Rule.”<sup>40</sup> Seyfarth Shaw recommended that the Department delay implementation of the proposal “until at least 180 days after the declared end of the COVID–19 pandemic.” AHLA urged the Department to “reconsider its Proposed Rule” after the end of the pandemic “or otherwise return to” the 2020 Tip final rule.

These commenters asserted that due to pandemic-related struggles and uncertainty in the restaurant and hospitality industry, employers would have difficulty bearing any additional management associated with this rule or any increased labor costs due to limits on their ability to take a tip credit for work that does not generate tips. *See, e.g.,* Chamber. Commenters also alleged that industries with many tipped employees are experiencing a labor shortage, which would make compliance with the proposal difficult. *See* Seyfarth (alleging that due to a labor shortage, it would be impossible for employers “to hire additional workers to ensure compliance with a more stringent tip credit”); *see also* AHLA; Chamber. Additionally, some commenters stated that the Department should take more time to consider the pandemic’s impact on tipping patterns in the restaurant industry before promulgating a revised dual jobs test. *See* AHLA; WPI.

Commenters such as EPI and most organizations representing employees, on the other hand, argued that the COVID–19 pandemic only made it more urgent that the Department withdraw the dual jobs portion of the 2020 Tip final rule and provide clearer limitations on the amount of non-tipped work that employers can shift to tipped workers while still relying on tips to bring their workers up to the minimum wage. *See, e.g.,* NELP; ROC; Network; WLP. EPI noted that it had estimated that implementation of the dual jobs portion of the 2020 Tip final rule could lead to a loss of income of \$700 million for employees and stated that “the impact of the 2020 Final Tip Rule could be much worse for tipped workers during the COVID–19 pandemic” due to changes in the restaurant industry’s business model. It added that any further loss in income “would be especially harmful for women and people of color,” noting that women and people of color are “disproportionately represented in the tipped workforce”

and arguing that they have borne the brunt of the pandemic’s devastating impacts.” As discussed above, commenters such as NELP, ROC, and WLP similarly noted that tipped workers, especially women and people of color, were far more likely to be below the poverty line than other workers “[e]ven before the pandemic,” and stated that such workers “had borne the brunt of the pandemic’s devastating impacts” to this point. They thus argued that “[s]trengthening and clarifying protections for people working in tipped jobs should . . . be a priority for the Department[.]”

Additionally, OFW disputed whether clearer limits on employers’ ability to take tip credit for work that does not produce tips would in fact be harmful for employers in the current economic conditions. Rather, OFW suggested that clearer limits on the payment of a direct cash wage of no less than \$2.13 an hour for such work could in fact be helpful. Citing a May 2021 study, OFW stated, “[t]he evidence is clear that the so-called worker shortage is in fact a wage shortage: those employers paying a full, fair wage, hire workers without issue and workers themselves state they would stay in jobs that pay a livable wage.”<sup>41</sup>

Consistent with the requirements of the CRA, this final rule will be effective 60 days after publication in the **Federal Register**, on December 31, 2021. Strengthening protections for tipped workers by providing clearer limitations on the amount of non-tipped work that employers can shift to tipped workers while still relying on tips to cover their minimum wage obligations is an urgent priority for the Department. Accordingly, the Department declines to further delay the effectiveness of the rule or postpone its rulemaking. In addition to satisfying the requirements of the CRA, the time between this rule’s publication and effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), which is designed to provide regulated entities time to adjust to new rules, *see Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992).

The Department is sensitive to the concerns of the restaurant, hotel, and other service industries regarding the impact of the COVID–19 pandemic.

Although employment in the leisure and hospitality industries recovered rapidly in the spring and early summer of 2021, and employment in this sector is still below its January 2020 level.<sup>42</sup> However, the Department also shares the concerns of commenters representing employees, who noted the impact of pandemic-related job losses on tipped workers—already a very vulnerable group—and argued that protections for tipped workers are especially important at this time. As noted above, the Department has taken into account the practical concerns of employers by making several adjustments to its proposal, which will provide greater clarity and predictability to employers. The Department acknowledges that this final rule will lead to some costs to employers, as discussed in greater detail in the economic analysis below; however, the Department predicts that such costs will be a minimal share of total revenues for businesses of all sizes, and we believe that the protections afforded to workers outweigh these costs. The dual jobs test set out in the final rule is a functional test to determine when a tipped employee is engaged in their tipped occupation because they are performing work that is part of their tipped occupation, and the Department has provided numerous additional examples of how to apply the test. As discussed above, the Department believes that its proposed test is both clear and sufficiently flexible to be applied to changing conditions. Finally, to the extent that employers in the restaurant and other industries are experiencing a worker shortage, the Department agrees with OFW that clearer limits on employer’s ability to pay a direct cash wage of as little as \$2.13 per hour for work that does not generate tips could help employers attract and retain qualified employees.

#### IV. 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, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens.

The Department noted in the NPRM (86 FR 32818) that the proposed rule did not contain a collection of information or any new paperwork burdens on the

<sup>40</sup> The Chamber of Commerce also recommended that the Department “make the effective date the first day of a new calendar year (*i.e.*, on January 1)” so that it aligns with “the date when most adjustments to State tip credit and minimum wage levels become effective.”

<sup>41</sup> A citation to the May 2021 study can be found here: UC Berkeley Food Labor Research Center & One Fair Wage, *It’s A Wage Shortage, Not a Worker Shortage: Why Restaurant Workers, Particularly Mothers, Are Leaving the Industry, and What Would Make Them Stay* (May 2021), [https://onefairwage.site/wp-content/uploads/2021/05/OFW\\_WageShortage\\_F.pdf](https://onefairwage.site/wp-content/uploads/2021/05/OFW_WageShortage_F.pdf).

<sup>42</sup> *See* Employment Situation Summary August 2021, Bureau of Labor Statistics <https://www.bls.gov/news.release/empisit.nr0.htm>.

public. The already existing information collection requirements are approved under Office of Management and Budget (OMB) control number 1235–0018. Although a few commenters mistakenly understood the NPRM to propose new recordkeeping requirements, and expressed concern about such requirements, the Department did not propose new records requirements and the final rule does not contain a revision to current recordkeeping requirements nor does it enact new recordkeeping requirements. As a result, this final rule does not contain a collection of information subject to OMB approval under the PRA.

### V. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>43</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect 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) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this rule is economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, 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 obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and 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. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

#### A. Background

In 2018 and 2019, the Department issued new guidance providing that the Department 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 WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); FAB 2019–2 (Feb. 15, 2019); WHD FOH 30d00(f). This guidance thus removed the 20 percent limitation on related, non-tipped duties that existed under the Department's prior 80/20 guidance. On December 30, 2020, the Department published the 2020 Tip final rule to largely incorporate this 2018–2019 guidance into its regulations. The Department uses the 2018–2019 guidance as a baseline for this analysis because this is what WHD has been enforcing since the 2018–2019 guidance was issued and is similar to the policy codified in the 2020 Tip final rule.

In this rule, the Department withdraws the dual jobs portion of the 2020 Tip final rule and inserts new regulatory language that it believes will better protect employees, and will provide more clarity and certainty for employers. Specifically, the Department amends its regulations to clarify that an employer may not take a tip credit for its tipped employees unless the employees are performing work that is part of their tipped occupation. This includes work that produces tips, as well as work that directly supports the tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time. In this final rule, the Department clarifies that its definition of *tip-producing work* was intended to be broadly construed to encompass any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips and provides more examples illustrating the scope of this term. The final rule also amends the definition of *directly supporting work* to explain that this category includes work that is performed by the tipped employee in preparation of or otherwise assists the provision of tip-producing customer

service work, and also provides more examples illustrating the scope of this term. The final rule also modifies the definition of *work that is not part of the tipped occupation* to reflect the changes to these two definitional categories. Additionally, the final rule modifies the application of the tip credit to the 30-minute limitation in order to treat it uniformly with the 20 percent tolerance.

In order to analyze this regulatory change, the Department has quantified costs, provided an analysis of transfers, and provided a qualitative discussion of benefits. These impacts depend on the interaction between the policy laid out in this rule and any underlying market failure—perhaps most notably in this case, the monopsony power created for employers if their workers receive a substantial portion of their compensation in the form of tips.<sup>44</sup>

As discussed in more detail below, some commenters supported the Department's analysis generally, while others noted that the Department's transfer estimates could be an underestimate. Employer-representative commenters asserted that the Department underestimated the managerial and adjustment costs employers would incur to comply with the proposed rule. Because of the modifications and clarifications made in this final rule, the Department has not made changes to the cost analysis, as discussed below.

#### B. Costs

The Department believes that this rule may result in three types of costs to employers: Rule familiarization costs, adjustment costs, and management costs. Rule familiarization and adjustment costs would be one-time costs following the promulgation of the final rule. Management costs would likely be ongoing costs associated with complying with the rule.

##### 1. Potentially Affected Entities

The Department has calculated the number of establishments that could be affected by this rule using 2019 data from the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW). Because this rule relates to the situations in which an employer is able to take a tip credit under the FLSA, it is unlikely that employers in states without a tipped minimum wage or employers in states with a direct cash wage of over \$7.25

<sup>44</sup> Jones, Maggie R. (2016), “Measuring the Effects of the Tipped Minimum Wage Using W–2 Data,” CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016–03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>.

<sup>43</sup> See 58 FR 51735, 51741 (Oct. 4, 1993).

would be affected by this change, because they are already paying their staff the full FLSA minimum wage for all hours worked. Therefore, the Department has dropped the following states from the pool of affected establishments: Alaska, Arizona, California, Colorado, Connecticut (Drinking Places (Alcoholic Beverages) only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.<sup>45</sup>

Because the QCEW data only provides data on establishments, the Department has used the number of establishments for calculating all types of costs. The Department acknowledges that for some employers, the costs associated with this rule could instead be incurred at a firm level, leading to an overestimate of costs.<sup>46</sup> Presumably, the headquarters of a firm could conduct the regulatory review for businesses with multiple locations, but could also require businesses to familiarize themselves with the rule at the establishment level.

The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule, along with a couple of other industries that have

tipped workers, which is consistent with using the 2018–2019 guidance as the baseline. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels)), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). See Table 1 for a list of the number of establishments in each of these industries. The Department understands that there may be entities in other industries with tipped workers who may review this rule. The Central Florida Compensation and Benefits Association (CFCBA) noted that the Department should include the following industries in the analysis: 711110 (Theaters Companies and Dinner Theaters), 713110 (Amusement and Theme Parks), 713910 (Golf Courses and Country Clubs), 712110 (Museums), 711212 (Racetracks), 48811 (Airports), and 622110 (Hospitals) because many have tipped servers, bartenders, valet and guides. The Department agrees that

there may be a small number of tipped workers in these industries, but the majority of employees are unlikely to be receiving tips, and for those that do receive some tips, it is unlikely that their employers are taking a tip credit. In attempt to determine how many employers in these industries are taking a tip credit, the Department used data from the Current Population Survey (CPS) to determine how many workers in these industries are earning less than \$7.25. The Department found that less than one percent (0.59 percent) of workers in the industries cited by CFCBA are earning less than \$7.25, meaning that almost no employers in these industries are taking a tip credit. Employers who do not take a tip credit will not need to familiarize themselves with this rule. Therefore, the Department does not feel that it is appropriate to include the establishments in these industries in the analysis.

The Department has calculated that in states that allow employers to pay a lower direct cash wage to tipped workers and in the industries mentioned above, there are 470,894 potentially affected establishments.

Table 1. Number of Establishments in Affected Industries

| Industry   | Establishments |
|--|----------------|
| NAICS 713210 (Casinos (except Casino Hotels))        | 211            |
| NAICS 721110 (Hotels and Motels)                     | 41,768         |
| NAICS 721120 (Casino Hotels)                         | 175            |
| NAICS 722410 (Drinking Places (Alcoholic Beverages)) | 30,313         |
| NAICS 722511 (Full-Service Restaurants)              | 171,296        |
| NAICS 722513 (Limited Service Restaurants)           | 173,509        |
| NAICS 722515 (Snack and Nonalcoholic Beverage Bars)  | 39,698         |
| NAICS 812113 (Nail Salons)                           | 13,924         |
| <b>Total</b>   | <b>470,894</b> |

Source: BLS Quarterly Census of Employment and Wages, 2019

## 2. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. The Department believes 1 hour per entity, on average, to be an appropriate review time for this rule. This estimate does not include any time employers spend adjusting their business or pay practices; that is

discussed in the adjustment cost section below. Many employers are familiar with a 20 percent tolerance, which is part of what is being put forth in this rule, since the Department enforced a 20 percent tolerance for 30 years prior to the 2018–2019 guidance, albeit in a different way. The Department believes that some employers in the industries listed above do not have any tipped

employees, or do not take a tip credit, and would therefore not review the rule at all. This review time therefore represents an average of employers who would spend less than 1 hour or no time reviewing, and others who would spend more time.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job

<sup>45</sup> Department of Labor, Wage and Hour Division, "Minimum Wages for Tipped Employees," Updated January 1, 2021. <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>.

<sup>46</sup> An establishment is a single physical location where one predominant activity occurs. A firm is an establishment or a combination of establishments, and can operate in one industry or

multiple industries. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.

Analysis Specialists (Standard Occupational Classification (SOC) 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019.<sup>47</sup> The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.<sup>48</sup> The Department estimates that regulatory familiarization costs would be \$23,827,236 (470,894 establishments × \$50.60 × 1 hour). The Department estimates that all regulatory familiarization costs would occur in Year 1.

In their comment, SBA Advocacy stated that they believe that DOL underestimated the rule familiarization costs of this rule. They noted that during their roundtable on this rule, small business owners said that they would need more than an hour to read and become familiarized with this rule. However, the Department did not receive any other comments from employers regarding rule familiarization. No commenters provided data or information on exactly how many hours they would spend on rule familiarization. If some business owners do spend more time on rule familiarization, that is not inconsistent with the Department's estimate of 1 hour, which is assumed to be an average of those who will spend more time and those who will spend no time because they do not have tipped workers or do not take a tip credit. Furthermore, in this final rule, the Department has made changes and clarifications in response to comments, which could limit the time necessary for rule familiarization. Lastly, many employers will not review the entire rule, because the Wage and Hour Division will provide compliance assistance through materials such as a fact sheet and information on the website.

### 3. Adjustment Costs

The Department expects that employers may incur adjustment costs associated with this rule. They may adjust their business practices and

<sup>47</sup> BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm). Data for 2020 are now available, but the Department believes that it is more appropriate to use 2019 data for the analysis, because wages could have been affected by structural changes associated with the COVID–19 pandemic. The Department has aligned the year of the cost data with the pre-pandemic data used in the transfer analysis discussed later.

<sup>48</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

staffing to ensure that workers do not spend more than 20 percent of their time on directly supporting work, and that directly supporting work does not exceed more than 30 minutes continuously. Additionally, as a result of this rule, some duties that were considered related, non-tipped duties of a tipped employee, for which employers could take a tip credit under certain conditions, under the Department's 2018–2019 guidance, may now be considered duties that are not part of a tipped occupation, for which employers cannot take a tip credit. Accordingly, some employers may also adjust their business practices and staffing to reassign such duties from tipped employees to employees in non-tipped occupations. Some employers may also adjust their payroll software to account for these changes, and may also provide training for managers and staff to learn about the changes.

The Department uses the same number of establishments (470,894) as discussed in the rule familiarization section above, and also assumes that the adjustments would be performed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or an employee of similar position and comparable pay, with a fully loaded wage of \$50.60 per hour. The Department estimates that these adjustments would take an average of 1 hour per entity. For employers that would need to make adjustments, the Department expects that these adjustments could take more than 1 hour. However, the Department believes that many employers likely would not need to make any adjustments at all, because either they do not have any tipped employees, do not take a tip credit, or the work that their tipped employees perform complies with the requirements set forth in this rule. Therefore, the hour of adjustment costs represents the average of the employers who would spend more than 1 hour on adjustments, and the many employers who would spend no time on adjustments. The Department estimates that adjustment costs would be \$23,827,236 (470,894 establishments × \$50.60 × 1 hour). The Department estimates that all adjustment costs would occur in Year 1.

### 4. Management Costs

The Department also believes that some employers may incur ongoing management costs, because in order to make sure that they can continue to take a tip credit for all hours of an employee's shift, they will have to ensure that tipped employees are not spending more than 20 percent of their

time on directly supporting work per workweek, or more than 30 minutes continuously performing such duties. The Department does not believe that these costs will be substantial, because if employers are able to make the upfront adjustments to scheduling, there is less of a need for ongoing monitoring. For example, if employers stop assigning work to tipped employees that will no longer be considered part of the tipped occupation under this rule, this will be a one-time change that does not necessitate ongoing monitoring. Additionally, employers may have also incurred similar management costs under the 2018–2019 guidance, because in order to take a tip credit for all hours, they would have had to ensure that tipped employees did not perform duties not related to their tipped occupation, and that employees' related, non-tipped work was contemporaneous with or for a reasonable time before or after the tipped work.

The Department estimates that employers would spend, on average, 10 minutes per week on management costs in order to comply with this rule. The Department expects that many employers will not spend any time on management tasks associated with this rule, because they do not claim a tip credit for any of their employees, or their business is already set up in a way where the work their tipped employees perform complies with the requirements set forth in this rule (such as a situation where the tipped employees perform minimal directly supporting work). Therefore, this estimate of 10 minutes is an average of those employers who would spend more time on management tasks, and the many employers who would spend no time on management tasks. The Department therefore calculates that the average annual time spent will be 8.68 hours (0.167 hours × 52 weeks).

The Department's analysis assumes that the management tasks would be performed by Food Service Managers (SOC 11–9051) or employees of similar status and comparable pay. The median hourly wage for these workers was \$26.60 per hour in 2019.<sup>49</sup> The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$43.36 (\$26.60 + \$12.24 + \$4.52). The Department estimates that management costs would be \$177,227,926 (470,894

<sup>49</sup> BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm).

establishments  $\times$  \$43.36  $\times$  8.68 hours). The Department estimates that these management costs would occur each year.

#### 5. Cost Summary

The Department estimates that costs for Year 1 will consist of rule familiarization costs, adjustment costs, and management costs, and would be \$224,882,399 (\$23,827,236 + \$23,827,236 + \$177,227,926). For the following years, the Department estimates that costs will only consist of management costs and would be \$177,227,926. Additionally, the Department estimated average annualized costs of this rule over 10 years. Over 10 years, it will have an average annual cost of \$183.6 million calculated at a 7 percent discount rate (\$151.1 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

#### 6. Comments on Adjustment and Managerial Costs

The Department received comments from employer representatives saying that the rule would be very costly for them to implement, and that adjustment and managerial costs would be higher than the Department's estimate. For example, NRF–NCCR claimed that the final rule would require all tipped employees to track and categorize every minute of their time at work. They said that employees would need to be equipped with time keeping devices and significant time and effort would have to be devoted to meeting the rule's extensive recordkeeping requirements. Additionally, the Chamber of Commerce mentioned that compliance with this rule would require employers to implement new timekeeping systems in which employees would need to be trained to code in and out every time they switch between tip producing work and directly supporting work. SBA Advocacy explained that small businesses say that employees perform tipped work and directly supporting work simultaneously. They state, "Working out the differences between current systems of work classifications and DOL's proposed classifications, as well as resolving ambiguities and inconsistencies in the rule and guidance from DOL, will cost well in excess of the estimate provided by DOL." They requested that DOL revise its estimate of adjustment and managerial costs, stating "minute-to-minute tracking is onerous and not realistic in such businesses as restaurants, bars, hair salons and nail salons." Although some commenters noted that the Department's cost estimates were not high enough, none of

the commenters provided information or analysis on exactly how much time should be used to calculate adjustment and managerial costs. The Department also received comments in support of its cost and transfer estimates, such as the comment from the Coalition of State Attorneys General, which said, "[T]he Dual Jobs NPRM provides a thoughtful estimate of its economic effects on employees and employers."

In formulating this final rule, the Department considered comments like these and the practical realities of work in tipped occupations. In response, as noted above, the Department has clarified in this final rule that its definition of *tip-producing work* was intended to be broadly construed to encompass any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips and provided more examples illustrating the scope of this term. The final rule also amends the definition of *directly supporting work* to explain that this category includes work that is performed by the tipped employee in preparation of or otherwise assists the provision of tip-producing customer service work, and also provides more examples illustrating the scope of this term. The final rule also modifies the definition of *work that is not part of the tipped occupation* to reflect the changes to these two definitional categories. Additionally, the final rule modifies the application of the tip credit to the 30-minute limitation in order to treat it uniformly with the 20 percent tolerance, which will make it easier for employers to comply with both limits.

#### 7. Comments Regarding the Labor Market

Some employer-representative commenters asserted that there is currently a labor shortage, which will make it difficult for employers to comply with this rule. For example, Seyfarth noted that restaurants and hotels were hit particularly hard by a national labor shortage and that because of this shortage, employers who "seek to hire additional workers to ensure compliance with a more stringent tip credit regulation" will not be able to hire these workers. The Chamber of Commerce also noted, "Employers in service industries already are combatting labor shortages, which means that businesses have extremely limited ability to shift this work to other non-tipped hourly employees." One Fair Wage (OFW) disputed this, saying, "The evidence is clear that the so-called worker shortage is in fact a wage shortage: those employers paying a full,

fair wage, hire workers without issue and workers themselves state they would stay in jobs that pay a livable wage." To the extent that employers in the restaurant and other industries are experiencing a worker shortage, there is additional uncertainty in the analysis of impacts; however, over the majority of the time horizon of this regulatory impact analysis, the Department believes that quantification using non-pandemic data allows for reasonable approximations.

#### C. Transfers

##### 1. Introduction

As previously discussed, the Department recognizes the concerns that it did not adequately assess the impact of the dual jobs provision of the 2020 Tip final rule. Therefore, for this rule, the Department provides the following analysis of the transfers associated with the changes to its dual jobs regulations, pursuant to which employers can only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation. The rule says tip-producing work encompasses any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips. The rule also says that an employer can take a tip credit for a non-substantial amount of directly supporting work, which is work that is performed by the tipped employee in preparation of or in assistance to the provision of tip-producing customer service work. The rule defines substantial as 20 percent of a tipped employee's workweek or a continuous period of more than 30 minutes.

The Department has performed two different transfer analyses for this rule. The first analysis refines a methodological approach similar to the one described by the Economic Policy Institute (EPI) in response to the Department's NPRM for the 2020 Tip final rule, which proposed to codify the Department's 2018–2019 guidance, which replaced the 80/20 approach with a different related duties test. See 84 FR 53956.<sup>50</sup> This analysis helps demonstrate the range of potential transfers that may result from this rule. The second analysis is a retrospective analysis that looks at changes to total hourly wages following the 2018–2019 guidance to help inform whether

<sup>50</sup> Shierholz, H. and D. Cooper. 2019. "Workers will lose more than \$700 million annually under proposed DOL rule." Available at <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

changes would occur in the other direction following this rule.

Both of the Department's analyses discuss the transfers from employees to employers that may have occurred from the removal of the 80/20 approach, and assumes that the direction of these transfers would be reversed under this rule, which, similar to the 80/20 guidance, includes a 20 percent tolerance on directly supporting work. The rule would also preclude employers from taking a tip credit for a continuous period of more than 30 minutes of directly supporting work.

## 2. Potential Transfer Analysis

Under the approach outlined in the 2020 Tip final rule, and as originally put forth in the 2018–2019 guidance, employers can take a tip credit for related, non-tipped duties so long as they are performed “contemporaneously with” or for “a reasonable time immediately before or after tipped duties.” Additionally, the 2018–2019 guidance uses the Occupational Information Network (O\*NET) to determine whether a tipped employee's non-tipped duties are related to the employee's tipped occupation.<sup>51</sup> As explained above, the Department believes that the terms “contemporaneously with” and “a reasonable time immediately before or after tipped duties” do not provide clear limits on the amount of time workers can spend on non-tipped tasks for which an employer is permitted to take a tip credit. Under the 2018–2019 guidance, transfers would have arisen if employers required tipped employees for whom they take a tip credit, such as servers and bartenders, to perform more related, non-tipped duties, such as cleaning and setting up tables, washing glasses, or preparing garnishes for plates or drinks, than they would have under the prior 80/20 guidance. Because employers would be taking a tip credit for these additional related, non-tipped duties instead of paying a direct cash wage of at least the full minimum wage for these duties, tipped employees would earn less pay because they would be spending less time on tip-producing duties, such as serving customers.

However, to retain the tipped workers that they need, employers would have needed to pay these workers as much as their “outside option,” that is, the hourly wage that they could receive in their best alternative non-tipped job with a similar skill level requirement to

their current position. For each tipped employee, the Department assumed that by assigning non-tipped work, an employer could have only lowered the tipped employee's total hourly pay rate including tips if the employee's current pay rate was greater than the predicted outside-option wage from a non-tipped job.<sup>52</sup> As a measure of the upper bound of the amount of tips that employers could have reallocated to pay for additional hours of work, the Department estimated the difference between a tipped worker's current hourly wage and the worker's outside-option wage. The Department acknowledges that an employee may not want to or be able to leave for an outside-option job right away, meaning that this outside-option analysis applies only in the long run.

The Department is specifically contemplating an example in which, prior to 2018, a restaurant employed multiple dishwashers and multiple bartenders. The dishwashers earned a direct cash wage of \$7.25 per hour and spent all of their time washing dishes and doing other kitchen duties. The bartenders earned a direct cash wage of \$2.13 per hour and spent all of their time tending bar. Following the removal of the 80/20 approach in the 2018–2019 guidance, the restaurant decided to employ fewer dishwashers, and instead hire one additional bartender and have the bartenders all take turns washing bar glasses throughout their shifts, adding up to more than 20 percent of their time. In this situation, the bartenders are each earning fewer tips because they are spending less time on tip-producing duties, such as preparing drinks, and more time on non-tip-producing duties, such as washing bar glasses. The employers' wage costs have also decreased, as they are paying more workers a direct cash wage of \$2.13 instead of \$7.25. This results in a transfer from employees to employers. This transfer would be reversed following the reinstatement of a time limit on directly supporting work in this rule. Employees who could have had a share of their tips reduced following the removal of the 80/20 approach could see an increase in their tipped income following this rule. The amount that employers were able to transfer away from employees by having them perform more non-tip-producing work is the amount that is likely to be restored following the requirements of this rule.

For example, consider a bartender who is currently spending more time on directly supporting work that does not produce tips, such as washing bar glasses between customers (and less time on tip-producing work), than they did prior to the removal of the 80/20 approach. Under this rule, they may spend less time performing such directly supporting work due to the 20 percent and 30 minute limits, and thus may be able to spend more time on tip-producing work.

Consider another case in which an employee is currently paid \$2.13 for hours of directly supporting work. Under this rule, their employer may decide that it is necessary to have this employee perform this work, so they will now have to pay them \$7.25 for time spent performing this work beyond the 20 percent limit or for periods longer than 30 minutes. For these hours, the employee's earnings will increase from \$2.13 to \$7.25, resulting in transfers from employers to employees. However, the Department lacks data on to what extent this dynamic currently exists, and to what extent it will change following this rule. In order to quantify this change, the Department would need to know the number of employees who are currently performing non-tip-producing work in excess of 20 percent of their workweek or in excess of 30 minutes, and for whom their employer is taking a tip credit for this time. Data does not exist on employees' schedules and duties to be able to estimate this number. The Department would also need to know the number of hours that each employee is currently performing this work and how it would change following the rule. Most importantly, the analysis requires knowledge of employers' behavior following this rule—e.g., they could choose to pay the full minimum wage for all of these hours, shift this work away to existing non-tipped workers, or spread the work around tipped workers so that it conforms to the requirements of the rule. With this uncertainty, the Department is unable to quantify this potential transfer estimate under a forward-looking framework. Nonetheless, the Department anticipates that there will be some employees who see an increase in their wage rates for some of their hours following this rule. In absence of a forward-looking quantitative framework, the Department believes that one way to quantify the transfers from employers to employees as a result of this Final Rule, which reinstates the 80/20 rule among other protections, is to quantify by how much

<sup>51</sup> As explained above, the 2020 Tip final rule—which is not yet in effect—provided that a non-tipped duty is merely presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O\*NET.

<sup>52</sup> This methodology of estimating an outside wage option was used in the Department's 2020 Tip Regulations under the Fair Labor Standards Act (FLSA) final rule to determine potential transfer of tips with the expansion of tip pooling.

employers could have reduced earnings in the absence of the 80/20 rule.

#### a. Defining Tipped Workers

The Department used individual-level microdata from the 2018 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 Outgoing Rotation Group (CPS-ORG) and provide more detailed information about those surveyed.<sup>53</sup> The Department used 2018 CPS-ORG data to avoid any unintentional impacts from the issuance of the 2018–2019 guidance. Because this analysis first looks at transfers that could have occurred following the 2018–2019 guidance, and uses that estimate to inform what the transfers would be following this rule, all data tables in this analysis include estimates for the year 2018, with dollar amounts inflated to \$2019 using the GDP deflator and further refinements as discussed below.

The Department included workers 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 BLS Standard Occupational Classification (SOC) codes SOC 35–3031 (Waiters and Waitresses) and SOC 35–3011 (Bartenders).<sup>54</sup> The Department considered these two occupations because a large percentage of the workers in these occupations receive tips (see Table 2 for shares of workers in these occupations who may receive tips). The Department understands that there are other occupations in these industries beyond servers and bartenders with tipped workers, such as SOC 35–9011 (Dining Room and Cafeteria Attendants and Bartender Helpers) and SOC 35–9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop). Additionally, there may also be some tipped workers in other industries who may be affected such as nail technicians, parking attendants, and hotel housekeepers.<sup>55</sup>

Table 2 presents the total number of bartenders and wait staff in restaurants and drinking places. The number of workers is then limited to those potentially affected by the changes in this rule. This excludes workers in states that do not allow a tip credit, workers in states that requires a direct cash wage of at least \$7.25, and workers in other states who are paid a direct cash wage of at least the full FLSA minimum wage of \$7.25 (*i.e.*, employees whose employers are not taking a tip

credit under the FLSA).<sup>56</sup> As alluded to above, because this rule relates to the situations in which an employer takes a tip credit, it is unlikely that employees of employers that cannot or otherwise do not take a tip credit would be affected. Both of these populations were also excluded from the analysis of potential transfers. The Department also assumed that nonhourly workers are not tipped employees and excluded these workers from the potentially affected population.<sup>57</sup> Lastly, workers earning a direct wage below \$2.13 per hour were dropped from the analysis.<sup>58</sup> This results in 630,000 potentially affected workers in these industries and occupations.

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. CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.<sup>59</sup> Therefore, the Department assumed bartenders and wait staff who responded affirmatively to this question receive tips. Table 2 presents the share of potentially affected bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2018: approximately 86 percent of bartenders and 78 percent of wait staff.

TABLE 2—BARTENDERS AND WAIT STAFF IN RESTAURANTS AND DRINKING PLACES

| Occupation       | Total workers (millions) | Potentially affected workers (millions) <sup>a</sup> | Potentially affected workers who report earning OTTC |         |
|------------------|--------------------------|--|--|---------|
|                  |                          |  | Workers (millions)                                   | Percent |
| Total .....      | 2.28                     | 0.63   | 0.50   | 79.4    |
| Bartenders ..... | 0.37                     | 0.09   | 0.07   | 85.5    |

<sup>53</sup> See Current Population Survey, U.S. Census Bureau, <https://www.census.gov/programs-surveys/cps.html> (last visited April 28, 2021); The Department used the Center for Economic and Policy Research. 2020. CPS ORG Uniform Extracts, Version 2.5. Washington, DC, <http://ceprdata.org/cps-uniform-data-extracts/cps-outgoing-rotation-group/cps-org-data/> (last visited April 27, 2021).

<sup>54</sup> In the CPS, 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).

<sup>55</sup> The Department considered the additional set of occupations: SOC 39–5090 (Miscellaneous Personal Appearance Workers), SOC 39–5012 (Hairdressers, hairstylists, and cosmetologists), SOC 39–5011 (Barbers), SOC 53–6021 (Parking Attendants), SOC 37–2012 (Maids and

Housekeeping Cleaners), and SOC 31–9011 (Massage Therapists). Workers in these occupations reported usually earning overtime pay, tips, and commissions (OTTC) less often than in the tipped occupations that the Department included in its analysis (15.2 percent compared to 56.1 percent). Additionally, a considerably lower proportion of workers in this additional set of occupations reported earning a direct wage below the Federal minimum wage per hour (1.2 percent compared to 27.8 percent).

<sup>56</sup> Workers considered not affected by the 20 percent limitation were those in the following states that either do not allow a tip credit or require a direct cash wage of at least \$7.25 as of 2019: Alaska, Arizona, California, Colorado, Connecticut (Bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

<sup>57</sup> The Department made this assumption because tipped employees are generally paid hourly and

because the CPS does not include information on tips received for nonhourly workers. 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 10 percent of wait staff and bartenders in restaurants and drinking places are nonhourly and the Department believes nonhourly workers have a lower probability of receiving tips.

<sup>58</sup> The Department was unable to determine whether these workers were earning a direct cash wage below \$2.13 because their employers were not complying with the minimum wage requirements of the FLSA, or whether the data was incorrect.

<sup>59</sup> According to BLS Current Population Survey data, in 2018, workers in service occupations worked an average of 35.2 hours per week. See <https://www.bls.gov/cps/aa2018/cpsaat23.htm>.



TABLE 2—BARTENDERS AND WAIT STAFF IN RESTAURANTS AND DRINKING PLACES—Continued

| Occupation               | Total workers (millions) | Potentially affected workers (millions) <sup>a</sup> | Potentially affected workers who report earning OTTC |         |
|--------------------------|--------------------------|--|--|---------|
|                          |                          |  | Workers (millions)                                   | Percent |
| Waiters/Waitresses ..... | 1.91                     | 0.54   | 0.42   | 78.4    |

Source: CEPR, 2018 CPS—ORG.

<sup>a</sup> Excludes workers in states that do not allow a tip credit, workers in states that require a direct cash wage of at least \$7.25, and workers in other states who are paid a direct cash wage of at least the full FLSA minimum wage of \$7.25 (i.e., employers whose employees are not using a tip credit). Also excludes nonhourly workers.

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 500,000 bartenders and wait staff who receive OTTC, only 310,000 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 3, 69 percent of bartenders' earnings (an average of \$339 per week) and 68 percent of wait staff's earnings (an average of \$251 per week) were from overtime pay, tips, and commissions in 2018. 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 (69 or 68 percent) was applied to their weekly total income to estimate weekly tips.

TABLE 3—PORTION OF INCOME FROM OVERTIME PAY, TIPS, AND COMMISSIONS FOR BARTENDERS AND WAIT STAFF 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 .....                  | 309,690                                    | \$386.44                | \$262.56            | 68                                       |
| Bartenders .....             | 40,354                                     | 491.03                  | 338.67              | 69                                       |
| Waiters and waitresses ..... | 269,335                                    | 370.77                  | 251.16              | 68                                       |

Source: CEPR, 2018 CPS—ORG, inflated to \$2019 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).

b. Outside-Option Wage

The Department assumed that employers only reduce the hourly wage rate of tipped employees for whom they are taking a tip credit if the tipped employee's total hourly wage, including the tips the employee retains, are greater than the "outside-option wage" that the employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used a 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.<sup>60</sup> The Department restricted the regression sample to non-tipped workers earning at least the applicable State minimum wage (inclusive of OTTC), and those who are employed. This analysis excludes workers in states where the

law prohibits employers from taking a tip credit or that require a direct cash wage of at least \$7.25.<sup>61</sup>

In calculating the outside-option wage for tipped workers, the Department defined the comparison sample as 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 O\*NET system for occupations that share important similarities with wait staff and bartenders—the occupations had to require "customer and personal service" knowledge and "service orientation" skills.<sup>62</sup> The list was further reduced by eliminating occupations that are not comparable to the wait staff and

bartender occupations in terms of education and training, as wait staff and bartender occupations do not require formal education or training. See Appendix Table 1 for a list of these occupations.

The regression analysis calculates a distribution of outside-option wages for each worker. The Department used 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.<sup>63</sup> This method assumes that a worker's position in the wage distribution for wait staff and bartenders reflects their position in the wage distribution for the outside-option occupations.

<sup>63</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> These states are Alaska, Arizona, California, Connecticut (bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

<sup>62</sup> For a full list of all occupations on O\*NET, see <https://www.onetcenter.org/reports/Taxonomy2010.html>.

### c. Potential Transfer Calculation

After determining each tipped worker's outside-option wage, the Department calculated the potential reduction in pay as the lesser of the following two numbers:

1. The positive differential between a worker's current earnings (wage plus tips) and their predicted outside-option wage, and

2. the positive differential between a worker's current earnings and the State minimum wage.

The second number is included for cases where the long-run outside-option wage predicted by the analysis is below the State minimum wage, because the worker cannot earn less than their applicable State minimum wage in non-tipped occupations.<sup>64</sup> Total tips for each worker were calculated from the OTTC variable in the CPS data. The Department subtracted predicted overtime pay to better estimate total tips.<sup>65</sup> For workers who reported receiving OTTC, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for wait staff or bartenders (see Table).

To determine the aggregate annual potential total pay transfer, the Department multiplied the weighted sum of weekly transfers by 45.2 weeks—the average weeks worked in a year for wait staff and bartenders in the 2018 CPS Annual Social and Economic Supplement. The resulting annual estimate of the upper bound of potential transfers from tipped employees to employers is \$733 million). This estimate is an upper bound, because following the 2018–2019 guidance, an employer could have, at most, had a tipped worker do more related non-tipped work until their overall earnings reached their outside option wage. In order to further refine this estimate, and adjust down this upper bound, the Department requested data on how much related non-tipped work tipped employees were performing prior to the 2018–2019 guidance and how that changed with the removal of the 80/20 approach, but the Department did not receive any comments with data on this.

<sup>64</sup> In the NPRM, the Department also included a third number in these categories: The total tips earned by the worker. However, the Department realized at the final rule stage that this last category should be removed. No workers should have all of their tips reduced because, by definition, these workers' employers are taking a tip credit, and hence the workers must receive some tips in order to receive the full minimum wage. Removing this restriction changed the total tip transfer slightly from \$714 million in the NPRM to \$733 million in this final rule.

<sup>65</sup> Predicted overtime pay is calculated as  $(1.5 \times \text{base wage}) \times \text{weekly hours worked over 40}$ .

The Department also requested information on whether employers increased the number of employees for which they took a tip credit, and decreased the number of employees for which they paid a direct cash wage of at least \$7.25, but did not receive any data.

The above analysis looks only at how the hourly earnings would change. It may also be informative to see how weekly earnings would change. Lowering the total hourly earnings of employees will either:

1. Lower the weekly earnings of these employees if their weekly hours worked remain the same; or

2. Require that these employees work more hours per week to earn the same amount per week.

The workers for whom potential pay reductions could have occurred had average weekly earnings of \$473; on average, their weekly earnings could have been reduced by as much as \$105, assuming their hours worked per week remained the same.

As noted above, this transfer estimate is based on the Department's 2019 proposal to codify the 2018–2019 guidance, which removed the 20 percent limitation on related, non-tipped duties, into the Department's regulations. The Department believes that this transfer analysis both underestimates and overestimates potential transfers. This estimate may be an underestimate because it does not include all possible occupations and industries for which there may be transfers. Additionally, it does not include workers with tipped jobs that are not listed as their main job in the CPS-ORG data. Additionally, the Department believes that transfers that would result from this rule may exceed the transfers that would occur from reinstating the previous 80/20 guidance. As noted above, under this rule, employers are prohibited from taking a tip credit for a substantial amount of directly supporting work, defined as 20 percent of the tipped employee's workweek or a continuous period of more than 30 minutes.

Some commenters noted that there are additional factors that could weigh in favor of the Department's transfer estimate being an underestimate. For example, EPI noted that tips are underestimated in the CPS data, making underestimation of the amount of pay that could be transferred likely. EPI also noted that the transfer estimate assumes that eliminating the 80/20 rule in the 2020 Final Rule would only have an effect if the employer were already taking a tip credit. They explained that the transfer calculation does not account

for the possibility that some employers may have been incentivized to start using the tip credit following the removal of the 80/20 limitation. The NWLC also commented that the transfer estimate could be an underestimate because of because of the "degree to which non-tipped work has grown during the pandemic in industries that employ large numbers of tipped workers." They cited the shift from dine-in to carryout service in restaurants as an incentive for employers to take a tip credit for greater amounts of non-tipped work. The requirements put in place in this final rule could help protect against this, and prevent a decrease in wages for these workers. Other commenters, such as the State AGs, provided broad support of the estimates in this analysis.

The Department believes that these estimates are also an overestimate, because they assume that every employer that takes a tip credit and for whom it was economically beneficial would lower the hourly rate (including tips) of tipped employees to their outside-option wage. In reality, even when it is seemingly economically beneficial from this narrow perspective, many employers may not have changed their non-tipped task requirements with the removal of the 20 percent limitation, because it would have required changes to the current practice to which their employees were accustomed. There are reasons it is not appropriate to assume that all employers are able to extract all the earnings above the outside-option wage of their employees for whom they take a tip credit. For example, decreasing workers' hourly earnings might reduce morale, leading to lower levels of efficiency or customer service. The reduction in workers' earnings may also lead to higher turnover, which can be costly to a company. Part of this turnover may be due to workers' wages falling below their reservation wage and causing them to exit the labor force.<sup>66</sup> In support of this, researchers have found evidence of downward nominal wage stickiness, meaning that employees rarely experience nominal wage decreases with the same employer.<sup>67</sup>

<sup>66</sup> A worker's reservation wage is the minimum wage that the worker requires to participate in the labor market. It roughly represents the worker's monetary value of an hour of leisure. If the worker's reservation wage is greater than their outside option wage, the worker may exit the labor market if tips are reduced.

<sup>67</sup> See, e.g., Kahn, S. 1997. "Evidence of Nominal Wage Stickiness from Microdata." *The American Economic Review*. 87(5): 993–1008. Hanes, C. 1993. "The Development of Nominal Wage Rigidity in the Late 19th Century." *The American Economic Review* 83(4): 732–756. Kawaguchi, D. and F.

Although in this case the direct wage paid by the employer would not change, these tipped employees' total hourly pay including tips would decrease due to the employer requiring more work on non-tipped tasks leading to earning fewer tips per hour. While some empirical evidence, such as the Kahn paper cited above, indicates that employers are unlikely to make changes in work requirements that would lower employees' nominal hourly earnings, this evidence may not hold in low-wage industries such as food service and in times of structural changes to the economy, such as during the COVID-19 pandemic.<sup>68</sup> Additionally, even if employers may be constrained from having current employees take on more non-tipped work, they could institute these changes for any newly hired employees, so the reduction in average earnings would be over a longer-term time horizon.

The Department believes that another potential reason these transfer estimates may be an overestimate is because of the interaction with the tip pooling provisions of the 2020 Final Rule. The 2020 Tip final rule codified the Consolidated Appropriations Act (CAA) amendments from 2018, which allowed employers to institute mandatory "nontraditional" tip pools to include both front-of-the-house and back-of-the-house workers, as long as they paid all employees a direct cash wage of at least \$7.25. *See* 85 FR 86765. The portions of the 2020 Tip final rule addressing tip pooling went into effect on April 30, 2021. *See* 86 FR 22598. Following this change, some employers may have been incentivized to no longer take a tip credit, and pay all of their employees the full minimum wage. For these employees, the dual jobs analysis is no longer relevant, because they are already earning at least \$7.25 for all hours worked. To the extent that employers responded to the CAA amendments by electing to stop taking a tip credit in order to institute a nontraditional tip pool, the Department believes that the transfers predicted in this analysis may be an overestimate.

However, the Department does not know to what extent this overestimate has occurred, because data is lacking on how many employers stopped taking a tip credit to expand their tip pools following the CAA amendments. Employers may not have acted on new

incentives to shift away from their current tip credit arrangements. Additionally, some states and local areas may not allow employer-mandated tip pooling, so employers in these areas would not have made adjustments following the change in tip pooling provisions. Moreover, there is uncertainty about the future trajectory of State employment regulations; if State-level prohibitions on mandatory tip pooling were to become more widespread, the scope of the tip pooling provisions' impacts could decrease and, in turn, the scope for this rule's impacts could increase (thus potentially making the \$733 million estimate less of an overstatement farther in the future than in the near-term). Lastly, the CAA amendments were enacted in March 2018, so although the Department expects that it may have taken employers time to implement changes to their pay practices, any employers that stopped taking a tip credit in order to institute a nontraditional tip pool directly following the CAA amendments could have already been excluded from the transfer calculation. The Department does not know if employers would have changed their usage of the tip credit following the CAA amendments, or waited to make the change until the codification of the CAA in the 2020 Tip final rule. As noted above, the tip pooling provisions of the 2020 Tip final rule went into effect on April 30, 2021.

The Department also looked at the share of workers in the occupations discussed above ("Waiters and Waitresses" and "Bartenders") earning a direct wage of less than \$7.25 in 2018 and 2019, and found no statistically significant difference between those two years. Because of this, and for all of the reasons discussed above, the Department has not quantified the reduction in transfers associated with the fact that the CAA allowed employers to institute nontraditional tip pools that include back-of-the-house workers.

The transfer estimate may also be an overestimate because it assumes that the 2018–2019 guidance, and the 2020 Tip final rule, completely lacked a limitation on non-tipped work. As discussed above, there was a limit put forth in this approach, but it was not clearly defined.

The Department was unable to determine what proportion of the total tips estimated to have been potentially transferred from these workers were realistically transferred following the replacement of its prior 80/20 guidance with the 2018–2019 guidance. The Department assumes that the likely potential transfers were somewhere between a lower bound of zero and an

upper bound of \$733 million, depending on interactions between Federal and State-level policies. The Department believes that the reasons the estimate is an overestimate outweigh the reasons the estimate is an underestimate. Therefore, the Department believes that this rule would result in transfers from employers to employees, but at a fraction of the upper bound of transfers. The Department does not have data to determine what percentage of the maximum possible transfers is likely to result from this rule.

If the rule results in transfers to tipped workers, it could also lead to increased earnings for underserved populations. Using data from the American Community Survey, the National Women's Law Center found that about 70 percent of tipped workers are women and 26 percent of tipped workers are women of color.<sup>69</sup> Tipped workers also have a poverty rate of over twice that of non-tipped workers.<sup>70</sup>

### 3. Retrospective Transfer Analysis (Extrapolated Forward)

Because the 80/20 guidance was withdrawn through guidance published in November 2018 and February 2019, the Department also looked at whether employees' wages and tips changed following the 2018–2019 guidance to help inform the analysis of transfers associated with this rule. If there was a significant drop in tips, it could mean that employers were having employees do more non-tipped work in response to the guidance.

The Department used the 2018 and 2019 CPS-ORG data to estimate earnings of tipped workers for whom their employers are taking a tip credit. Comparisons were restricted to observations in the months of February–November in each year to compare before and after the guidance. The Department looked at the difference in tips per hour, total hourly wages (direct wages plus tips), and weekly earnings in 2018 and 2019. None of the differences in values between these two periods was statistically significant. The Department also ran linear regressions on these three variables using the set of controls used in the outside-option wage regressions discussed above (state, age, education, gender, race/ethnicity,

<sup>69</sup> National Women's Law Center, "Women in Tipped Occupations, State by State," May 2019. <https://nwlc.org/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf>.

<sup>70</sup> Sylvia A. Allegretto and David Cooper, "Twenty-three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage," July 10, 2014. <https://files.epi.org/2014/EPI-CWED-BP379.pdf>.

Ohtake. 2007. "Testing the Morale Theory of Nominal Wage Rigidity." *ILR Review* 61(1): 59–74.  
Kaur, S. 2019. "Nominal Wage Rigidity in Village Labor Markets." *American Economic Review* 109(10): 3585–3616.

<sup>68</sup> *See* Section V.E. for a more detailed discussion of the effects of the COVID-19 pandemic.

citizenship, marital status, veteran, metro area) and also found that none of the differences were statistically significant.

This lack of a significant decline in tips and total wages could imply that employers had not directed employees to do more non-tipped work following the guidance, and that there will also be little to no transfers associated with the requirement put forth in the rule. However, it is also possible that employers had made no changes in response to the guidance, but would have shifted employees' duties following the 2020 Tip final rule. As noted above, Federal courts largely declined to defer to the Department's 2018–2019 guidance, and this may have influenced employer's decisions as well.<sup>71</sup> Additionally, it may be that the time period is too short to really observe a meaningful difference. The Department chose not to examine data from 2020, as average hourly wages during that year increased as low-wage workers in the leisure and hospitality industry were out of work due to the COVID–19 pandemic, making meaningful comparisons difficult. Furthermore, as noted elsewhere in this regulatory impact analysis, other tip-related policy changes occurred in 2018, thus creating challenges in estimating impacts attributable to each such policy.

#### 4. The Department's Response to Comments Regarding a Negative Impact on Employees

Some commenters alleged that this rule could have a negative economic impact on employees. For example, the Chamber of Commerce noted, "Many employers currently utilizing the tip credit may choose to pay the full minimum wage because of the excessive costs and risks associated with compliance and defending against allegations of non-compliance. As a result, tipped employees may ultimately end up making less money than they do currently." They also state, "On average, tip-eligible employees make significantly more money per hour than the proposed minimum wage of \$15 and many good-paying hourly jobs. Experience demonstrates that many tipped workers prefer a job in which they can earn extra income through gratuities rather than being paid the minimum wage." Franchise Business Services also similarly stated, "Currently, servers earn in excess of \$25 to \$30 per hour, including tips; under DOL's proposal, they would make an hourly wage, and likely earn

considerably less than they do currently." Although there may be servers who earn more than \$15 per hour, this is not true for the occupation overall. According to BLS Occupational Employment and Wage Statistics, waiters and waitresses earned a median hourly wage of \$11.42 in 2020. The Department believes that median earnings data is most appropriate because mean data is more likely to be skewed towards high earners.

The assertion made by these commenters hinges on the assumption that if employers stop taking a tip credit for their employees, these employees will no longer receive tips. The Department does not believe that the amount of tips that employees receive will greatly diminish if their employers are no longer taking a tip credit. Customers would likely not be aware of how servers and other tipped occupations are compensated, so they would be unlikely to reduce the amount that they tip. Even if they were aware that these workers were earning the full minimum wage, they still may not reduce the amount they tip.

In order to see if customers do tip less when they know that workers are receiving the full minimum wage, the Department performed an analysis on tips in states that do allow the use of a tip credit and for those that don't allow the use of a tip credit. The analysis looked for evidence of a difference in the hourly tips earned by tipped workers in states in which employers can take a tip credit versus the hourly tips earned by tipped workers in states in which employers cannot take a tip credit, and found no evidence of lower tips for workers in states that do not allow a tip credit.<sup>72</sup>

Using pooled CPS data from 2017–2019, for bartenders and waiters and waitresses in the restaurants and drinking places industries, the Department regressed tips earned per hour<sup>73</sup> on a dummy variable indicating the worker lives in a State that requires a cash wage of at least \$7.25. Only tipped workers reporting non-zero tips were included. The results were that workers earned more in tips per hour in states that do not allow a tip credit.<sup>74</sup>

<sup>72</sup> The states that do not allow a tip credit or require a cash wage of at least \$7.25 are California, Minnesota, Nevada, Washington, Oregon, Alaska, Montana, Arizona, Colorado, Hawaii, New York, and Connecticut bartenders.

<sup>73</sup> The Department calculated tips per hour earned by each tipped worker who reported an amount of usual overtime, tips, and commissions. The estimates amount of overtime was deducted from the total for workers who usually worked overtime.

<sup>74</sup> Without any additional controls, the coefficient on working in a State that does not allow a tip

The Department recognized that some differences in tips per hour earned may be due to differences in local economic conditions, so additional regressions were run with two variables to try to control for differences in tip amounts due to economic conditions. The Department theorized that states without a tip credit tend to be higher-wage and higher cost of living states (e.g., CA, OR, WA), which could be driving the higher tip amount. To attempt to control for differences in food prices, a variable was added with the average mean expenditure for food away from home from the Consumer Expenditure Survey.<sup>75</sup> A variable was also included to reflect the MIT living wage estimate for each State (hourly rate for one adult with zero children) as a way to control for different costs of living that may impact the amount of tips received.<sup>76</sup> In both cases, the coefficient on living in a State that does not allow a tip credit was no longer statistically significant. From these basic analyses, the Department found no statistically significant difference between the amount of tips earned in states that do or do not allow a tip credit. Therefore, the Department does not believe that workers' earnings would decrease if employers choose not to take a tip credit following this rulemaking.

#### D. Benefits and Cost Savings

The Department believes that one benefit of this rule is increased clarity for both employers and workers. In the 2020 Tip final rule, the Department said that it would not prohibit an employer from taking a tip credit for the time a tipped 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. However, the Department did not define "contemporaneously" or a "reasonable time immediately before or after." If the 2020 Tip final rule's revisions to the dual jobs regulations had gone into effect, the Department believes that the lack of clear definitions of these terms

credit is 1.4 and is statistically significant at a 0.05 level (i.e., workers earn more in tips in states without a tip credit). The same regression was run removing workers from California as a sensitivity check. The results were similar (coefficient of 2.2, statistically significant at the 0.01 level). A regression was also run that excluded workers in the states that had a tipped minimum wage greater than \$2.13 but less than \$7.25 as another sensitivity check. Again, the results were similar (coefficient of 1.7, statistically significant at a 0.05 level).

<sup>75</sup> Bureau of Labor Statistics, Consumer Expenditure Surveys, <https://www.bls.gov/cex/>.

<sup>76</sup> Living Wage Calculator, Massachusetts Institute of Technology, <https://livingwage.mit.edu/>.

<sup>71</sup> See *supra* note 3 (identifying cases in which courts declined to defer to the 2018–19 guidance).

could have made it more difficult for employers to comply with the regulations and more difficult for WHD to enforce them. The reinstatement of the historically used 20 percent workweek tolerance of work that does not produce tips but is part of the tipped occupation, together with the 30 continuous minute limit on directly supporting work, along with examples and explanations, will make it easier for employers to understand their obligations under the Fair Labor Standards Act, and will ensure that workers are paid the wages that they are owed.

Under this rule, employers will also no longer need to refer to O\*NET to determine whether a tipped employee's non-tipped duties are related to their tipped occupation. This rule's functional test allows for better flexibility and adaptability in categorizing workers' duties than a fixed list such as O\*NET. As the economy evolves and duties change, there could be a delay in updating sources like O\*NET and employers would have to regularly review the site to ensure that they are in compliance. Under the Department's test, however, employers and employees would be able to more easily adapt the definitions to changing industry conditions. Therefore, this rule could result in cost savings related to employers' time referencing O\*NET.

As noted previously in this regulatory impact analysis, the phenomenon of tipping can create monopsony power in the labor market. As a result, the relationship between minimum wages for tipped employees and employment of such workers has been estimated by some to be quadratic—with employment increasing over some range of minimum wage increases and decreasing over a further range.<sup>77</sup> Although this rule does not change the minimum direct cash wage that must be paid when an employer claims a tip credit, one way that an employer could comply with the requirements in this rule is to pay tipped workers a direct cash wage of at least \$7.25 for all hours worked. An employer could discontinue taking a tip credit if they found it more beneficial not to limit the amount of directly supporting work performed by a tipped employee. Some employers commented that the rule would be too onerous to comply with, and they would therefore

end up paying the minimum wage for all hours worked. For example, the Chamber of Commerce noted, "Under the Proposed Rule, many employers currently utilizing the tip credit may choose to pay the full minimum wage because of the excessive costs and risks associated with compliance and defending against allegations of non-compliance." The Department believes that the clarifications provided in the final rule will help address employers' concerns about compliance costs, but there may still be some employers who choose to pay the full minimum wage following this rule.

#### *E. Note on the Effects of the COVID-19 Pandemic*

The Department notes that this analysis relies on data from 2018 and 2019, which is prior to the COVID-19 pandemic. Because many businesses were shut down during 2020 or had to change their business model, especially restaurants, the economic situation for tipped workers likely changed due to the pandemic. For example, a survey from One Fair Wage found that 83 percent of respondents reported that their tips had decreased since COVID-19, with 66 percent reporting that their tips decreased by at least 50 percent.<sup>78</sup> This reduction in tips received could result in a decrease in the amount of transfers calculated above.

The labor market has likely changed for tipped workers during the pandemic, and could continue to change following the recovery from the pandemic, especially in the restaurant business. The full-service restaurant industry lost over 1 million jobs since the beginning of the pandemic,<sup>79</sup> and by the end of 2020, over 110,000 restaurants had closed permanently.<sup>80</sup> Although employment in the leisure and hospitality industries recovered rapidly in the spring and early summer of 2021, employment in this sector is still below its February 2020 level.<sup>81</sup> These industry changes could impact workers' wages, as well as their ability and willingness to change jobs. There may also be other factors such as safety

influencing workers' choice of workplace, which could distort labor market assumptions and behavior. Workers that value the security and safety of their job could be less willing to leave for another job, even if their net earnings decreased, and this could have an impact on the outside-option analysis.

#### **VI. Regulatory Flexibility Act (RFA) 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 this rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this rule was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).<sup>82</sup> The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). As discussed in Section V.B.1, there are 470,894 potentially affected establishments. The QCEW does not provide size class data for these detailed industries and states, but the Department calculates that for all industries nationwide, 99.8 percent of establishments have fewer than 500 employees. If we assume that this proportion holds true for the affected states and industries in our analysis, then there are 469,952 potentially affected establishments with fewer than 500 employees.

The Year 1 per-entirety cost for small business employers is \$477.56, which is

<sup>77</sup> Jones, Maggie R. (2016), "Measuring the Effects of the Tipped Minimum Wage Using W-2 Data," CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016-03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>; Wessels, Walter John (1997), "Minimum Wages and Tipped Servers," *Economic Inquiry* 35: 334-349, April 1997.

<sup>78</sup> One Fair Wage, "Service Workers' Experience of Health & Harassment During COVID-19", November 2020. [https://onefairwage.site/wp-content/uploads/2020/11/OFW\\_COVID\\_WorkerExp\\_Emb-1.pdf](https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf).

<sup>79</sup> BLS Current Employment Statistics, <https://www.bls.gov/ces/>. Series ID CES702251101.

<sup>80</sup> Carolina Gonzales, "Restaurant Closings Top 110,000 With Industry in 'Free Fall,'" December 7, 2020. <https://www.bloomberg.com/news/articles/2020-12-07/over-110-000-restaurants-have-closed-with-sector-in-free-fall>.

<sup>81</sup> See Employment Situation Summary August 2021, Bureau of Labor Statistics, <https://www.bls.gov/news.release/empsit.nr0.htm>.

<sup>82</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

the regulatory familiarization cost of \$50.60, plus the adjustment cost of \$50.60, plus the management cost of \$376.36. For each subsequent year, costs

consist only of the management cost. See Section V.B for a description of how the Department calculated these costs. The Department has provided tables

with data on the impact on small businesses, by size class, for each industry included in the analysis.  
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Table 4.

| NAICS 713210 - Casinos (Except Casino Hotels) |                 |   |                           |                 |                           |                          |   |
|---|-----------------|---|---------------------------|-----------------|---------------------------|--------------------------|---|
|   | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees                      | 10              | 18.9%   | 18                        | \$5,209,000     | \$520,900                 | \$478                    | 0.09%   |
| Firms with 5-9 employees                      | 0               | 0.0%  | 0                         | \$0             | \$0                       | \$478                    | 0.00%   |
| Firms with 10-19 employees                    | 0               | 0.0%  | 0                         | \$0             | \$0                       | \$478                    | 0.00%   |
| Firms with <20 employees                      | 12              | 22.6%   | 29                        | \$5,419,000     | \$451,583                 | \$478                    | 0.11%   |
| Firms with 20-99 employees                    | 0               | 0.0%  | 0                         | \$0             | \$0                       | \$478                    | 0.00%   |
| Firms with 100-499 employees                  | 26              | 49.1%   | 6,264                     | \$761,372,000   | \$29,283,538              | \$478                    | 0.00%   |
| Firms with <500 employees                     | 53              | 100.0%  | 6,743                     | \$817,192,000   | \$15,418,717              | \$478                    | 0.00%   |
| Firms with >500 employees                     | 24              | 45.3%   | 20,148                    | \$4,914,882,000 | \$204,786,750             | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 5

| NAICS 721110 - Hotels and Motels |                 |   |                           |                  |                           |                          |   |
|----------------------------------|-----------------|---|---------------------------|------------------|---------------------------|--------------------------|---|
|                                  | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts  | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees         | 10,947          | 35.1%   | 17,143                    | \$4,371,463,000  | \$399,330                 | \$478                    | 0.12%   |
| Firms with 5-9 employees         | 4,818           | 15.5%   | 32,968                    | \$8,336,706,000  | \$1,730,325               | \$478                    | 0.03%   |
| Firms with 10-19 employees       | 7,167           | 23.0%   | 100,872                   | \$8,336,706,000  | \$1,163,207               | \$478                    | 0.04%   |
| Firms with <20 employees         | 22,934          | 73.6%   | 150,997                   | \$15,921,106,000 | \$694,214                 | \$478                    | 0.07%   |
| Firms with 20-99 employees       | 7,160           | 23.0%   | 240,673                   | \$20,671,674,000 | \$2,887,105               | \$478                    | 0.02%   |
| Firms with 100-499 employees     | 1,081           | 3.5%  | 150,879                   | \$14,128,738,000 | \$13,070,063              | \$478                    | 0.00%   |
| Firms with <500 employees        | 31,175          | 100.0%  | 542,549                   | \$50,721,518,000 | \$1,626,993               | \$478                    | 0.03%   |
| Firms with >500 employees        | 1,630           | 5.2%  | 512,075                   | \$62,705,672,000 | \$38,469,737              | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 6

| NAICS 721120 - Casino Hotels |                 |   |                           |                  |                           |                          |   |
|------------------------------|-----------------|---|---------------------------|------------------|---------------------------|--------------------------|---|
|                              | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts  | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees     | 3               | 6.5%  | 0                         | \$0              | \$0                       | \$478                    | 0.00%   |
| Firms with 5-9 employees     | 0               | 0.0%  | 0                         | \$0              | \$0                       | \$478                    | 0.00%   |
| Firms with 10-19 employees   | 0               | 0.0%  | 0                         | \$0              | \$0                       | \$478                    | 0.00%   |
| Firms with <20 employees     | 8               | 17.4%   | 14                        | \$8,215,000      | \$1,026,875               | \$478                    | 0.05%   |
| Firms with 20-99 employees   | 3               | 6.5%  | 195                       | \$14,229,000     | \$4,743,000               | \$478                    | 0.01%   |
| Firms with 100-499 employees | 27              | 58.7%   | 7,177                     | \$860,044,000    | \$31,853,481              | \$478                    | 0.00%   |
| Firms with <500 employees    | 46              | 100.0%  | 8,217                     | \$1,007,450,000  | \$21,901,087              | \$478                    | 0.00%   |
| Firms with >500 employees    | 84              | 182.6%  | 118,524                   | \$18,217,851,000 | \$216,879,179             | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 7

| NAICS 722410 - Drinking Places (Alcoholic Beverages) |                 |   |                           |                  |                           |                          |   |
|--|-----------------|---|---------------------------|------------------|---------------------------|--------------------------|---|
|  | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts  | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees                             | 13,749          | 50.8%   | 26,626                    | \$2,881,174,000  | \$209,555                 | \$478                    | 0.23%   |
| Firms with 5-9 employees                             | 6,707           | 24.8%   | 44,050                    | \$2,715,239,000  | \$404,837                 | \$478                    | 0.12%   |
| Firms with 10-19 employees                           | 3,729           | 13.8%   | 49,361                    | \$2,715,239,000  | \$728,141                 | \$478                    | 0.07%   |
| Firms with <20 employees                             | 24,187          | 89.3%   | 120,064                   | \$8,241,853,000  | \$340,755                 | \$478                    | 0.14%   |
| Firms with 20-99 employees                           | 2,741           | 10.1%   | 96,465                    | \$5,063,067,000  | \$1,847,161               | \$478                    | 0.03%   |
| Firms with 100-499 employees                         | 138             | 0.5%  | 14,534                    | \$859,303,000    | \$6,226,833               | \$478                    | 0.01%   |
| Firms with <500 employees                            | 27,088          | 100.0%  | 232,886                   | \$14,249,073,000 | \$526,029                 | \$478                    | 0.09%   |
| Firms with >500 employees                            | 64              | 0.2%  | 4,151                     | \$372,813,000    | \$5,825,203               | \$478                    | 0.01%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 8

| NAICS 722511 - Full-Service Restaurants |                 |   |                           |                   |                           |                          |   |
|---|-----------------|---|---------------------------|-------------------|---------------------------|--------------------------|---|
|   | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts   | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees                | 43,191          | 30.0%   | 69,719                    | \$12,037,880,000  | \$278,713                 | \$478                    | 0.17%   |
| Firms with 5-9 employees                | 26,370          | 18.3%   | 179,617                   | \$23,155,092,000  | \$878,085                 | \$478                    | 0.05%   |
| Firms with 10-19 employees              | 30,904          | 21.4%   | 429,712                   | \$23,155,092,000  | \$749,259                 | \$478                    | 0.06%   |
| Firms with <20 employees                | 100,465         | 69.7%   | 679,048                   | \$47,196,499,000  | \$469,781                 | \$478                    | 0.10%   |
| Firms with 20-99 employees              | 41,179          | 28.6%   | 1,549,506                 | \$72,425,782,000  | \$1,758,804               | \$478                    | 0.03%   |
| Firms with 100-499 employees            | 2,504           | 1.7%  | 330,685                   | \$16,855,317,000  | \$6,731,357               | \$478                    | 0.01%   |
| Firms with <500 employees               | 144,148         | 100.0%  | 2,559,239                 | \$136,477,598,000 | \$946,788                 | \$478                    | 0.05%   |
| Firms with >500 employees               | 2,441           | 1.7%  | 1,276,925                 | \$61,492,598,000  | \$25,191,560              | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 9

| NAICS 722513 - Limited Service Restaurants |                 |   |                           |                   |                           |                          |   |
|--|-----------------|---|---------------------------|-------------------|---------------------------|--------------------------|---|
|  | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts   | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees                   | 39,481          | 37.1%   | 69,109                    | \$9,918,230,000   | \$251,215                 | \$478                    | 0.19%   |
| Firms with 5-9 employees                   | 20,041          | 18.8%   | 133,363                   | \$14,262,156,000  | \$711,649                 | \$478                    | 0.07%   |
| Firms with 10-19 employees                 | 20,256          | 19.0%   | 276,233                   | \$14,262,156,000  | \$704,095                 | \$478                    | 0.07%   |
| Firms with <20 employees                   | 79,778          | 74.9%   | 478,705                   | \$32,962,211,000  | \$413,174                 | \$478                    | 0.12%   |
| Firms with 20-99 employees                 | 22,427          | 21.1%   | 826,711                   | \$40,270,656,000  | \$1,795,633               | \$478                    | 0.03%   |
| Firms with 100-499 employees               | 4,243           | 4.0%  | 659,080                   | \$33,702,776,000  | \$7,943,148               | \$478                    | 0.01%   |
| Firms with <500 employees                  | 106,448         | 100.0%  | 1,964,496                 | \$106,935,643,000 | \$1,004,581               | \$478                    | 0.05%   |
| Firms with >500 employees                  | 2,591           | 2.4%  | 1,283,835                 | \$66,321,227,000  | \$25,596,768              | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry



Table 10

| NAICS 722515 - Snack and Nonalcoholic Beverage Bars |                 |   |                           |                  |                           |                          |   |
|---|-----------------|---|---------------------------|------------------|---------------------------|--------------------------|---|
|   | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts  | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees                            | 12,657          | 43.6%   | 16,075                    | \$2,029,785,000  | \$160,369                 | \$478                    | 0.30%   |
| Firms with 5-9 employees                            | 6,176           | 21.3%   | 42,046                    | \$3,772,007,000  | \$610,752                 | \$478                    | 0.08%   |
| Firms with 10-19 employees                          | 6,291           | 21.7%   | 83,512                    | \$3,772,007,000  | \$599,588                 | \$478                    | 0.08%   |
| Firms with <20 employees                            | 25,124          | 86.6%   | 141,633                   | \$7,833,377,000  | \$311,789                 | \$478                    | 0.15%   |
| Firms with 20-99 employees                          | 3,528           | 12.2%   | 107,810                   | \$5,072,661,000  | \$1,437,829               | \$478                    | 0.03%   |
| Firms with 100-499 employees                        | 362             | 1.2%  | 37,996                    | \$2,070,085,000  | \$5,718,467               | \$478                    | 0.01%   |
| Firms with <500 employees                           | 29,021          | 100.0%  | 287,716                   | \$14,984,672,000 | \$516,339                 | \$478                    | 0.09%   |
| Firms with >500 employees                           | 343             | 1.2%  | 164,169                   | \$10,774,588,000 | \$31,412,793              | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

Table 11

| NAICS 812113 - Nail Salons   |                 |   |                           |                 |                           |                          |   |
|------------------------------|-----------------|---|---------------------------|-----------------|---------------------------|--------------------------|---|
|                              | Number of Firms | Number of Firms as Percent of Small Firms in Industry | Total Number of Employees | Annual Receipts | Average Receipts per Firm | First Year Cost per Firm | First Year Cost per Firm as Percent of Receipts |
| Firms with 0-4 employees     | 9,688           | 74.7%   | 16,512                    | \$2,059,539,000 | \$212,587                 | \$478                    | 0.22%   |
| Firms with 5-9 employees     | 2,455           | 18.9%   | 15,647                    | \$448,685,000   | \$182,764                 | \$478                    | 0.26%   |
| Firms with 10-19 employees   | 701             | 5.4%  | 8,883                     | \$448,685,000   | \$640,064                 | \$478                    | 0.07%   |
| Firms with <20 employees     | 12,858          | 99.1%   | 41,188                    | \$3,395,814,000 | \$264,101                 | \$478                    | 0.18%   |
| Firms with 20-99 employees   | 95              | 0.7%  | 2,367                     | \$119,640,000   | \$1,259,368               | \$478                    | 0.04%   |
| Firms with 100-499 employees | 0               | 0.0%  | 0                         | \$0             | \$0                       | \$478                    | 0.00%   |
| Firms with <500 employees    | 12,970          | 100.0%  | 44,111                    | \$3,532,063,000 | \$272,326                 | \$478                    | 0.18%   |
| Firms with >500 employees    | 0               | 0.0%  | 0                         | \$0             | \$0                       | \$478                    | 0.00%   |

Source: U.S. Census Bureau Statistics of U.S. Businesses, 2017 SUSB Annual Data Tables by Establishment Industry

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As shown in the tables above, costs for small business entities in these industries are never more than 0.3 percent of annual receipts. Therefore, this rule will not have a significant economic impact on a substantial number of small entities.

In their comment, SBA Advocacy noted that it was concerned about DOL's certification that the rule will not have a significant economic impact on a

substantial number of small entities, saying, "DOL improperly certified this proposed rule because it omitted some and underestimated other compliance costs of this rule for small employers." As discussed in the regulatory impact analysis above, the Department believes that the change and clarifications put forth in this final rule will help mitigate commenters' concerns about compliance costs. Additionally, the minute-to-minute tracking discussed by

commenters is not required by the rule, and will also not be necessary to comply with the rule. Lastly, employers would already have been monitoring employees' work to some extent under the prior guidance, so the management cost calculation should only take into account the change from that guidance to the current rule. For these reasons, the Department has not adjusted its cost estimates in this final rule.

SBA Advocacy also requested that the Department include increased wage costs to employers in the Regulatory Flexibility Analysis (RFA). As noted in Section C.2.c., the Department estimated that transfers associated with increased wages for employees could be anything up to \$733 million, but there is too much uncertainty to further refine the estimate to determine exactly how much employees' wages would change. The Department lacks data to determine how many employers changed employees' wages following the 2018–2019 guidance and the publication of the 2020 Final Rule, and so therefore cannot determine how wages would change with the publication of this rule. The Department has not calculated a definitive estimate of transfers, and does not believe that it is appropriate to include increased wage costs in the cost calculations for the RFA. However, as an illustrative example, the Department has provided the following rough analysis using the upper bound of transfers. It is difficult to determine how the transfers discussed in this rule would be spread across establishments, because not all establishments have tipped workers or use the tip credit. However, for purposes of this example, assuming all transfers are spread equally across establishments, dividing the upper bound of transfers (\$733,000,000) by the total number of affected establishments used in the transfer analysis (470,894) yields a per-establishment wage cost of \$1,557. For small businesses, even for the industry size class with the lowest average receipts per firm (\$160,369), total costs (\$2,035) consisting of increased wages, rule familiarization, adjustment, and management costs are only 1.3 percent of revenues.<sup>83</sup> <sup>84</sup> For all other industries and size classes, total costs are a smaller share of small business revenues. Therefore, as presented in the tables above, and even when including an example estimate of increased wage costs, the rule will not have a significant economic impact on a substantial number of small entities.

## VII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>85</sup> requires agencies to prepare a written statement for rules

<sup>83</sup> The industry size class with the lowest average receipts per firm are firms with 0–4 employees in the Snack and Alcoholic Beverage Bars industry. See Table 10.

<sup>84</sup> Total costs include the illustrative example wage costs discussed here (\$1,516), as well as the per-establishment costs shown in tables 4–11 (\$478). \$1,557 + \$478 = \$2,035.

<sup>85</sup> See 2 U.S.C. 1501.

with a Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$165 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least 1 year.<sup>86</sup> This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate State, local, and Tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

### A. Authorizing Legislation

This final rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*

#### 1. Assessment of Costs and Benefits

For purposes of the UMRA, this rule includes a Federal mandate that would result in increased expenditures by the private sector of more than \$156 million in at least 1 year, but will not result in any increased expenditures by State, local, and Tribal governments.

The Department determined that the rule could result in Year 1 total costs for the private sector of \$224.9 million, for regulatory familiarization, adjustment costs, and management costs. The Department determined that the rule could result in management costs of \$177.2 million in subsequent years. Furthermore, the Department estimates that there may be substantial transfers experienced as UMRA-relevant expenditures by employers.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.<sup>87</sup> However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of \$53.6 billion to \$107.2 billion (using 2019 GDP).<sup>88</sup> A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it

<sup>86</sup> Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

<sup>87</sup> See 2 U.S.C. 1532(a)(4).

<sup>88</sup> According to the Bureau of Economic Analysis, 2019 GDP was \$21.43 trillion. [https://www.bea.gov/system/files/2020-02/gdp4q19\\_2nd\\_0.pdf](https://www.bea.gov/system/files/2020-02/gdp4q19_2nd_0.pdf).

is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be \$224.9 million. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

## VIII. Executive Order 13132, Federalism

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule will 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.

## IX. Executive Order 13175, Indian Tribal Governments

This rule will 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.

### 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

### 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 531

Wages.

## PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

■ 1. The authority citation for part 10  
 continues 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  
 paragraph (b)(2) and adding paragraph  
 (b)(3) to read as follows:

### § 10.28 Tipped employees.

\* \* \* \* \*

(b) \* \* \*

(2) *Dual jobs.* In some situations an  
 employee is employed in dual jobs, as,  
 for example, where a maintenance  
 person in a hotel also works as a server.  
 In such a situation the employee, if the  
 employee customarily and regularly  
 receives at least \$30 a month in tips for  
 the work as a server, is engaged in a  
 tipped occupation only when employed  
 as a server. The employee is employed  
 in two occupations, and no tip credit  
 can be taken for the employee's hours of  
 employment in the occupation of  
 maintenance person.

(3) *Engaged in a tipped occupation.*  
 An employee is engaged in a tipped  
 occupation when the employee  
 performs work that is part of the tipped  
 occupation. An employer may only take  
 a tip credit for work performed by a  
 tipped employee that is part of the  
 employee's tipped occupation.

(i) *Work that is part of the tipped  
 occupation.* Work that is part of the  
 tipped occupation is:

(A) Work that produces tips; and  
 (B) Work that directly supports the  
 tip-producing work, if the directly  
 supporting work is not performed for a  
 substantial amount of time.

(ii) *Tip-producing work.* (A) Tip-  
 producing work is any work performed  
 by a tipped employee that provides  
 service to customers for which the  
 tipped employee receives tips.

(B) *Examples:* The following examples  
 illustrate *tip-producing work* performed  
 by a tipped employee that provides  
 service to customers for which the  
 tipped employee receives tips. A tipped  
 employee's tip-producing work includes  
 all aspects of the service to customers  
 for which the tipped employee receives  
 tips; this list is illustrative and is not  
 exhaustive. A server's tip-producing  
 work includes providing table service,  
 such as taking orders, making  
 recommendations, and serving food and  
 drink. A bartender's tip-producing work  
 includes making and serving drinks,  
 talking to customers at the bar and, if  
 the bar includes food service, serving  
 food to customers. A nail technician's  
 tip-producing work includes performing  
 manicures and pedicures and assisting  
 the patron to select the type of service.  
 A busser's tip-producing work includes  
 assisting servers with their tip-  
 producing work for customers, such as  
 table service, including filling water  
 glasses, clearing dishes from tables,  
 fetching and delivering items to and  
 from tables, and bussing tables,  
 including changing linens and setting  
 tables. A parking attendant's tip-  
 producing work includes parking and  
 retrieving cars and moving cars in order  
 to retrieve a car at the request of  
 customer. A service bartender's tip-  
 producing work includes preparing  
 drinks for table service. A hotel  
 housekeeper's tip-producing work  
 includes cleaning hotel rooms. A hotel  
 bellhop's tip-producing work includes  
 assisting customers with their luggage.  
 The tip-producing work of a tipped  
 employee who both prepares and serves  
 food to customers, such as a  
 counterperson, includes preparing and  
 serving food.

(iii) *Directly supporting work.* (A)  
 Directly supporting work is work  
 performed by a tipped employee in  
 preparation of or to otherwise assist tip-  
 producing customer service work.

(B) *Examples:* The following  
 examples illustrate tasks that are  
*directly supporting work* when they are  
 performed in preparation of or to  
 otherwise assist tip-producing customer  
 service work and when they do not  
 provide service to customers. This list is  
 illustrative and is not exhaustive: A  
 server's directly supporting work

includes dining room prep work, such  
 as refilling salt and pepper shakers and  
 ketchup bottles, rolling silverware,  
 folding napkins, sweeping or  
 vacuuming under tables in the dining  
 area, and setting and bussing tables. A  
 busser's directly supporting work  
 includes pre- and post-table service  
 prep work such as folding napkins and  
 rolling silverware, stocking the busser  
 station, and vacuuming the dining  
 room, as well as wiping down soda  
 machines, ice dispensers, food warmers,  
 and other equipment in the service  
 alley. A bartender's directly supporting  
 work includes work such as slicing and  
 pitting fruit for drinks, wiping down the  
 bar or tables in the bar area, cleaning bar  
 glasses, arranging bottles in the bar,  
 fetching liquor and supplies, vacuuming  
 under tables in the bar area, cleaning ice  
 coolers and bar mats, making drink  
 mixes, and filling up dispensers with  
 drink mixes. A nail technician's directly  
 supporting work includes cleaning  
 pedicure baths between customers,  
 cleaning and sterilizing private salon  
 rooms between customers, and cleaning  
 tools and the floor of the salon. A  
 parking attendant's directly supporting  
 work includes cleaning the valet stand  
 and parking area, and moving cars  
 around the parking lot or garage to  
 facilitate the parking of patrons' cars. A  
 service bartender's directly supporting  
 work includes slicing and pitting fruit  
 for drinks, cleaning bar glasses,  
 arranging bottles, and fetching liquor or  
 supplies. A hotel housekeeper's directly  
 supporting work includes stocking the  
 housekeeping cart. A hotel bellhop's  
 directly supporting work includes  
 rearranging the luggage storage area and  
 maintaining clean lobbies and entrance  
 areas of the hotel.

(iv) *Substantial amount of time.* An  
 employer can take a tip credit for the  
 time a tipped employee spends  
 performing work that is not tip-  
 producing, but directly supports tip-  
 producing work, provided that the  
 employee does not perform that work  
 for a substantial amount of time. For the  
 purposes of this section, an employee  
 has performed directly supporting work  
 for a substantial amount of time if:

(A) The directly supporting work  
 exceeds a 20 percent workweek  
 tolerance, which is calculated by  
 determining 20 percent of the hours in  
 the workweek for which the employer  
 has taken a tip credit. The employer  
 cannot take a tip credit for any time  
 spent on directly supporting work that  
 exceeds the 20 percent tolerance. Time  
 for which an employer does not take a  
 tip credit is excluded in calculating the  
 20 percent tolerance; or

(B) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent tolerance in paragraph (b)(3)(iv)(A) of this section.

(v) *Work that is not part of the tipped occupation.* (A) Work that is not part of the tipped occupation is any work that does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time.

(B) *Examples:* The following examples illustrate work that is not part of the tipped occupation because the work does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. This list is illustrative and is not exhaustive. Preparing food, including salads, and cleaning the kitchen or bathrooms, is not part of the tipped occupation of a server. Cleaning the dining room or bathroom is not part of the tipped occupation of a bartender. Ordering supplies for the salon is not part of the tipped occupation of a nail technician. Servicing vehicles is not part of the tipped occupation of a parking attendant. Cleaning the dining room and bathrooms is not part of the tipped occupation of a service bartender. Cleaning non-residential parts of a hotel, such as the exercise room, restaurant, and meeting rooms, is not part of the tipped occupation of a hotel housekeeper. Cleaning the kitchen or bathrooms is not part of the tipped occupation of a busser. Retrieving room service trays from guest rooms is not part of the tipped occupation of a hotel bellhop.

\* \* \* \* \*

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

■ 3. The authority citation for part 531 continues 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.

■ 4. Amend § 531.56 by revising paragraph (e) and adding paragraph (f) to read as follows:

#### **§ 531.56 “More than \$30 a month in tips.”**

\* \* \* \* \*

(e) *Dual jobs.* In some situations an employee is employed in dual jobs, as, for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least \$30 a month in tips for the employee's work as a server, the employee is engaged in a tipped occupation only when employed as a server. The employee is employed in two occupations, and no tip credit can be taken for the employee's hours of employment in the occupation of maintenance person.

(f) *Engaged in a tipped occupation.* An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation. An employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation.

(1) *Work that is part of the tipped occupation.* Work that is part of the tipped occupation is:

(i) Work that produces tips; and  
(ii) Work that directly supports the tip-producing work, if the directly supporting work is not performed for a substantial amount of time.

(2) *Tip-producing work.* (i) Tip-producing work is any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.

(ii) *Examples:* The following examples illustrate *tip-producing work* performed by a tipped employee that provides service to customers for which the tipped employee receives tips. A tipped employee's tip-producing work includes all aspects of the service to customers for which the tipped employee receives tips; this list is illustrative and is not exhaustive. A server's tip-producing work includes providing table service, such as taking orders, making recommendations, and serving food and drink. A bartender's tip-producing work includes making and serving drinks, talking to customers at the bar and, if the bar includes food service, serving food to customers. A nail technician's tip-producing work includes performing manicures and pedicures and assisting the patron to select the type of service. A busser's tip-producing work includes assisting servers with their tip-producing work

for customers, such as table service, including filling water glasses, clearing dishes from tables, fetching and delivering items to and from tables, and bussing tables, including changing linens and setting tables. A parking attendant's tip-producing work includes parking and retrieving cars and moving cars in order to retrieve a car at the request of customer. A service bartender's tip-producing work includes preparing drinks for table service. A hotel housekeeper's tip-producing work includes cleaning hotel rooms. A hotel bellhop's tip-producing work includes assisting customers with their luggage. The tip-producing work of a tipped employee who both prepares and serves food to customers, such as a counterperson, includes preparing and serving food.

(3) *Directly supporting work.* (i) Directly supporting work is work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work.

(ii) *Examples:* The following examples illustrate tasks that are *directly supporting work* when they are performed in preparation of or to otherwise assist tip-producing customer service work and when they do not provide service to customers. This list is illustrative and is not exhaustive: A server's directly supporting work includes dining room prep work, such as refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables. A busser's directly supporting work includes pre- and post-table service prep work such as folding napkins and rolling silverware, stocking the busser station, and vacuuming the dining room, as well as wiping down soda machines, ice dispensers, food warmers, and other equipment in the service alley. A bartender's directly supporting work includes work such as slicing and pitting fruit for drinks, wiping down the bar or tables in the bar area, cleaning bar glasses, arranging bottles in the bar, fetching liquor and supplies, vacuuming under tables in the bar area, cleaning ice coolers and bar mats, making drink mixes, and filling up dispensers with drink mixes. A nail technician's directly supporting work includes cleaning pedicure baths between customers, cleaning and sterilizing private salon rooms between customers, and cleaning tools and the floor of the salon. A parking attendant's directly supporting work includes cleaning the valet stand and parking area, and moving cars around the parking lot or garage to facilitate the parking of patrons' cars. A

service bartender's directly supporting work includes slicing and pitting fruit for drinks, cleaning bar glasses, arranging bottles, and fetching liquor or supplies. A hotel housekeeper's directly supporting work includes stocking the housekeeping cart. A hotel bellhop's directly supporting work includes rearranging the luggage storage area and maintaining clean lobbies and entrance areas of the hotel.

(4) *Substantial amount of time.* An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:

(i) The directly supporting work exceeds a 20 percent workweek tolerance, which is calculated by determining 20 percent of the hours in the workweek for which the employer has taken a tip credit. The employer cannot take a tip credit for any time spent on directly supporting work that exceeds the 20 percent tolerance. Time for which an employer does not take a

tip credit is excluded in calculating the 20 percent tolerance; or

(ii) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent tolerance in paragraph (f)(4)(i) of this section.

(5) *Work that is not part of the tipped occupation.* (i) Work that is not part of the tipped occupation is any work that does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time.

(ii) *Examples:* The following examples illustrate *work that is not part of the tipped occupation* because the work does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work. This list is

illustrative and is not exhaustive.

Preparing food, including salads, and cleaning the kitchen or bathrooms, is not part of the tipped occupation of a server. Cleaning the dining room or bathroom is not part of the tipped occupation of a bartender. Ordering supplies for the salon is not part of the tipped occupation of a nail technician. Servicing vehicles is not part of the tipped occupation of a parking attendant. Cleaning the dining room and bathrooms is not part of the tipped occupation of a service bartender. Cleaning non-residential parts of a hotel, such as the exercise room, restaurant, and meeting rooms, is not part of the tipped occupation of a hotel housekeeper. Cleaning the kitchen or bathrooms is not part of the tipped occupation of a busser. Retrieving room service trays from guest rooms is not part of the tipped occupation of a hotel bellhop.

Signed this 23rd day of October, 2021.

**Jessica Looman,**

*Acting Administrator, Wage and Hour Division.*

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