

August 23, 2021

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted at: <https://www.federalregister.gov/documents/2021/06/23/2021-13262/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal>

**Re: *Comments on Regulatory Information Number (RIN) 1235-AA21:
Tip Regulations under the Fair Labor Standards Act: Partial Withdrawal***

Dear Ms. DeBisschop:

I am writing this letter on behalf of my firm, FISH POTTER BOLAÑOS, P.C. We are a law firm in Chicago that represents individuals and classes of plaintiffs/employees in employment related matters. Our practice is heavily concentrated in litigation on behalf of employees who are compensated in whole or in part on tips. In addition, I worked for many years as a bartender and server prior to becoming an attorney, and thus I have firsthand experience in the restaurant industry as a tipped employee.

We support the above-referenced Department of Labor (“Department” or “DOL”) proposed rulemaking, which clarifies that an employer may only take a tip credit when tipped employees perform work that produces tips or a non-substantial amount of work that directly supports tip-producing work and defines “substantial amount of time” as more than 20 percent of all hours worked during the employee’s workweek or exceeding 30 continuous minutes. In addition, we support payment of the full minimum wage for any non-tipped work, as set forth below.

Importance of tipped work rules to FISH POTTER BOLAÑOS, P.C.

During the last 20 years, we have collectively successfully represented thousands of workers in tipped occupations in the Chicago-area and in nation-wide class and collective actions, including servers, bussers, bar tenders, pizza delivery drivers, “exotic” dancers, blackjack dealers, and parking valet attendants.

In our experience, wage and hour violations and discrimination are commonplace in industries which employ tipped workers, in part due to the nature of tip-based compensation agreements.

In today's economy and especially during the pandemic, the ability of employers to pay workers a subminimum tipped wage of \$2.13/hour should be scrutinized and only narrowly permitted. The origins of the subminimum wage for tipped service jobs are rooted in racist and gendered carve-outs for work performed predominantly by workers of color and women workers,¹ and this wage perpetuates inequality today. Even before the pandemic, median hourly earnings for people working in common tipped jobs like restaurant server and bartender were \$12 or less, including tips,² while poverty rates for tipped workers were more than twice as high as rates for working people overall.³ Women—disproportionately women of color—represent more than two-thirds of tipped workers nationwide, and are even more likely to experience poverty than their male counterparts.⁴ And the Department routinely identifies significant wage violations in industries with large concentrations of tipped workers, where employers have been able to violate rules with near impunity.⁵

Many of our cases have been class and collective actions alleging wage and hour violations that all-too-commonly impact tipped employees, including illegal participation by management or non-service line employees in the tip pool, the failure to pay any wage (apart from tips), the failure to pay for all hours worked, the misclassification of tipped employees as “independent contractors,” the requirement that employees pay for uniforms or other work-related expenses that cause their wages to drop below the statutory minimum, and the imposition of unauthorized (and illegal) wage deductions.

We have also brought numerous sex and/or race discrimination and harassment claims on behalf of tipped employees, and our experience confirms the empirical studies cited above that gratuity-based compensation arrangements are a catalyst for unlawful discrimination and harassment. Tipped employees face inherent pressure to avoid reporting or opposing illegal conduct for fear of alienating customers (whom they rely on for tips) or managers (who control shift assignments and other factors that can dramatically impact their tip income). Some of our cases have involved truly egregious discriminatory conduct that was attributable to, in

¹ See, e.g., Michelle Alexander, *Tipping Is a Legacy of Slavery*, N.Y. Times (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/opinion/minimum-wage-racism.html>.

² According to the most recent national wage estimates, which are based on data collected between November 2017 and May 2020 (near the onset of the pandemic), median hourly wages, including tips, were \$11.42 for waiters and waitresses and \$12.00 for bartenders, the two largest groups of tipped workers. See U.S. Dep't of Labor, Bureau of Labor Statistics, May 2020 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/current/oes_nat.htm. Tipped workers in other occupations have similarly low wages, such as barbers/hairstylists/cosmetologists (\$13.28) and baggage porters and bellhops (\$13.00). *Id.*

³ See *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, Nat'l Women's Law Ctr. (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf>.

⁴ *Id.*

⁵ See generally, e.g., David Weil, *Improving Workplace Conditions Through Strategic Enforcement* (May 2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

whole or in part, the inherently unequal (and historically subservient) position employees who work for tips are placed in.

Strengthening protections for people working in tipped jobs should thus be a priority for the Department, and this proposed rule takes important steps to do so.

I. Restoring the 80/20 rule permanent is incredibly important, because tipped workers should be paid at least the full minimum wage when non-tipped work consumes more than 20% of their time.

Under the longstanding “80/20 rule,” DOL guidance provided that employers could not pay a tipped employee the \$2.13/hour subminimum wage for time beyond 20% of the workweek that the employee spends on tasks that are related to their job but do not produce tips. In the restaurant context, for example, if a server spent 12 hours in a 40-hour workweek on “side work”—like rolling silverware or setting tables—their employer would have to pay the full minimum wage for at least four of those hours (because eight hours of side work reaches the 20% limit). Under the Trump administration, however, the Department removed this crucial limit, allowing employers to pay just \$2.13/hour for non-tipped work as long as those duties are done “contemporaneously with tipped duties or for a reasonable time immediately before or after performing the tipped duties.” See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018). But the Department did not define “reasonable time,” giving unscrupulous employers free rein to abuse the rule and making enforcement difficult.

The Economic Policy Institute estimated in 2019 that elimination of the 80/20 rule would allow employers to capture more than \$700 million annually from workers,⁶ a number that has likely gone up as shifts in employer and consumer behavior during the pandemic—such as restaurants increasing carry-out and reducing dine-in service—have created much more non-tipped work in establishments that employ tipped workers. This loss would be especially harmful for women and people of color who are both disproportionately represented in the tipped workforce and have borne the brunt of the pandemic’s devastating impacts.

We support the Department’s restoration in the proposed rule of the 20% limit on related, non-tipped work for which an employer can pay a tipped employee less than the full minimum wage.

II. Under this rule, an employer also cannot take the tip credit when non-tipped duties are performed for a continuous period of time exceeding 30 minutes. Bright-line rules are important for clarity of application and to avoid subminimum wage pay for workers not properly treated as “tipped.”

The Department recognizes that a lack of bright-line rules makes compliance with and enforcement of the limitations on use of the tipped wage difficult. The proposal sets a threshold of 30 minutes of non-tipped work as an appropriate limit for determining when an employee is no longer performing work that is incidental to

⁶ Heidi Shierholz & David Cooper, *Workers Will Lose More Than \$700 Million Annually Under Proposed DOL Rule*, Econ. Policy Inst. (Nov. 30, 2019), <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

producing tips and has therefore ceased being in a tipped occupation and must be paid at least the full minimum wage.

We support bright-line rules to enhance clarity and compliance with minimum wage and overtime rules. The 30 minutes of continuous non-tipped work standard meets this objective.

III. The Department should go further and rule that if an employee performs any non-tipped duties during a shift, the employer may not take a tip credit and must pay that employee the full minimum wage for those hours worked.

While we appreciate the Department's efforts to restore and strengthen the longstanding 80/20 rule, we urge the Department to go further still. 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, and we encourage 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 earning tips. And if the Department will not do so, we urge you to consider reducing the threshold of related, non-tipped work to, for example, 5% or 10%. As set forth above, there are numerous social and economic factors that impede and discourage tipped employees from enforcing their legal rights, and we urge the Department to take this additional step that would facilitate compliance.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

FISH POTTER BOLAÑOS P.C.

/s/ M. Nieves Bolaños