



August 23, 2021

By electronic submission: <http://www.regulations.gov>

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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**Re: Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial
Withdrawal, 86 Fed. Reg. 32,818 (June 23, 2021), RIN 1235-AA21**

Dear Secretary Walsh and Director DeBisschop:

On behalf of the Restaurant Law Center (the “Law Center”) and the National Restaurant Association (the “Association”), we appreciate the opportunity to submit our comments on the notice of proposed rulemaking (the “Proposed Rule”) issued by the Wage and Hour Division (“WHD”) of the U.S. Department of Labor (the “Department”) and published in the Federal Register on June 23, 2021, to amend the regulations at 29 C.F.R. §§ 10.28 and 531.56 with respect to the topics of tipped employees and so-called dual jobs. We write to express our concerns about, and our opposition to, the Proposed Rule.

Interest of the Commenters

The Law Center is a 501(c)(6) legal entity affiliated with the Association and launched in 2015 with the expressed purpose of promoting laws and regulations

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that allow restaurants to continue growing, creating jobs, and contributing to a robust American economy. The Law Center’s goal is to protect and to advance the restaurant industry and to ensure that the views of America’s restaurant and foodservice industry (the “Industry”) are taken into consideration by giving its members a stronger voice, particularly in the courtroom, but also before legislative and administrative bodies. The Law Center files comments and pursues cases of interest to the Industry. In fact, for over a decade, the Law Center or the Association has led the litigation seeking proper enforcement of the FLSA with regard to its provisions relating to tipped employees.¹

Founded in 1919, the Association is the largest trade association representing the Industry in the world. The Industry comprises more than one million restaurants and other foodservice outlets employing almost 15.6 million people—approximately 10 percent of the U.S. workforce.

Restaurants are job creators and the nation’s second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. Thus, it is especially important that the FLSA’s tip regulations provide clear guidance that informs small business owners, as well as their employees, what the law allows and requires.

The Deeply Flawed Origins of the Dual Jobs Regulation

The Proposed Rule seeks comments on the substance of the Department’s dual jobs regulation—currently found in both 29 C.F.R. Part 531 concerning minimum wage payments under the FLSA and 29 C.F.R. Part 10 concerning minimum wage for federal contractors—to address the application of the FLSA’s tip credit to tipped employees who perform both tipped and so-called non-tipped duties. Thus, it is worth clarifying that, under the FLSA, employers may pay a “tipped employee”—i.e., “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips”—a cash wage of at least \$2.13 per hour so long as the employer satisfies certain statutory criteria, including that the employee’s tips plus the cash wage equal at least the minimum wage.² Congress has expressly noted occupations in which workers qualify for the tip credit to

¹ See, e.g., *Rest. Law Ctr. v. U.S. Dep’t of Labor*, No. 18-cv-567 (W.D. Tex. July 6, 2018); *Nat’l Rest. Ass’n v. Dep’t of Labor* (U.S.) (No. 16-920) (appeal mooted by change in the law and, thus, *certiorari* petition denied on January 24, 2017); *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

² 29 U.S.C. § 203(m), (t).

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include “waiters, bellhops, waitresses, counter men, busboys, service bartenders, etc.”³

The “dual jobs” regulation seeks to address the scenario in which an employee may work for an employer in two distinct, non-overlapping capacities, one of which is tipped and one of which is not. Congress has already spoken to how the law should treat a worker’s status as a tipped employee in that situation: “[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.”⁴

According to Congress, therefore, the availability of the tip credit in situations where the employee has both a tipped job and an untipped job depends on which job was predominant in any given workweek. Apart from the dual jobs regulation, the first discussion by WHD of tipped employees engaging in supposedly non-tipped work appears to be in a 1979 opinion letter addressing waitresses who “report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar.”⁵ With little analysis, WHD concluded that “since it is our opinion that salad preparation activities are essentially the activities performed by chefs, no tip credit may be taken for the time spent in preparing vegetables for the salad bar.”⁶

In 1980, WHD was asked to opine whether the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese, salt, and pepper shakers), and vacuumed the dining room carpet.⁷ WHD stated that the employee would be considered a tipped employee for this period and the tip credit would apply because the employee was not engaged in a dual occupation.

Furthermore, WHD noted that there was no “clear dividing line” between the work of the server and the work of another occupation. The letter makes no mention of any percentage limitation on tipped versus non-tipped duties or that the appropriate analysis would involve such a limitation.

³ S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

⁴ *Id.*

⁵ U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA-895 (Aug. 8, 1975).

⁶ *Id.*

⁷ See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, WH-502 (Mar. 28, 1980).

In 1985, WHD issued an opinion letter addressing whether a server who during a five-hour shift performed 1.5 to 2 hours of preparatory work before the restaurant opens can be paid the tip credit rate for the time spent performing preparatory activities, which amounted to “30%-40%” of the employee’s workday.⁸ WHD concluded that because only one employee was assigned to the opening duties, the employee was responsible for preparing the entire restaurant, not just her area, and because the amount of time was 30% to 40% of the entire shift, the tip credit was not available for that time.⁹

None of those opinion letters articulated a temporal limit on performing tasks that do not directly generate tips in order for an employer to retain the right to take a tip credit for all time a tipped employee works. Then in 1988, based on these various opinion letters, WHD issued a revision to the Field Operations Handbook¹⁰ (since rescinded) inventing, seemingly from whole cloth, a variety of new categories of restaurant duties, including those that are:

- “related to the tipped occupation”;
- “not by themselves directed toward producing tips”;
- “not tip producing”;
- “incidental to the regular duties of the [tipped employees]”;
- “generally assigned to the [tipped employees]”; and
- “general preparation work or maintenance.”¹¹

These new made-up categories in the Field Operations Handbook unleashed a wave of class and collective action litigation focusing on, among other things, whether certain tasks are tip-producing, related or incidental to tip-producing tasks, or unrelated to tip-producing tasks. None of that litigation, which imposed untold millions of dollars in costs and burdens on the Industry, should have happened, because WHD should never have gone down the rabbit hole of applying the dual jobs framework to a single job in the Industry. Tasks such as getting the restaurant ready for customers, restocking various items during meal service, cleaning, and

⁸ U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA-854 (Dec. 20, 1985).

⁹ *See id.*

¹⁰ *See* U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988).

¹¹ *Id.*

closing down the restaurant at the end of the day—known in the Industry as “side work”—have long been an integral part of the tipped occupations commonly found in restaurants.

These side work activities are a normal part of these tipped jobs. The FLSA simply provides no basis for carving up a tipped restaurant job into tipped and non-tipped segments, especially given the clearly expressed will of Congress that these restaurant occupations qualify as “tipped occupations” under the law.¹² So long as an employer assigns a tipped employee to perform the core functions of an occupation during a shift (*e.g.*, assigning a server to wait tables, or a bartender to prepare drinks for customers), that employee does not cease to be engaged in the tipped occupation by virtue of performing side work during a shift along with the core functions of the occupation. Nor does a tipped employee cease to be engaged in the tipped occupation merely because the employer assigns side work during times when the restaurant is slow.

Factual and Legal Deficiencies in the Proposed Rule

1. The Proposed Rule Incorrectly and Arbitrarily Excludes Various Tasks from the Tipped Occupations.

The Proposed Rule asserts that “preparing food or cleaning the bathroom is not part of a server’s occupation.”¹³ That statement is simply incorrect. Servers can and do prepare food. This does not necessarily mean lengthy, labor-intensive activity in the kitchen preparing multi-course meals, but servers often warm or toast bread, assemble salads, garnish plates, cook or plate appetizers, and the like. Tipped 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 it is common for tipped employees, including servers, to have responsibility for 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.

Indeed, the O*NET OnLine database confirms that these types of tasks are a normal part of server work in restaurants. For example, the summary report for occupation code “35-3031.00—Waiters and Waitresses” includes among the various tasks performed by servers the following items:

¹² See S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

¹³ 86 Fed. Reg. at 32,845-46 (proposed 29 C.F.R. §§ 10.28.b(3)(ii), 531.56(f)(2)).

- “Remove dishes and glasses from tables or counters and take them to kitchen for cleaning.”
- “Clean tables or counters after patrons have finished dining.”
- “Prepare tables for meals, including setting up items such as linens, silverware, and glassware.”
- “Assist host or hostess by answering phones to take reservations or to-go orders[.]”
- “Perform cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or **checking and cleaning bathroom.**”
- “Prepare hot, cold, and mixed drinks for patrons, and chill bottles of wine.”
- “Roll silverware, set up food stations, or set up dining areas to prepare for the next shift or for large parties.”
- “Stock service areas with supplies such as coffee, food, tableware, and linens.”
- “Fill salt, pepper, sugar, cream, condiment, and napkin containers.”
- “**Perform food preparation duties such as preparing salads, appetizers, and cold dishes, portioning desserts, and brewing coffee.**”
- “**Garnish and decorate dishes in preparation for serving.**”¹⁴

That same report includes among the detailed work activities for servers the following items:

- “Collect dirty dishes or other tableware.”
- “**Cook foods.**”
- “Arrange tables or dining areas.”
- “Clean food service areas.”

¹⁴ See www.onetonline.org/link/summary/35-3031.00 (last visited July 23, 2021) (emphases added).

- “Schedule dining reservations.”
- “Clean food preparation areas, facilities, or equipment.”
- “Prepare hot or cold beverages.”
- “Stock serving stations or dining areas with food or supplies.”
- “*Prepare foods for cooking or serving.*”
- “*Add garnishes to food.*”¹⁵

Similarly, the Proposed Rule states that “[p]reparing food or cleaning the dining room is not part of a bartender’s occupation.”¹⁶ This statement is likewise incorrect. Although they do not ordinarily engage in extensive cooking or prepare complex entrées, bartenders in many full-service restaurants prepare food, particularly simpler items such as appetizers. And bartenders often spend a portion of their working time cleaning the dining area, particularly the seating area associated with the bar, which in many full-service restaurants doubles as an area where customers can remain throughout their visit, including while eating their meal.

The O*NET summary report for occupation code “35-3011.00—Bartenders” includes the following items among the tasks that bartenders perform:

- “Clean glasses, utensils, and bar equipment.”
- “Balance cash receipts.”
- “*Clean* bars, work areas, and *tables.*”
- “Plan, organize, and control the operations of a cocktail lounge or bar.”
- “Stock bar with beer, wine, liquor, and related supplies such as ice, glassware, napkins, or straws.”
- “Mix ingredients, such as liquor, soda, water, sugar, and bitters, to prepare cocktails and other drinks.”

¹⁵ *Id.* (emphases added).

¹⁶ 86 Fed. Reg. at 32,845-46 (proposed 29 C.F.R. §§ 10.28.b(3)(ii), 531.56(f)(2)).

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- “Slice and pit fruit for garnishing drinks.”
- “Arrange bottles and glasses to make attractive displays.”
- “Create drink recipes.”
- “Order or requisition liquors and supplies.”
- “Plan bar menus.”
- “*Prepare appetizers such as pickles, cheese, and cold meats.*”¹⁷

The same report includes among the detailed work activities for bartenders the following items:

- “Clean tableware.”
- “Balance receipts.”
- “*Clean food service areas.*”
- “Stock serving stations or dining areas with food or supplies.”
- “Mix ingredients.”
- “Order materials, supplies, or equipment.”
- “*Prepare foods for cooking or serving.*”
- “Arrange tables or dining areas.”
- “Plan menu options.”
- “Create new recipes or food presentations.”¹⁸

The Proposed Rule contends that O*NET “was not created to identify employer’s legal obligations under the FLSA” and that “O*NET may not be an appropriate instrument to delineate the duties that are part of a tipped occupation for which an

¹⁷ See www.onetonline.org/link/summary/35-3011.00 (last visited July 23, 2021) (emphases added).

¹⁸ *Id.* (emphases added).

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employer may take a tip credit.”¹⁹ The Department’s rationale for rejecting the occupational information provided by O*NET is that “O*NET uses data obtained in part by asking employees which duties their employers are requiring them to perform. As a result, when employers require tipped employees to perform the work of a non-tipped occupation, O*NET may reflect these duties on the task list for their tipped occupation even though they are not the tasks of the tipped occupation.”²⁰

The Department’s reasoning is, however, entirely arbitrary, and invalid. In the Department’s view, tasks that servers and bartenders customarily and regularly perform, as reported by workers in these roles, are not actually part of these occupations because . . . the Department says so.²¹ The Department has never undertaken a factual examination or study of the tasks performed by these occupations, whether at the time Congress created the tip credit in 1966, or with the significant amendments to the FLSA’s tip credit provisions in 1974, or at any time since.

The only “analysis” the Department has ever performed of the tasks associated with tipped occupations is the bald *ipse dixit* in the 1979 opinion letter discussed above that “salad preparation activities are essentially the activities performed by chefs”²²—which the Department has cited repeatedly through the years as support for its unwarranted foray into trying to direct the work of restaurants at the task level. In short, the Department has no factual basis whatsoever for asserting that various tasks that tipped employees customarily and regularly perform are not, in fact, within the scope of those roles.

2. The Proposed Rule Incorrectly and Arbitrarily Purports to Parse Single Restaurant Jobs into Multiple Different Occupations, Without Even Attempting to Specify What Those Other Occupations Might Be.

The premise underlying the Proposed Rule is that there is a need to regulate to prevent employers from inappropriately taking a tip credit for non-tipped jobs when an employee works in “dual jobs,” such as “where a maintenance person in a hotel also works as a server” in the hotel’s restaurant. In that instance, the Proposed

¹⁹ 86 Fed. Reg. at 32,825.

²⁰ *Id.*

²¹ *See id.* at 32,825-26 (referencing the position taken in private litigation by parties purporting to rely on “the Department’s longstanding position that these duties are not part of the tipped occupation”).

²² U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA-895 (Aug. 8, 1975).

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Rule says, “[t]he employee is employed in two occupations,” and “the employee is engaged in a tipped occupation only when employed as a server.”²³

From that scenario of two *distinct* occupations, performed in separate locations and with generally non-overlapping job duties, the Proposed Rule makes the irrational, unlawful, unsupported, and completely unnecessary leap of applying a dual jobs framework to tasks within a *single* tipped occupation. The Proposed Rule seeks to parse occupations long recognized as tipped, such as servers and bartenders, into segments of time spent on supposedly tipped *tasks* and segments of time spent on supposedly non-tipped *tasks* within those occupations. The proposed approach makes no sense.

As the Proposed Rule recognizes, most tipped occupations involve a mix of tasks that directly and immediately generate tips and tasks that do not directly and immediately generate tips. A server does not cease to be a server simply because he or she spends somewhat more time on non-tipped tasks than other servers might spend. A server who spends 100% of his or her working time performing tasks that by any measure fall within the universe of activities that servers perform remains a server, and a tipped employee, throughout the workweek.

The server does not suddenly cease to be a server, and instead enter a different non-tipped occupation akin to a hotel maintenance person, if the amount of time spent on non-tipped tasks (under the Proposed Rule’s framework) crosses a 20% threshold, or if the server spends more than 30 consecutive minutes on non-tipped tasks within the scope of recognized server work. And the same holds true for bartenders, hosts, and other tipped roles.

Whatever merit there may or may not be in a dual jobs framework designed for a situation where an employee performs two clearly distinct and separate jobs, the dual jobs concept simply has no relevance to the restaurant setting, where it is customary for different categories of workers to have tasks in common, such as food preparation duties or responsibilities for various types of cleaning or preparation work. Section 3(m)(2)(A) of the FLSA makes the tip credit available with respect to any “tipped employee.”²⁴ Section 3(t), in turn, defines a “[t]ipped employee” to be “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.”²⁵

²³ 86 Fed. Reg. at 32,845-46 (proposed 29 C.F.R. §§ 10.28(b)(2), 531.56(e)).

²⁴ 29 U.S.C. § 203(m)(2)(A).

²⁵ *Id.* § 203(t).

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In short, a server, bartender, or other tipped employee who spends all of his or her working time engaged in tasks associated with that occupation, and who customarily and regularly earns \$30 or more per month in tips, is a tipped employee under the law throughout that working time. The Department has no authority to dictate otherwise by trying to slice and dice tipped *occupations* into clusters of tipped and non-tipped *tasks*. The Proposed Rule ignores the language and purpose of the statute.

Indeed, the Proposed Rule appears to assume that a server who spends more than 20% of his or her working time on tasks that do not directly and immediately generate tips, or a bartender that spends more than 30 consecutive minutes on tasks that do not directly and immediately generate tips, has ceased to be engaged in the occupations of server or bartender. The Proposed Rule instead seems to posit that those workers have at that point entered a different, non-tipped occupation. That assumption is simply incorrect, as well as unsupported by industry history or practice.

If the worker ceases to be engaged in the occupation of server, bartender, or other tipped role, then into what non-tipped occupation has the worker moved upon performing the requisite amount of supposedly non-tip-producing tasks according to the Department? It is uncommon for full-service restaurants to employ maintenance workers or janitors. Instead, most light cleaning in restaurants is the shared work of hourly kitchen and dining room staff, with heavy cleaning typically performed by kitchen staff or contracted cleaning crews.

Most other activity that tipped employees in restaurants perform that would appear to fall into the Department's proposed category of activity directly supporting tip-producing activity tends to involve clearing tables; moving used dishes, silverware, and glasses to the kitchen; and preparing drinks without directly interacting with customers. That work, however, when not performed by servers or bartenders, is ordinarily the work of bussers (also known as server assistants) or service bartenders, both of which the Department has long recognized as *tipped* occupations.²⁶

Thus, the supposedly "directly supporting" work that tipped employees perform, and for which the Proposed Rule would impose caps with respect to paying these workers a tipped wage, is not at all work that is outside of a tipped occupation. Nor is it unusual or improper for a restaurant to assign this work to tipped employees, rather than to non-tipped workers in different occupations. Instead, this work is and long has been an indispensable part of the work of servers, bartenders, and

²⁶ See *infra* note 27.

other tipped roles, inseparable from the activities the Department views as tip-producing duties.

What is the second, non-tipped job that a server, bartender, or other tipped employee occupies once he or she crosses the 20% or 30-minute threshold established in the Proposed Rule? The failure of the Department to consider that question, much less to provide a coherent answer, demonstrates the futility of the Proposed Rule's application of the dual jobs concept to tasks within a single tipped occupation. The proposal is inconsistent with the plain language of the FLSA regarding the tip credit and the definition of tipped employees.

3. The Proposed Rule Is Irreconcilable with the FLSA's Treatment of Bussers and Service Bartenders as Tipped Occupations.

The Department of Labor, Congress, and the restaurant industry as a whole have uniformly recognized, for as long as there has been a tip credit under the FLSA, that the roles of bussers (also known as busboys or server assistants) and service bartenders are tipped occupations fully subject to the tip credit for all time spent in those roles.²⁷ Yet the Proposed Rule would apparently render both of these classes of workers ineligible for the tip credit for the vast majority of the time spent in these tipped occupations.

The Proposed Rule sets forth three categories of activity for tipped employees:

- 1) "Tip-producing work," defined as "work for which tipped employees receive tips";
- 2) "Work that directly supports tip-producing work," defined as "work that assists a tipped employee to perform the work for which the employee receives tips"; and,
- 3) "Work that is not part of the tipped occupation," defined as "any work that does not generate tips and does not directly support tip-producing work."²⁸

²⁷ See, e.g., S. Rep. No. 93-690, at 43 (Feb. 22, 1974); U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d04(b)(4)-(5) (Dec. 15, 2016) (listing "Bussers (*i.e.*, server helpers)" and "Service bartenders" among the "occupations . . . recognized as those in which employees customarily and regularly receive tips"; citing Wage and Hour Division opinion letters from 1985, 2008, and 2009).

²⁸ 86 Fed. Reg. at 32,845-46 (proposed 29 C.F.R. §§ 10.28(b)(3)(i)(A)-(B), 10.28(b)(3)(ii), 531.56(f)(1)(i)-(ii), 531.56(f)(2)).

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The Proposed Rule disallows a tip credit for time spent in excess of 20% of the hours worked in a workweek for the second category.²⁹

This framework would appear to render bussers and service bartenders non-tipped occupations. Bussers ordinarily do not engage in direct customer-facing tasks, or if they do so, it is only infrequently. In most instances, they clear tables after customers leave; bring used dishes, glasses, and silverware back to the kitchen for cleaning; and set up tables for the next customers.

Thus, their actions do not seem to produce tips as contemplated by the Proposed Rule, because the customers do not normally see the work of the busser, except to the extent that the busser's activity helped to prepare the restaurant to be in a position to serve the customer. Thus, this work would appear to fall within the second category, work that directly supports tip-producing work.

Similarly, service bartenders ordinarily have little or no interaction with customers. Instead, their work focuses on preparing drinks to fulfill orders that customers place with either servers or bartenders, who in turn present the drinks to the customers. As with bussers, this work does not appear to involve what the Proposed Rule posits as tip-producing work. Instead, this work seems to involve the "directly supports" category.

The Proposed Rule would apparently limit employers to taking a tip credit for no more than 20% of the working time of bussers and service bartenders. A Proposed Rule that has the effect of converting roles uniformly regarded for more than half a century as tipped into primarily, if not entirely, non-tipped occupations is inconsistent with both the letter and the spirit of the FLSA. And, more broadly, the failure of the Proposed Rule's construct of tip-producing work and work that directly supports tip-producing work to adequately account for bussers and service bartenders demonstrates the fundamental unsoundness, arbitrariness, and illegality of that construct as applied to any tipped role.

4. The Proposed Rule's 20% and 30-Minute Limits Are Arbitrary and Devoid of Factual or Legal Support.

The implicit assumption behind the Proposed Rule's selection of a 20% ceiling on "directly supporting" work, as well as the 30-minute cap on such activity, before losing the tip credit appears to be that there is something unusual or improper about a tipped employee spending more than 20% of his or her working time, or more than 30 consecutive minutes, engaged in tasks that do not directly and

²⁹ 86 Fed. Reg. at 32,845-46 (proposed 29 C.F.R. §§ 10.28(b)(3)(i)(C), 531.56(f)(iii)).

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immediately generate tips. That assumption, like the other assumptions built into the Proposed Rule, is incorrect.

As an initial matter, every task that occurs in a full-service restaurant affects tips in one way or another. Everything from the cleanliness of the floor or carpet to the quality of the food, the appearance of the restroom, how clean the plates, glasses, and silverware are, and much more, affects the customer experience. Everything about the customer experience, in turn, influences tips. Many tip-affecting tasks occur directly in the presence of the customer, but many others do not. The Proposed Rule's artificial separation of tasks into those that produce tips and those that do not produce tips fails to appreciate the interconnectedness of all that happens in the restaurant. *All* tasks in a full-service restaurant, particularly those tasks performed by tipped employees, produce tips.

But even if one were to accept the artificial division of tasks into tip-producing and non-tip-producing work, there is no factual basis for the Department's view that 20% and 30 minutes are appropriate limits. It is common, for example, for bartenders to spend continuous blocks of 30 to 90 minutes, once or twice a week, preparing drink mixes or otherwise getting the bar ready for customers.

This is work that falls squarely within the scope of recognized bartender work, and the work is essential for the bartender to be able to carry out his or her customer-facing duties. The same is true of other opening and closing tasks that various tipped employees commonly undertake.

Likewise, circumstances may dictate that tipped employees spend more than 20% of their working time on "directly supporting" work. Customer flow is often unpredictable in full-service restaurants. When customers are in the restaurant, tipped employees normally spend most or all of their time focusing on the customers. However, during periods when there are no customers present, when the tipped employees thus have no customer-facing work to perform, the normal practice is to have those employees engage in tasks that help to prepare for the next wave of customers. This work can involve rolling silverware in napkins, restocking condiments and beverage centers, sweeping or cleaning the dining area, wiping windows, or other preparatory activity. This type of activity has long been a recognized and essential part of the server, bartender, host, and other tipped occupations.

There is no industry norm suggesting that either 20% or 30 minutes is a hard cap on such activity, such that side work performed beyond those levels is outside the standards for tipped occupations. Instead, those arbitrary standards are entirely the Department's creation, pulled from thin air rather than based on any sort of

empirical study, data analysis, or statutory text. Moreover, Congress has already spoken to this issue, making it clear in the legislative history to the 1974 FLSA Amendments that “where 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”³⁰— **not**, as the Department would have it, based on splitting the workweek into tipped working time and non-tipped working time. The Department’s proper role is to implement the law as Congress intended it, not to try to manufacture nonexistent statutory ambiguities as a pretext to exert power over aspects of the workplace that Congress never intended it to control.

5. There Is No Practical, Reasonable, Feasible Way for Restaurants to Track Side Work.

The Department’s proposal states that “the Department believes that the limitations on performing non-tipped work included in the proposed rule allow employers ample ability to assign to their tipped employees a non-substantial amount of non-tipped duties that directly support the tip-producing work, without needing to account for employees’ duties minute-by-minute.”³¹ That assertion turns a blind eye to the wave of class and collective action lawsuits that have plagued the restaurant industry regarding this exact issue over approximately the past decade and a half. The Department is well aware of that litigation, as it has participated in some of those cases as an *amicus curiae* in support of the plaintiffs bringing these claims.

In case after case, courts have allowed plaintiffs who make thinly-supported allegations of spending more than 20% of their working time on side work to send notices to hundreds, thousands, or even tens of thousands of workers. This is true notwithstanding the employers’ evidence that the tipped workers spend far less than 20% of their time on these tasks.

The practical reality is that so long as the Department continues to support a position that limits the tip credit when a worker spends more than 20% of his or her time on what the Department views as not tip-producing work, restaurants that do not track the time workers spend on these various activities face extreme risk in litigation and, presumably, in investigations by the Department.

Maintaining records of side work is utterly unworkable for typical tipped restaurant roles. In a span of just five minutes, a waitress may take customer orders at a

³⁰ S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

³¹ 86 Fed. Reg. at 32,830.

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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.

Under the Department's proposal, that sequence would require that the worker go to the time clock to record these events no fewer than six times. Over the course of a five or six-hour shift, a single tipped employee normally toggles dozens or hundreds of times back and forth between activity the Department views as tip-producing and activity the Department views as directly supporting tip-producing activity.

Storing and processing such a high volume of time records would place a nearly impossible burden on the technology systems that most restaurants use to store employee clocking events, which would likely involve hundreds or even thousands of discrete entries per shift for a single restaurant. In addition, the lost productivity resulting from having employees repeatedly walking to and from the time clock—normally a point-of-sale terminal in most full-service restaurants—would severely strain restaurant operations and require higher staffing levels to serve the same level of business. This, in turn, would drive up operating costs in an environment where restaurants are already under severe financial strain from the disruption caused by COVID-19, thereby threatening business closures and job losses, including for tipped employees.

The alternative to maintaining those detailed time records is for restaurants to leave themselves vulnerable to the argument that they *should* have maintained those records, and that the absence of such records enables plaintiffs or the Department to proceed on the basis of worker estimates, which in litigation invariably seem to end up exceeding 20% of time spent on side work. That is no alternative at all.

The Department's proposal is thus impractical and unworkable, as restaurants can neither maintain detailed time records of side work nor risk not maintaining those records. Instead, the Department's proposal would force restaurants to fundamentally alter their tipped roles to eliminate side work. The Department has no authority to bully the restaurant industry into changing the activities that its tipped employees perform, and any attempt to do so is contrary to the letter and the spirit of the FLSA, specifically sections 3(m) and 3(t).

6. The Dual Jobs Regulation Furthers No Legitimate Statutory Purpose Under the FLSA Because the Tip Credit Provisions Already Fully Protect Workers' Minimum Wage Rights.

The Department and the courts have long recognized that determining whether a worker receives at least the full federal minimum wage requires examining the worker's total wages over the course of a workweek and then dividing those wages by the total hours worked in that same workweek.³² If the worker's total wages for the workweek equal or exceed the FLSA's minimum wage multiplied by the total hours worked, then the worker has received wages for that workweek in compliance with the federal minimum wage. Notably, the FLSA minimum wage inquiry does not examine the workweek hour by hour, or minute by minute, but instead looks at the workweek as a whole.³³

At its core, the FLSA's tip credit provision is simply another way of ensuring that workers receive at least minimum wage. So long as a worker customarily and regularly receives more than \$30 a month in tips, the FLSA allows an employer to treat some or all of the worker's tips as wages for purposes of determining minimum wage compliance. If the worker's tips exceed that monthly threshold, thus demonstrating that the tips are a regular part of the worker's job rather than being isolated or sporadic, then, for minimum wage purposes, the FLSA puts a dollar of tips in the worker's hands on an equal footing with a dollar of cash wages.

So long as over the course of the workweek the worker receives a cash wage of at least \$2.13 per hour as well as tips sufficient to cover the difference between the cash wage and the minimum wage, the worker is in exactly the same position as a worker who received full federal minimum wage for that workweek. For example, a tipped employee who receives \$5 per hour in cash wages from the employer plus an average of \$10 per hour in tips over the course of the workweek is in the same position from an income standpoint as a worker who receives \$15 per hour in cash wages.

The Department's Proposed Rule has nothing to do with the purpose behind the tip credit or the minimum wage. With or without a dual jobs regulation, tipped employees *already* receive the full protection of the federal minimum wage. If their tips are insufficient, when added to the required cash wage, to satisfy the minimum wage, then the FLSA already requires employers to pay additional wages to make

³² See, e.g., *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1997 WL 998028 (Aug. 12, 1997).

³³ See *id.*

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up the difference. The Proposed Rule thus does nothing to protect minimum wage rights under the FLSA.

Instead, the Proposed Rule would afford workers' rights that *exceed* the federal minimum wage, and that *exceed* the minimum wage rights afforded to any other category of worker under the FLSA. The Proposed Rule requires paying full minimum wage for specific minutes or hours during which workers perform certain tasks within their occupations that do not, in the Department's view, directly generate tips, even though those same workers receive during the other portions of the workweek sufficient tips to satisfy the minimum wage.

If a worker receives at least the minimum required cash wage, plus tips averaging \$10, \$20, or \$50 per hour over the course of a workweek, the Department has no legal authority to declare that the employee has not received wages in compliance with the FLSA's minimum wage. The Department's proposal effectively requires paying workers *above* the federal minimum wage by disallowing a tip credit for tips the FLSA regards as wages in workweeks where a worker spends more than 20% of his or her working time on what the Department views as supporting rather than tip-producing activities. The proposal is contrary to the FLSA.

7. Tipped Employees Typically Have the Highest Overall Earnings Among Non-Supervisory Restaurant Workers.

Servers and bartenders ordinarily have the highest total earnings among non-supervisory staff in a full-service restaurant. These workers normally earn over the course of a workweek several dollars an hour more than hourly kitchen staff such as dishwashers or cooks because they receive tips. Kitchen employees often seek to transfer to tipped dining room roles, whereas servers, bartenders, and hosts rarely try to move to positions in the kitchen.

It is common for tipped workers to receive the bulk of their tips in a relatively short period of time. For example, a server working a six-hour dinner shift from 5:00 to 11:00 p.m. will often receive the vast majority of his or her tips within a span of two to three hours or less at the height of the dinner rush. The same is true for tipped employees on other shifts. For breakfast and lunch shifts, the rush period may be as short as 60 to 90 minutes.

During busy periods, tipped workers ordinarily receive tips at a rate several times greater than the federal tip credit. And when the restaurant is slow, there may be no tips for periods lasting an hour or more. This is, and long has been, the nature of tipped work in restaurants: slow periods earning as little as \$2.13 per hour, coupled with concentrated periods of significant tip activity when the restaurant is busy.

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There is nothing unusual or unfair about the tipped workers receiving relatively low earnings during the slow times and relatively high earnings during the busy times. It all balances out over the course of the workweek. On a weekly basis, the tipped employees end up earning at least as much as, and often quite a bit more than, workers paid a cash wage equal to the federal minimum wage.

The Department's proposal to require higher wages for the normal slow times that tipped employees experience is entirely unnecessary. Periods of low and high earnings that balance out over the week are part and parcel of tipped work in restaurants. Requiring full minimum wage for certain periods of side work will merely exacerbate the earnings disparities that already exist between dining room and kitchen personnel, while advancing no goal consistent with the FLSA.

8. The Proposed Rule Grossly Understates its Economic Impact on Small Businesses.

Even the U.S. Small Business Administration's Office of Advocacy ("Advocacy"), established by Congress to represent the views of small entities before Federal agencies,³⁴ "is concerned that the DOL's certification that the rule will not have a significant economic impact on a substantial number of small entities lacks an adequate factual basis."³⁵

While also asserting that the Proposed Rule is invalid for the reasons stated above, the Law Center and the Association share in the concerns expressed in the comment letter submitted by Advocacy regarding the Department's lack of an adequate factual basis for its certification that the Proposed Rule will not have a significant economic impact on a substantial number of small businesses, and we join in and adopt the views stated in that comment letter.³⁶

The Department must complete and make available for public comment an Initial Regulatory Flexibility Analysis, as requested by Advocacy, to reassess and update their estimates to fully reflect the economic impact of the Proposed Rule on small entities. At that point, the Department should realize that some of the assertions that it makes in the Proposed Rule without factual examination or study, as highlighted in our comments, are incorrect and, thus, the best regulatory alternative at this point is to allow the portions of the 2020 Final Rule,³⁷ relating to

³⁴ Pub. L. 94-305.

³⁵ See www.regulations.gov, RIN 1235-AA21, comment ID WHD-2019-0004-2116, at 2 (submitted Aug. 20, 2021).

³⁶ *Id.*

³⁷ Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (Dec. 20, 2020).

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dual jobs, to go into effect. This alternative accomplishes the stated objectives of the applicable statutes while minimizing the economic impact on small entities.

The Current Economic Status of the Industry

It is important to highlight the fact that the restaurant industry has been uniquely hurt by the pandemic. No industry has lost more jobs or more revenue. For the Industry, the nation's second-largest private sector employer, to suffer such harm should be alarming to everyone, including the Department. Our analysis shows that in the first 12 months of the pandemic, restaurant and foodservice sales are down \$270 billion from expected levels. Restaurants are still down two million jobs (or 16 percent) below the pre-COVID-19 pandemic level. Approximately 17 percent of restaurants (amounting to about 110,000 sites) have closed permanently or long-term. The vast majority of permanently closed restaurants were well-established businesses, and fixtures in their communities, many of which had been open for at least 30 years.

As the industry attempts an economic recovery from the pandemic, it is critically important that restaurant employers and employees have workplace policies that provide clear guidelines and predictability to achieve regulatory and legal compliance obligations. Notwithstanding the impacts of the pandemic, businesses already confront an ever-expanding nebula of different and often dissimilar or even contradictory obligations imposed by the federal government, states, and local governing bodies.

The burden posed on businesses to understand and comply with changing regulations is onerous for both small employers, which generally have limited resources, and larger businesses that operate in multiple states. To the extent that federal labor standards and regulations can be harmonized with the underlying statutory provisions, the resulting benefits will broadly enhance business efficiency and opportunity and allow businesses to emerge successfully from the pandemic. Improved efficiency and greater opportunity, in turn, benefit everyone from the individual worker to the macro-level of our national economy.

As explained above, the previous experiment of assigning arbitrary caps and attempting to micromanage restaurant work at the level of task assignment led to unnecessary litigation, imposing untold millions of dollars in costs and burdens on the Industry. The Department should instead return its focus to what WHD was designed to do: ensuring that employees receive the wages the FLSA guarantees. At its core, the tip credit is about the tips, not the tasks the employee is performing each minute of the day. The tip credit exists to protect employees' minimum wage rights under the FLSA, no more and no less.

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For the reasons stated above, the Law Center and the Association ask the Department to eliminate the Proposed Rule and, instead, allow the portions of the 2020 Final Rule³⁸ relating to dual jobs to go into effect. We thank you for the opportunity to submit these comments and look forward to working with the Department moving forward on such an important issue for our industry.

Sincerely,



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³⁸ Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (Dec. 20, 2020).