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DEPARTMENT OF LABOR

Wage and Hour Division

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

RIN 1235-AA21

Tip Regulations under the Fair Labor Standards Act (FLSA)

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final Rule.

SUMMARY: In the Consolidated Appropriations Act of 2018 (CAA), Congress amended section 3(m) of the Fair Labor Standards Act (FLSA) to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). In this final rule, the Department of Labor (Department) amends its tip regulations to address these amendments. The final rule also codifies the Department's guidance regarding the tip credit's application to employees who perform tipped and non-tipped duties.

DATES: This final rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final 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 (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

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage, which is currently $7.25 per hour. *See* 29 U.S.C. 206(a)(1). As amended, section 3(m) of the FLSA allows an employer that satisfies certain requirements to count a limited amount of the tips received by its "tipped employees" as a credit toward its federal minimum wage obligation (known as a "tip credit"). *See* 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only for "tipped employees" and only if, among other things, its tipped employees retain all their tips. *Id.* This requirement does not, however, preclude an employer that takes a tip credit from implementing a tip pool in which tips are shared only among those employees who "customarily and regularly receive tips." *Id.*

In 2011, the Department revised its tip regulations to reflect its view at the time that, regardless of whether their employer takes a tip credit, the FLSA required that tipped employees retain all tips they received, except tips distributed through a tip pool

limited to employees who customarily and regularly receive tips. *See, e.g.*, 29 CFR 531.52. On December 5, 2017, the Department published a Notice of Proposed Rulemaking (NPRM), 82 FR 57395, which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full federal minimum wage and do not take a tip credit.

On March 23, 2018, Congress amended section 3(m) of the FLSA in the CAA, Pub. L. No. 115-141, Div. S., Tit. XII, sec.1201, 132 Stat. 348, 1148–49 (2018). Among other things, the CAA revised section 3(m) by renumbering the existing tip credit language as section 3(m)(2)(A) and adding a new section 3(m)(2)(B). That new section prohibits employers from keeping their employees' tips "for any purposes, including allowing managers or supervisors to keep any portion of employees' tips" even if they do not claim a tip credit. In addition, the CAA amended sections 16(b) and 16(c) of the FLSA to permit private parties and the Department to recover any tips unlawfully kept by an employer in violation of section 3(m)(2)(B), in addition to an equal amount of liquidated damages. Finally, the CAA amended section 16(e) of the FLSA to give the Department discretion to impose civil money penalties (CMPs) up to $1,100 when employers unlawfully keep employees' tips. On October 8, 2019, the Department issued a new NPRM proposing, among other things, to update its tip regulations to incorporate the CAA amendments.

Congress specified in the CAA that the portions of the 2011 final rule that "are not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor]." CAA, Div. S, Tit. XII, sec. 1201(c). As the Department explained in a Field

Assistance Bulletin (FAB) published shortly thereafter, that statement applies to those portions of the Department's regulations—§§ 531.52, 531.54, and 531.59—that restricted tip pooling by employers that pay tipped employees at least the full minimum wage as a direct cash wage and, therefore, do not claim a tip credit. *See* FAB No. 2018-3 (Apr. 6, 2018).[1] In light of the CAA's amendments to the FLSA, the Department's 2019 NPRM withdrew the 2017 NPRM, which addressed the same topic as those amendments. 84 FR 53956.

This final rule revises the Department's current tip pooling regulations in light of the 2018 CAA amendments. The CAA did not change the statutory requirements, now in section 3(m)(2)(A) of the FLSA, that apply to employers that take a tip credit. Those employers may continue to institute a mandatory "traditional" tip pool, that is, a tip pool limited to employees who "customarily and regularly" receive tips. In addition, the CAA removed the regulatory restrictions on an employer's ability to require tip pooling when it does not take a tip credit; those employers may now implement mandatory, "nontraditional" tip pools, which include employees who do not customarily and regularly receive tips, such as cooks and dishwashers.

The CAA also imposed a new prohibition, in section 3(m)(2)(B), that applies to all employers regardless of whether they take a tip credit: Employers may not keep employees' tips and may not allow managers or supervisors to do so. Among other things, section 3(m)(2)(B) prohibits employers, managers, and supervisors from receiving employees' tips as part of any tip pooling arrangement. It also prohibits employers from operating tip pools in any manner such that they "keep" tips.

[1] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2018_3.pdf.

This final rule updates the Department's tip regulations to incorporate the CAA's amendments to the FLSA. As explained above, the CAA renumbered the FLSA's existing tip credit language as section 3(m)(2)(A), but made no substantive changes to that language. As a result, this rule does not alter the Department's existing regulations and guidance regarding section 3(m)(2)(A) for employers that claim a tip credit. Those regulations are addressed only as necessary to clarify how they relate to the CAA's amendments to the FLSA. In this rule, the Department makes the following three substantive changes to regulations concerning tips. First, the rule incorporates the new statutory language, section 3(m)(2)(B)—which applies whether or not the employer takes a tip credit—into the Department's regulations and incorporates a new recordkeeping requirement to help it administer the new statutory language. Second, this rule, consistent with the CAA's amendments, removes the portions of the Department's regulations that prohibited certain employers—those that pay their tipped employees a direct cash wage of at least the full federal minimum wage and do not take a tip credit against their minimum wage obligations—from including employees who do not customarily and regularly receive tips, such as cooks and dishwashers, in mandatory tip pooling arrangements. Third, this rule amends the Department's regulations to reflect recent guidance explaining that an employer may take a tip credit for time that an employee in a tipped occupation spends performing related, non-tipped duties contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties. These amended regulations also address which non-tipped duties are related to a tip-producing occupation.

Additionally, the Department incorporates the CAA's new language regarding CMPs into its regulations. The Department also takes this opportunity to revise portions of its CMP regulations on willful violations (specifically, 29 CFR 578.3 and 579.2). It does so to make the regulatory language consistent with the way the Department actually litigates willfulness issues and to address the appellate courts that have, for example, "urge[d]" it to reconsider those regulations to ensure their consistency with the Supreme Court's interpretation of the meaning of "willful" in the FLSA.

Finally, the Department amends the portions of its regulations that address the payment of tipped employees under Executive Order 13658, Establishing a Minimum Wage for Contractors, to reflect rescissions in the FLSA regulations for tipped employees, incorporate the Department's explanation of when an employee performing non-tipped work is a tipped employee, and otherwise align those regulations with the Executive Order.

The Department estimates this final rule could result in a potential transfer of $109 million, as tip pools are expanded from front-of-the-house employees alone to include back-of-the-house employees. A directly observable transfer would occur only among employees because section 3(m)(2)(B) prohibits employers from participating in these tip pools or otherwise keeping employees' tips. However, assuming the shared tips are large enough to maintain wage levels for all workers in the tip pool, the Department acknowledges that some employers could potentially offset some of the increase in total compensation received by back-of-the-house workers by reducing the direct wage that they pay those workers (as long as they do not reduce their wage below the applicable minimum wage), and such an outcome is what is modeled to produce the $109 million

estimate of transfers from employees to employers. The rule may also result in transfers to workers as employers who adopt tip pools containing back-of-the-house workers may not take a tip credit for their front-of-the-house staff. The Department also acknowledges the possibility that some transfers could occur as a result of the changes to the regulations involving when an employer may take a tip credit, but the Department is unable to estimate the likelihood or magnitude of these transfers. The Department estimates that regulatory familiarization costs associated with this final rule would be $3.86 million in the first year.

This rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule's economic analysis. 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. Section 3(m)

Section 6(a) of the FLSA requires covered employers to pay their nonexempt employees a minimum wage of at least $7.25 per hour. 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to any "tipped employee" by taking a partial credit toward the minimum wage based on tips an employee receives. *Id.* 203(m)(2)(A). 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." *Id.* 203(t). 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—in tips

received by the employee if the cash wage plus the employee's tips equal at least the minimum wage. If the employee does not earn sufficient tips to bring his or her hourly earnings to the minimum wage, the employer must pay any additional wages required to make up the difference. If the employee's cash wage plus tips exceeds the minimum wage, the employer must still pay a cash wage of at least $2.13 per hour. An employer may take a tip credit only if, among other things, the tipped employees retain all the tips they receive. An employer taking a tip credit is also allowed to implement a mandatory tip pool in which tips are shared only among employees who "customarily and regularly receive tips."

Under section 3(m)(2)(B) of the FLSA, added by the CAA, "an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips." *See* Div. S., Tit. XII, sec.1201. Section 3(m)(2)(B) applies regardless of whether an employer takes a tip credit.

B. Statutory and Regulatory History

i. 1966 and 1974 Amendments to the FLSA[2]

Congress created the FLSA's tip credit in 1966 by amending the definition of "wage" in section 3(m). *See* Pub. L. No. 89-601, sec. 101(a), 80 Stat. 830 (1966). The Department promulgated its initial tip regulations the following year. *See* 32 FR 13575 (Sep. 28, 1967). In 1974, Congress amended section 3(m) to prohibit an employer from taking a tip credit unless, among other things, "all tips received by [an] employee have

[2] Congress also amended section 3(m)'s tip credit language in 1977, 1989, and 1996. These amendments changed only the amount of tips received by employees that could be credited toward an employer's minimum wage obligations. *See* Pub. L. No. 95-151, § 3(b), 91 Stat. 1245 (1977); Pub. L. No. 101-157, § 5, 103 Stat. 938 (1989); Pub. L. No. 104-188, § 2105(b), 110 Stat. 1755 (1996).

been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." Pub. L. No. 93-259, sec. 13(e), 88 Stat. 55 (1974). As a result, an employer that takes a tip credit may require a tipped employee to share tips with other employees engaged in occupations that customarily and regularly receive tips, but it cannot use employees' tips for any other purpose or require tipped employees to share them with employees who do not customarily and regularly receive tips. By setting conditions under which an employer may take a tip credit, the statute makes plain that Congress intended these conditions to apply only to employers who take such a credit. Section 3(m)(2)(A) contains no indication that Congress intended for these restrictions to apply to employers that do not take a tip credit and that use tip pools for other purposes, such as by sharing tips with "back-of-the-house" employees like cooks and dishwashers.

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

ii. 2011 Regulations

The Department did not promulgate regulations addressing the 1974 amendments to the FLSA's tip credit language until 37 years later. *See* 76 FR 18832, 18854–56 (Apr. 5, 2011). Though issued after the *Cumbie* decision, the 2011 regulations prohibited employers from, among other things, establishing mandatory tip pools that include employees who are not customarily and regularly tipped—whether the employers took a tip credit or not. *See* 29 CFR 531.52 (2011) ("The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool."). *See also* 29 CFR 531.54 ("an employer . . . may not retain any of the employees' tips"); 531.59 ("With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee."). The Department acknowledged that section 3(m) did not expressly address the use of an employee's tips when an employer does not take a tip credit and pays a direct cash wage equal to or greater than the minimum wage, but stated that the regulation would fill a "gap" that the Department then believed to exist in the statutory scheme. 76 FR 18841–42.

Multiple lawsuits challenged the Department's authority under section 3(m) to regulate employers that pay a direct cash wage of at least the federal minimum wage. The parties challenging the validity of the 2011 regulations argued, and several courts ruling in favor of those parties recognized, that section 3(m)'s text reflected Congress' intent to impose conditions only on employers that take a tip credit. *See, e.g.*, *Malivuk v. Ameripark, LLC,* No. 15-2570, 2016 WL 3999878, at *4 (N.D. Ga. July 26, 2016)

(agreeing that "Section 203(m) only imposed a condition on employers who take a tip credit, rather than a blanket requirement on all employers regardless of whether they take a tip credit."); *Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 562 (S.D.N.Y. 2013) ("Although the Court need not resolve this issue definitively . . . [it] finds Pret's argument more persuasive: The DOL regulations are contrary to the plain language of § 203(m).").

In 2016, a divided Ninth Circuit panel upheld the validity of the 2011 regulations. *See Oregon Rest. & Lodging Ass'n (ORLA) v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). Although the Ninth Circuit declined *en banc* review of the decision, ten judges dissented on the ground that the FLSA authorized the Department to address tip pooling and tip retention only when an employer takes a tip credit. 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of reh'g *en banc*). The dissent noted that the Ninth Circuit itself had decided in *Cumbie* that the FLSA "clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit." *Id*. at 358 (citing *Cumbie*, 596 F.3d at 579 n.6, 581–83). The dissent therefore concluded that "because the Department [had] not been delegated authority to ban tip pooling by employers who forgo the tip credit, the Department's assertion of regulatory jurisdiction [was] manifestly contrary to the statute and exceed[ed] its statutory authority." *Id.* at 363 (internal quotation marks omitted). The National Restaurant Association, on behalf of itself and other *ORLA* plaintiffs, sought U.S. Supreme Court review. *See* Pet. for Writ of Cert., *Nat'l Rest. Ass'n v. U.S. Dep't of Labor*, No. 16-920, 2017 WL 360483, (U.S. Jan. 19, 2017).

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

In light of the conflicting decisions from the federal courts of appeals, the Department adopted a nationwide "nonenforcement policy" under which it would "not enforce" the 2011 regulations in any context in which an employer pays its employees a direct cash wage of at least the federal minimum wage. *See* 82 FR 57395, 57399 (Dec. 5, 2017).

In its 2018 response to the petition for a writ of certiorari in the *ORLA* case, the government explained that the Department had reconsidered its defense of the 2011 regulations in light of the Ninth Circuit's ten-judge dissent from denial of rehearing in *ORLA* and the Tenth Circuit's decision in *Marlow*. That reconsideration had led the Department to conclude that it had exceeded its statutory authority in promulgating those regulations to the extent they apply to employers that do not take a tip credit against their federal minimum wage obligations: "[U]ntil the 2018 [congressional] amendments, Section 203(m) placed limits only on employers that took a tip credit," and "[n]either Section 203(m) nor any other provision of the FLSA prevents an employer that pays at

least the minimum wage from instituting a nontraditional tip pool [that includes back-of-the-house employees like cooks and janitors] for employees' tips." Br. for Resps. at 26–27, *Nat'l Rest. Ass'n*. (May 22, 2018). The government also noted that the Department had published in December 2017 an NPRM that proposed to rescind the challenged portions of the regulations. *Id.* at 10. Shortly thereafter, the Supreme Court denied the petition. 138 S. Ct. 2697 (2018).

iii. 2017 Notice of Proposed Rulemaking

On December 5, 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full federal minimum wage and do not take a tip credit against their minimum wage obligations. *See* 82 FR 57395 (Dec. 5, 2017). It did so in part because of its concerns at the time, in light of *Marlow* and the dissent from the denial of rehearing in *ORLA*, that it had misconstrued the statute when it promulgated the 2011 regulations. *See* 82 FR 57399. The Department stated that where "an employer has paid a direct cash wage of at least the full federal minimum wage and does not take the employee tips directly, a strong argument exists that the statutory protections of section 3(m) do not apply." 82 FR 57402. The Department also proposed allowing these employers to establish tip pools that include employees who contribute to the customers' experience but do not customarily and regularly receive tips, such as dishwashers or cooks. *See, e.g.*, 82 FR 57399.

A number of commenters on the 2017 NPRM supported allowing employers to establish these tip pools. Several commenters pointed out that these workers contribute to each customer's overall service, which directly affects the size of the customer's tip.

Many commenters, however, expressed concern that employers would take tips received by employees for its own purposes.

During a hearing on March 6, 2018, before the Subcommittee on Labor, Health and Human Services, and Education of the U.S. House of Representatives Committee on Appropriations, Secretary of Labor R. Alexander Acosta was asked about the proposed rulemaking. The Secretary explained that the Tenth Circuit had made clear in *Marlow*, in reasoning the Secretary found persuasive, that the Department lacked statutory authority for its 2011 regulations at issue. He noted that Congress had the authority to implement a solution, and he suggested that Congress enact legislation stating that establishments, whether or not they take a tip credit, may not keep any portion of employees' tips.[3]

C. The CAA's Amendments to the FLSA

Later that month, Congress enacted the CAA, amending the FLSA to address employers' practices with respect to their employees' tips. Pub. L. 115-141, Div. S., Tit. XII, sec. 1201. Shortly thereafter, the Department issued a FAB concerning the Wage and Hour Division's (WHD) enforcement of the CAA amendments. *See* FAB No. 2018-3 (Apr. 6, 2018).

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

The CAA left unchanged section 3(m)'s then-existing text, renumbered as section 3(m)(2)(A), preserving the longstanding requirements that apply to employers that take a tip credit. It also added a new section 3(m)(2)(B) to the FLSA, which states that "[a]n employer may not keep tips received by its employees for any purposes, including

[3] A recording of the testimony is available at https://www.congress.gov/committees/video/house-appropriations/hsap00/6Weo1vfNM1k.

allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." CAA, Div. S, Tit. XII, sec. 1201(a) (codified at 29 U.S.C. 203(m)(2)(B)); *see* FAB No. 2018-3 (Apr. 6, 2018).

ii. Effect on Regulations

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

iii. Amendments to section 16 of the FLSA

Section 16(b) of the FLSA allows employees to sue for unpaid minimum wages or overtime compensation. The CAA amended that section to add that "[a]ny employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages." CAA, Div. S, Tit. XII, sec. 1201(b)(1).

Section 16(c) of the FLSA authorizes the Department to enforce the payment of unpaid minimum wages and unpaid overtime compensation. The CAA amended that section to add to the Department's enforcement authority: "The authority and requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages." CAA, Div. S, Tit. XII, sec. 1201(b)(2).

Under section 16(e)(2), repeated or willful violators of the FLSA's minimum wage and overtime requirements are subject to a CMP not to exceed $1,100 for each such violation.[4] The CAA amended this section to add a CMP for violations of section 3(m)(2)(B): "Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]"

D. The Dual Jobs Regulation

The CAA's changes to the FLSA, in conjunction with subregulatory guidance the Department issued in 2018, have illuminated the need to harmonize and update the Department's "dual jobs" regulation, codified at 29 CFR 531.56(e). The dual jobs

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

regulation addresses when an employer can take a tip credit for time that an employee in a tipped occupation spends performing duties that do not directly result in tips for that employee.[5]

The dual jobs regulation, § 531.56(e), was introduced in 1967 as part of the Department's first final rule addressing tipped employment. 32 FR 13575; *see* 29 CFR 531.50–.60. The "dual jobs" regulation was not contemplated in the notice proposing that rule, *see* 32 FR 222–227 (Jan. 10, 1967), but was added as part of the final rule. Under the regulation, an employee who works for the same employer in both a tipped occupation and a non-tipped occupation is a "tipped employee" for purposes of section 3(t) of the FLSA only while employed in the tipped occupation. Therefore, an employer may take a tip credit against its minimum wage obligations only for the hours the employee spends in the tipped occupation. It may not take a tip credit for the time spent in a non-tipped occupation.

Subsection 531.56(e) also distinguishes between employees who have dual jobs and tipped employees who 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." In that example, 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. 29

[5] As explained further below, there are a number of duties that may contribute to the tipped worker's tips, but which are performed by other employees who do not directly receive tips for their work (e.g., the cook at a restaurant makes the food which the server delivers to a table, but only the server receives a tip for that work).

CFR 531.56(e). But that is as far as the regulation goes. It does not set forth or explain criteria for determining whether particular non-tipped duties are related to a tipped occupation. It does not set forth or explain criteria for determining when an employee is performing duties unrelated to his or her tipped occupation and therefore engaged in a dual job. Nor does it explain whether or when an employee who performs related non-tipped duties more than "part of the time" or "occasionally" might cease being employed in a tipped occupation and instead be engaged in a non-tipped occupation. Nor does it even give examples illustrating activities that would be considered (or not considered) related duties for workers other than those in restaurants.

Section 531.56(e) did not define "related duties," "part of the time," or "occasionally," and this lack of precision creates a need for clarification. WHD over the years attempted to clarify this rule through subregulatory guidance, but this piecemeal approach was insufficient. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 112–13 (2015) (Scalia, J., concurring) ("There are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means."). For example, following the 1974 statutory amendments to section 3(m) of the FLSA, WHD issued three opinion letters that address this issue. In 1977, WHD addressed whether workers employed as "salad preparation persons" could participate in a tip pooling arrangement. WHD concluded that salad-preparation personnel could not participate in a tip pool as they "are essentially chefs" who "prepare food in the kitchen as any chef ordinarily would[,]" and rather than serving food to customers, "their basic duty outside

the kitchen is to keep the buffet tables clean and replenish food as needed." WHD Opinion Letter FLSA-623 (June 3, 1977).[6]

In 1979, WHD addressed servers who "report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar." WHD Opinion Letter FLSA-895 (Aug. 8, 1979). WHD opined that the employer could not claim a tip credit for those two hours because "salad preparation activities are essentially . . . [those] performed by chefs." *Id.* (citing WHD Opinion Letter FLSA-623 (June 3, 1977)).

In 1980, WHD addressed whether the tip credit applied to servers in a restaurant who, as part of their closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the server station, cleaned and reset the tables (including filling cheese, salt, and pepper shakers), and vacuumed the dining room carpet. *See* WHD Opinion Letter (Mar. 28, 1980). WHD opined that the employees would be considered tipped employees for this period because they were not engaged in a dual occupation. WHD noted that the after-hours cleanup duties were "assigned generally to the [server] staff" at the establishment. *Id.* WHD did not explain why it concluded that tearing down and cleaning the salad bar was a tipped server's duty but preparing vegetables for that same salad bar was a non-tipped chef's duty. The letter suggested that if "specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming," the employer would have been precluded from claiming a tip credit for the time the specific employees spent performing those maintenance activities. *Id.*

[6] The letter cited legislative history to support its conclusion that chefs were among the "employees who have not customarily and regularly participated in tip pools." *Id.* (citing S. Rep. 93-690 (1974) at 43).

Finally, in 1985, WHD addressed whether a server who, during a 5-hour shift, performed 1.5 to 2 hours of preparatory work before the restaurant opened, could be paid the tip-credit rate for the time spent performing those preparatory activities. WHD Opinion Letter (Dec. 20, 1985). The preparatory work included a variety of tasks such as setting tables, preparing coffee, and salad preparation. WHD repeated, but did not elaborate upon or explain, its earlier statements that "salad preparation activities are essentially the activities performed by chefs" for which the employer could not take a tip credit. WHD then concluded that because only one employee was assigned to the non-salad preparatory work, the employee was responsible for preparing the entire restaurant, not just his or her area. The employee spent 30 percent to 40 percent of the entire shift on those duties. Such a "substantial portion" of the workday spent "performing general preparation or maintenance" work was too extensive to be considered part of the same occupation, and the employer could not take a tip credit for the hours spent on those tasks. *Id.* This was the first time WHD employed a proportion-of-time analysis to the "dual jobs" regulation.

In 1988, WHD amended its Field Operations Handbook (FOH) to include section 30d00(e), regarding time spent in duties related to a tipped occupation. WHD FOH Revision 563 (Dec. 12, 1988). According to the handbook entry, § 531.56(e) "permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though those 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. 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). But "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." For the first time, the FOH noted a "substantial" amount of time spent performing general preparation or maintenance work as being in excess of 20 percent.

The FOH does not establish a binding legal standard on the public and is not a device for establishing interpretive policy.[7] Rather, the FOH is an "operations manual" that makes available to WHD investigators and staff policies already "established through changes in legislations, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator." *Id.*; *see also* WHD Opinion Letter FLSA2020-12 (Aug. 31, 2020); *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1012 (9th Cir. 2011). But, by furnishing these instructions to WHD investigators and staff in the field, the FOH in practice prohibited an employer from claiming a tip credit for "related-duties" time if that time exceeded 20 percent of the employee's workweek. The handbook entry stated no rationale for a hard percentage cap in general or the 20 percent figure in particular, and the Department did not issue any guidance rationalizing a hard cap. The standard in the FOH became known as the "80/20 rule," even though it was not promulgated as a regulation.

[7] *Field Operations Handbook*, U.S. Dep't of Labor (last accessed Aug. 18, 2020), *available at* https://www.dol.gov/agencies/whd/field-operations-handbook.

In 2009, WHD issued an opinion letter expressly rescinding the 80/20 approach prescribed in the FOH, concluding that 20 years of experience had shown it to be confusing and unworkable. WHD Opinion Letter FLSA2009-23 (Jan. 16, 2009). WHD explained that, consistent with the text of the FLSA and its regulations, so long as the duties performed by the employees are part of their tipped occupation, those employees are not engaged in "dual jobs." Thus, the Department would interpret the dual jobs regulation such that "no limitation shall be placed on the amount of these [related] duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties." *Id.* Following a change in the administration, however, in 2009 WHD withdrew that opinion letter "for further consideration" and stated it would "provide a further response in the near future."

In 2012, WHD revised FOH 30d00(e), replacing it with language currently located at section 30d00(f). The prior 1988 language had stated that tipped employees could spend up to 20 percent of their working time engaged in "maintenance and preparatory or closing activities" such as cleaning and setting tables, making coffee, and occasionally washing dishes or glasses." The 2012 revision, on the other hand, stated categorically that "maintenance work," such as "cleaning bathrooms and washing windows," is not related to the occupation of a server. Rather, "such jobs are non-tipped occupations" subject to the full minimum wage, regardless of the time spent. As with the 1988 entry, this language was not promulgated as a rule and was not supported by guidance from WHD or the Department. As the Department explained in the 2019

NPRM, this dual jobs policy set forth in the FOH has proven difficult to enforce and resulted in widespread compliance issues; it has also generated extensive, costly litigation. *See* 84 FR 53972.

Due in large part to those concerns, the Department in November 2018 reinstated the January 16, 2009, opinion letter and later released an accompanying FAB. *See* WHD Opinion Letter FLSA 2018-27; *see also* FAB No. 2019-2 (Feb. 15, 2019). In these documents, the Department 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 id.* The Department also explained that, in addition to the examples listed in § 531.56(e), it would use the Occupational Information Network (O*NET), a comprehensive database of worker attributes and job characteristics, to determine whether a tipped employee's non-tipped duties were related to his or her tipped occupation. The 2019 NPRM proposed to revise § 531.56(e) to reflect this 2018 guidance.

E. The Department's Proposal

On October 8, 2019, the Department issued a new NPRM, proposing to amend its tip regulations under the FLSA to address the CAA's amendments to the statute and to codify policy on how the tip credit applies to employees who perform both tipped and non-tipped duties. The Department proposed to incorporate the new statutory prohibition against keeping employee tips—section 3(m)(2)(B), which applies whether or not the employer takes a tip credit—into its existing regulations and to enact new recordkeeping requirements to assist it in administering the new language. The Department proposed,

consistent with the CAA's depriving of further force or effect those portions of the Department's 2011 regulations that restricted tip pooling by employers that do not take a tip credit, to remove the portions of its regulations that prohibited those employers from including in mandatory tip-pooling arrangements those employees who do not customarily and regularly receive tips. Since the CAA merely renumbered the FLSA's existing tip credit language, now section 3(m)(2)(A), the Department did not propose revising the existing tip retention, tip pooling, and notice regulations.

The Department proposed to incorporate into its CMP regulations the new statutory language giving it authority to seek CMPs for violations of section 3(m)(2)(B). To harmonize the regulations with Supreme Court authority and the manner in which the Department actually litigates willfulness, it also proposed to revise portions of its CMP regulations (specifically, 29 CFR 578.3 and 579.2) that address how the Department determines whether an FLSA violation is willful. Additionally, the Department proposed to amend its tip regulations to reflect recent guidance stating that an employer may take a tip credit for time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with or for a reasonable time immediately before or after performing the tipped duties. Finally, the Department proposed to amend its regulations that address the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) to reflect the rescissions proposed in the FLSA regulations for tipped employees, to incorporate the Department's guidance on when an employee performing non-tipped work is a tipped employee and to otherwise align those regulations with the Executive Order.

The Department received 466 timely comments on the NPRM during the 64-day comment period that ended on December 11, 2019.[8] The comments were from a broad array of constituencies, including small business owners, restaurant companies, employer and industry associations, worker advocacy groups, trade unions, non-profit organizations, social scientists, law firms, Members of Congress, state attorneys general, a state department of labor, and other interested members of the public. All timely received comments may be viewed on the regulations.gov website, docket ID WHD-2019-0004. Some of the comments the Department received were general statements of support or opposition, and the Department also received approximately 340 identical or nearly identical "campaign" comments sent in response to an organized initiative. Commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal; however, most commenters favored some, if not all, of the changes proposed in the NPRM. Some commenters, including numerous worker advocacy groups that submitted comments with substantially similar language, requested that the Department reject proposed revisions to its regulations that reflected recent guidance addressing the extent to which an employer can take a tip credit for the time a tipped employee spends performing related, non-tipped duties. The Department has considered the timely submitted comments addressing the proposed changes.

The Department also received a small number of comments that are beyond the scope of this rulemaking. These include, for example, requests that the Department reconsider its regulation on compulsory service charges, § 531.55, and a request that the

[8] The Department extended the end of the comment period from December 9 to December 11, 2019, due to an outage that temporarily caused most web browsers to refuse access to Regulations.gov.

Department reconsider the notice requirements in § 531.59. The Department does not address those issues in this final rule.

Significant issues raised in the comments are discussed below, along with the Department's responses to those comments.

III. Final Regulatory Revisions

The Department finalizes its proposals to amend its tip regulations to implement the CAA amendments and address other issues. The sections below address these regulatory revisions as adopted in the final rule.

The sections of this rule are separate and severable and operate independently from one another. If any section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intends that the remaining sections continue in effect.

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

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

Section 3(m)(2)(B) of the FLSA prohibits an employer from "keeping" tips received by its employees "for any purposes." The prohibition on employers keeping tips applies regardless of whether the employer takes a tip credit. The Department proposed to amend § 531.52 to include the new statutory language prohibiting an employer from keeping employees' tips and to clarify the extent to which an employer may exert control over employees' tips without "keep[ing]" them in violation of 3(m)(2)(B). The Department proposed that an employer may exert control over tips only to (1) promptly distribute tips to the employee or employees who received them; (2) require employees to share tips with other eligible employees; or (3) where the employer facilitates tip pooling

by collecting and redistributing employees' tips, promptly distribute tips to eligible employees in a tip pool. In these circumstances, the Department explained, employees, not the employer, "keep" the tips.

Commenters—representing both employers and employees—supported the Department's proposal to implement section 3(m)(2)(B)'s prohibition on employers' keeping tips. *See, e.g.*, Center for Workplace Compliance; National Employment Lawyers Association (NELA); National Restaurant Association; Oxfam. The Center for Workplace Compliance, for example, commented that the proposal aligns with the language of the amendment. The Department agrees, and adopts the changes to § 531.52 as proposed.

In addition to comments on the Department's proposal, several commenters requested that the Department address whether, under the new section 3(m)(2)(B), employers may deduct a portion of the transactional fee charged by the credit card company from employees' credit card tips. Historically, the Department has consistently taken the position that, when a tip is charged to a credit card, an employer may reduce the amount of tips paid to the employee by the percentage charged by the credit card company as a transactional fee. For example, where a credit card company charges an employer 3 percent on all sales charged to its credit service, the employer may pay the employee 97 percent of the charged tips without violating FLSA. The Department has long permitted employers to do so, finding this consistent with the statutory requirement that employees retain their tips. *See* WHD Opinion Letter FLSA-214 (Mar. 28, 1977); WHD Opinion Letter FLSA 2006-1 (Jan. 13, 2006); 29 U.S.C. 203(m)(1) (1974); 32 FR 13580 (adopting 29 CFR 531.52 (1967)). The NPRM did not specifically address this

issue; however, as the Department explained shortly after Congress passed the CAA amendments, the Department has continued to apply its previous guidance concerning tips charged on credit cards. *See* FAB No. 2018-3 (Apr. 6, 2018). In response to the NPRM, some commenters urged the Department to clarify that employers cannot reduce the amount of tips by the amount of credit card transactional fees. These commenters stated that it is the employer's choice to incur the costs associated with taking credit cards, and section 3(m)(2)(B) should be interpreted to prohibit them from using a portion of employee tips to subsidize those costs. *See* NELP, NWLC, and the Pennsylvania Department of Labor and Industry. In contrast, another commenter requested that the Department affirm that an employer may continue to deduct those fees under whatever final rule is implemented based on the NPRM. *See* Littler Mendelson. The commenter noted the Department's longstanding position allowing employers to do this and that courts have allowed the practice. *See, e.g.*, *Myers v. Copper Cellar*, 192 F.3d 546, 554 (6th Cir. 1999) (employer may deduct the cost of "converting the credited tip to cash").

After considering these comments, the Department affirms its longstanding guidance authorizing employers to deduct the actual cost of credit card processing charges from employees' tips. By deducting transactional fees, the employer exerts only the amount of control necessary to liquidate the tips to cash and distribute them to employees. This is consistent with the Department's proposal, adopted in this final rule, that an employer may exert control over employees' tips without "keep[ing]" them in violation of 3(m)(2)(B) only to distribute them to employees or to facilitate tip pooling. Credit-card processing fees are not an imposition by the employer on the employee; they are the price of converting credit obligations to cash. The same fees would be imposed

upon servers themselves if they collected their tips through credit payments separate from the customer's payment to the establishment. The Department reiterates that an employer may not deduct more than the actual transactional fee charged by the credit card company attributable to liquidating the credit card tip, nor may the employer reduce the amount of tips paid to the employee to cover other costs incurred by the employer related to credit card use, such as the cost of installing a Point of Sale system. *See* WHD Opinion Letter FLSA2006-1 (Jan. 13, 2006). An employer that uses tips to cover those operating expenses would violate section 3(m)(2)(B).

ii. Managers and Supervisors May Not Keep Tips

a. Summary of the Final Rule

Section 3(m)(2)(B) prohibits employers, regardless of whether they take a tip credit, from keeping tips, "including allowing managers or supervisors to keep any portion of employees' tips." 29 U.S.C. 203(m)(2)(B). The prohibition applies to managers or supervisors obtaining employees' tips directly or indirectly, such as via a tip pool. To clarify which employees qualify as managers or supervisors for purposes of section 3(m)(2)(B), the 2019 NPRM proposed § 531.52(b)(2), which would codify the Department's current enforcement policy under FAB No. 2018-3 (Apr. 6, 2018).

The Department is finalizing the language as proposed. Specifically, the final rule uses the duties test, but not the salary tests, from the FLSA's executive employee exemption to determine which individuals are managers or supervisors who may not keep tips under section 3(m)(2)(B).[9] As the 2019 NPRM explained, this exclusion ensures that

[9] An employee is an executive exempt from the FLSA's minimum wage and overtime requirements if the employee performs certain duties, is paid on a salary basis, and is paid a minimum salary level. 29 U.S.C. 213(a)(1), 29 CFR 541.100(a)(2)–(4).

the terms "manager" and "supervisor" encompass more individuals than the term "executive" as used in section 13(a)(1) of the FLSA.

In effect, the final rule defines a manager or supervisor for purposes of section 3(m)(2)(B) as any employee (1) whose primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise; (2) who customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (3) who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing are given particular weight. The definition also includes as managers or supervisors any individuals who own at least a bona fide 20 percent equity interest in the enterprise in which they are employed and who are actively engaged in its management.

The final rule also revises § 531.52 to state that FLSA section 3(m)(2)(B) "prohibits employers from requiring employees to share tips with managers and supervisors," and revises § 531.54 to state that employers who do not take a tip credit "may not include supervisors and managers" in a tip pool.

b. Comments Regarding the Definition of Managers and Supervisors

The Department received several comments addressing the issue of who should be included as managers or supervisors under section 3(m)(2)(B). The majority of commenters expressed general support for the proposal and one commenter noted that the proposed approach would be familiar and therefore less likely to have unintended consequences. Many commenters recommended modifications to the Department's proposal.

The Pennsylvania Department of Labor & Industry supported using the executive exemption duties test, but recommended that every employee who satisfies any of the three elements of the duties test be deemed a "manager" or "supervisor" under section 3(m)(2)(B). For example, an employee who customarily and regularly directs the work of two or more other employees, but does not have the authority to hire or fire other employees, would be counted as a "manager" or "supervisor" under this definition, and prohibited from sharing employee's tips.

Other commenters, including Littler Mendelson and Fisher Phillips, recommended that the Department adopt the entire executive exemption, including the salary basis and salary level tests, rather than incorporating only the duties test. Littler asserted that this would state "an easy, bright-line rule" and would save "time and effort necessary to determine whether lower-paid employees qualify for the exemption."

Other commenters, including the National Employment Law Project (NELP), Restaurant Opportunities Center United (ROC), and A Better Balance recommended incorporating a salary level into the definition, such as the median wage for supervisors of food preparation and serving workers based on the National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES). They proposed in the alternative that the definition include the executive exemption's salary level test, 29 CFR 541.100(a)(1), but allow an hourly equivalent. This, they urged, would allow more low-level managerial employees to participate in tip pools.

Finally, Senator Patty Murray and Representative Rosa DeLauro stated that the executive exemption duties test "is not appropriate for accurately identifying all

employees who are managers and supervisors." Senator Murray and Representative DeLauro asserted that the Department's proposal allows employees who engage in some managerial work to participate in tip pools, while section 3(m)(2)(B) prohibits that group from keeping employees' tips. They instead recommended importing the definition of "supervisor" from section 2(11) of the National Labor Relations Act or using "as a starting point" the definition of "management" from 29 CFR 541.102.

After considering all comments, the Department finalizes this portion of § 531.52 as proposed. Using the duties test disjunctively or using the definition of "management" set forth in 29 CFR 541.102 would prevent employees who perform some lower-level managerial responsibilities from participating in tip pools, even if they are not bona fide managers or supervisors of the employer. On the other hand, adopting the full executive exemption test (including the salary basis and salary threshold tests) would, as Senator Murray and Representative DeLauro noted, conflict with Congress's use of the terms "managers" and "supervisors"—terms not used elsewhere in the FLSA—rather than "executives" or a reference to section 13(a)(1). This counsels against fully adopting the test used for the executive exemption.

Relatedly, Senator Murray and Representative DeLauro asserted that the Department's proposed definition of "managers" and "supervisors" as used in section 3(m)(2)(B) violates Congress's intent because that section does not refer to the executive exemption. However, the section 13(a)(1) executive exemption requires each of the three tests—salary basis, salary threshold, and duties—to be met. The proposed definition of "manager" and "supervisor" uses just one of those criteria—the duties test. As the NPRM

noted, this definition therefore encompasses a different, broader group of employees than the term "executive" as used in section 13(a)(1).

As for other commenters' suggestion to establish two different salary levels, one for the executive exemption and one for managers and supervisors excluded from tip pools, the Department concludes that this would likely cause undue confusion in the regulated community. Additionally, setting a separate compensation level, as suggested by some commenters, could require periodic updates to § 531.52 to reflect inflation. Finally, there is no basis for applying a salary level based on the restaurant industry to tipped employees in all industries. For instance, the Department has not studied or received comments on an appropriate salary level at which to exclude managers and supervisors from tip pools in the cosmetology, casino, or cleaning-service industries and therefore cannot reasonably predict the effects imposing such a requirement would have in those industries. The Department therefore declines to adopt these proposals and finalizes this portion of § 531.52 as proposed.

In sum, the Department concludes that the criteria in § 531.52 effectively identify the managers and supervisors whom Congress sought to prevent from keeping other employees' tips. The Department believes that employers can readily use these criteria to determine whether an employee is a manager or supervisor because employers are generally familiar with the longstanding regulations from which those criteria are drawn.

c. Comments Regarding Managerial Participation in Tip Pools

The Department also received several comments supporting the language in § 531.52 prohibiting employers "from requiring employees to share tips with managers

and supervisors" and the language in § 531.54 specifying that employers that do not take a section 3(m)(2)(A) tip credit "may not include supervisors and managers" in a tip pool.

Some commenters raised concerns, however, that the Department's proposed regulations neither expressly prohibit nor expressly allow managers or supervisors to retain tips they receive directly from customers. For example, the National Restaurant Association and the Bowling Proprietors' Association of America suggested that the regulations clarify that the law does not prohibit supervisors or managers from retaining tips they themselves receive directly from customers. These commenters also requested that the Department allow managers or supervisors who receive tips directly from customers to share or pool tips with other managers or other nontipped employees. The National Restaurant Association proposed that the prohibition against managers and supervisors participating in a tip pool "extend only to those individuals receiving money from the pool or share, but not to individuals who only contribute money into the pool or share."

The Department agrees that section 3(m)(2)(B) permits a manager or supervisor to keep a tip that he or she receives directly from a customer for the service only he or she provides. The statute states only that an "employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips" and is implicitly stating that managers and supervisors may not keep tips received by employees other than themselves. A salon manager, for example, may keep tips left by customers whose hair she personally styles. In response to commenters' suggestions, the Department added language in finalized § 531.52(b)(2) to

make this clear: "A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides."

With regard to tip pools, the Department notes that the requirements of § 531.54 only apply to those tip pools mandated by employers. When a manager or supervisor who receives tips directly from customers wishes to voluntarily "tip out" a portion of his or her tips to other employees, that is not considered to be participation in a tip pool and is not prohibited by the FLSA or the proposed regulations. Voluntarily "tipping out" is different from an employer-mandated tip pool. The Department believes that allowing managers and supervisors to participate in tip pools for one purpose (contributing tips) and not for another (receiving tips) would create confusion among employers and employees. Furthermore, such a proposal could lead to situations where it is difficult for employers to demonstrate compliance with the prohibition on employees sharing tips with managers and supervisors. Therefore, the Department declines to make such changes in the final rule.

Finally, upon review, the Department realizes that it may have unintentionally created confusion by not including language expressly forbidding manager and supervisor participation in tip pools in proposed § 531.54(c), which applies to employers that take a section 3(m)(2) tip credit. As the statutory text and proposed § 531.52(b) make clear, no employer may require employees to share tips with managers and supervisors—there is no distinction between employers who do or do not take a tip credit. Therefore, the Department will add a new subparagraph § 531.54(c)(3) that mirrors the language in proposed § 531.54(d): "An employer may not participate in such a tip pool and may not

include managers and supervisors in the pool." The Department otherwise finalizes as proposed the language in §§ 531.52(b) and 531.54(d).

B. Tip Pooling—Section 531.54

The Department proposed to amend § 531.54, which generally addresses tip pooling, to reflect the CAA amendments. The Department proposed to incorporate section 3(m)(2)(B)'s prohibition on employers keeping tips, which applies regardless of whether the employer takes a tip credit, into § 531.54. The Department also proposed to amend § 531.54 to include the specific requirements that apply to employers that establish mandatory tip pools, depending on whether the employer does or does not take a tip credit, and depending on whether the mandatory tip pool is a traditional pool limited to customarily and regularly tipped employees or a nontraditional tip pool, which may include employees who do not customarily and regularly receive tips.

i. Requirements When an Employer Collects and Redistributes Tips—Section 531.54(b)

In its proposed rule, the Department took the position that section 3(m)(2)(B) does not prohibit an employer from collecting tips received by employees to facilitate a mandatory tip pool if the employer fully redistributes the tips it collects no less often than when it pays wages. In those circumstances, the employees' tips are only temporarily within the employer's possession, and the employer does not "keep" the tips within the meaning of section 3(m)(2)(B). However, the Department proposed that employers "keep" tips in violation of section 3(m)(2)(B) when they collect tips but do not redistribute them within this time period.

As proposed, § 531.54(b)(1) covered employers that collect tips to administer a tip pool and required those employers to fully distribute any collected tips at the regular

payday for the workweek, or, for pay periods of more than one workweek, at the regular payday for the period in which the particular workweek ends. Proposed § 531.54(b) also required that, to the extent an employer could not ascertain the amount of tips received or how tips should be distributed before processing payroll, those tips be distributed to employees as soon as practicable after the regular payday. As the Department observed in the 2019 NPRM, these requirements align with current guidance on how soon an employer must distribute to tipped employees tips that were charged on credit cards. *See* WHD Opinion Letter FLSA2006-1 (Jan. 13, 2006). Because proposed § 531.54(b)(1) defined "keep" within the confines of section 3(m)(2)(B), the requirement that an employer fully and promptly distribute any tips it collects would have applied regardless of whether the employer took a tip credit and regardless of the type of tip pool the employer administered.

The Pennsylvania Department of Labor and Industry expressed support for proposed § 531.54(b)(1). Restaurant owners who submitted comments as part of a comment campaign also expressed general support for "the proposed changes regarding tip pooling," noting that they "closely track the new statutory language." Accordingly, the Department adopts § 531.54(b)(1) as proposed, but separates it into two subsections, (b)(1) and (b)(2).

ii. Additional Requirements for Mandatory Tip Pools When an Employer Takes a Tip Credit—Section 531.54(c)

Proposed § 531.54(c) sets forth the tip pooling requirements for employers that take a tip credit. As explained in the 2019 NPRM, the Department's approach to those employers remains unchanged because the CAA did not amend the substance of what is

now section 3(m)(2)(A), which applies to those employers. Accordingly, proposed § 531.54(c) would retain the Department's existing requirements in § 531.54 but would clarify that these requirements apply only to employers that take a tip credit. Those existing requirements state that those employers that take a tip credit can require tipped employees to contribute tips to a tip pool only if the pool's membership is limited to employees who customarily and regularly receive tips.

Proposed § 531.54(c)'s requirements are drawn directly from section 3(m)(2)(A) of the FLSA—formerly numbered section 3(m)—which has imposed the same tip pooling, notice, and tip retention requirements on employers that take a tip credit since 1974. The Department thus adopts § 531.54(c) as proposed.

iii. Nontraditional Tip Pools When an Employer Does Not Take a Tip Credit—Sections 531.52, 531.54, and 531.59

In 2011, the Department revised its tip regulations to require that tipped employees retain the tips that they receive, except those distributed through a tip pool comprising solely employees who customarily and regularly receive tips. The Department applied this interpretation to all employers of tipped employees, regardless of whether they took a tip credit. *See* 29 CFR 531.52, 531.54, and 531.59 (2011).

Through the CAA, Congress suspended portions of §§ 531.52, 531.54, and 531.59 that restricted employers that do not take a tip credit from instituting nontraditional tip pools. *See* CAA, Div. S, Tit. XII, sec. 1201(c). As a result, since the CAA's effective date, employers that do not claim a tip credit have been permitted to implement mandatory nontraditional tip pools that include both tipped and nontipped employees. *See* FAB No. 2018-3 (Apr. 6. 2018).

Consistent with these amendments, the Department proposed to revise its regulations to remove certain restrictions on employers that do not claim a tip credit (and therefore pay workers a direct cash wage of at least the minimum wage), including those prohibiting them from instituting mandatory nontraditional tip pools. These restrictions were based on what is now section 3(m)(2)(A) of the FLSA, which the Department previously concluded neither limits employers that do not take a tip credit nor grants authority to the Department to do so. *See* Resps.' Br. at 13, *Nat'l Rest. Ass'n v. Dept. of Labor*, No. 16-920 (U.S.), *cert. denied,* 138 S. Ct. 2697 (2018); *see also* 82 FR 57399. In particular, the Department proposed to rescind the congressionally-suspended language in § 531.52 that bars employers from establishing mandatory nontraditional tip pools, "whether or not it takes a tip credit," and to make additional clarifying edits; to revise § 531.54 to clarify that the restrictions and notice requirements for tip pools apply only to employers that take a tip credit; and to revise § 531.59 to state that the bar on mandatory nontraditional tip pools applies only to employers that take a tip credit. *See* 84 FR 53976–77. The Department also proposed to make explicit in § 531.54 that an employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a mandatory tip pooling arrangement that includes dishwashers, cooks, or other employees who are not employed in an occupation in which employees customarily and regularly receive tips, as long as that arrangement does not include any employer, supervisor, or manager. *See* 84 FR 53976.

A number of commenters addressed the Department's proposal to allow employers that do not take a tip credit to mandate nontraditional tip pools. Commenters including the NFIB, Bloomin' Brands, Littler, and several individuals, supported the

proposal, noting that it reflects the realities of tipped workplaces and is fairer to nontipped employees. As Bloomin' Brands stated, "it takes an entire team," including employees in occupations that do not customarily and regularly receive tips, to give customers "the total quality experience necessary to earn a tip." Littler stated that nontraditional tip pools are especially helpful where state law precludes employers from taking a tip credit, and tipped employees who continue to earn tips on top of their wages would otherwise "earn far more than their nontipped coworkers."

In contrast, Texas RioGrande Legal Aid and some individual commenters opposed allowing employers that do not take a tip credit to institute mandatory nontraditional tip pools, arguing that this arrangement is contrary to what customers intend when they leave a tip and unfair to tipped employees. At least one of these commenters, however, appears to have misunderstood that the Department's proposal requires an employer to pay a tipped employee the full federal minimum wage before the employer can require the employee to participate in a mandatory tip pool or other similar arrangement that includes one or more nontipped employees. Texas RioGrande Legal Aid also opposed the removal of language in § 531.52 stating that the customer "has the right to determine who shall be the recipient" of a tip.

Other commenters, including those who did not oppose mandatory nontraditional tip pools as a general matter, expressed concern that an employer that institutes a mandatory nontraditional tip pool could conceivably reduce the cash wages it pays to nontipped employees, such as cooks and dishwashers, who receive tips from the pool. *See, e.g.*, ROC, NELP, and Policy Integrity. The Department had acknowledged this possibility in the economic analysis accompanying the NPRM. *See* 84 FR 53968. NELP

and other commenters asked the Department to prohibit employers from taking advantage of nontraditional tip pools to pay lower cash wages to nontipped employees, asserting that those actions would be inconsistent with 3(m)(2)(B)'s prohibition on employers' keeping tips. Policy Integrity acknowledged, however, that it would be "difficult to design a rule" to accomplish this end.

Finally, Senator Murray and Representative DeLauro recommended that the Department require employers to institute a "democratic process" to obtain the consent of tipped employees before instituting nontraditional tip pools. They asserted that such a safeguard would ensure that employers are not keeping employees' tips.

After considering the comments, the Department adopts without modification the changes it proposed to §§ 531.52, 531.54, and 531.59, which allow employers that do not take a tip credit to implement mandatory nontraditional tip pools, as long as those tip pools do not include employers, managers, or supervisors. These changes are consistent with the 2018 amendments to the FLSA and the text of section 3(m)(2) as a whole. Section 3(m)(2)(A) expressly prohibits employers that take a tip credit from including employees that do not customarily and regularly receive tips in mandatory tip pools together with employees that do, but it does not place this prohibition on employers that do not take a tip credit. In addition, as commenters noted, the revised regulations will afford employers flexibility to reward nontipped employees who contribute to the customers' experience and incentivize tipped and nontipped employees alike to improve that experience.[10] As finalized, §§ 531.52, 531.54, and 531.59 expressly allow employers

[10] Given this flexibility afforded to employers to reward nontipped employees, the Department need not resolve disagreement between commenters as to whether customers

that do not claim a tip credit to implement a mandatory tip pool that includes both employees who receive tips and employees who do not ”customarily and regularly” receive tips. However, that tip pool may not include any employer, manager, or supervisor.

The Department declines to require that employers institute a process to obtain consent from tipped employees before including them in a mandatory nontraditional tip pool. Nothing in section 3(m)(2) predicates the imposition of a tip pool on employee consent, and there is no textual basis for creating such a requirement with respect to only a nontraditional tip pool. Not only is there no textual basis for such a requirement, a bill introduced to impose such a requirement was neither passed, nor its substance incorporated into the CAA. *See* H.R. 5180, 115th Cong. (2d Sess. 2018). Additionally, this recommendation is outside of the proposed changes, and the public has not had the opportunity to comment on its merits or feasibility.

The Department also declines to modify its proposal in response to commenters' concern that an employer could reduce the cash wages paid to a nontipped employee who participates in a nontraditional tip pool. What matters is not nontipped employees' cash wages, but rather their overall compensation, which includes both cash wages and tips that they may now receive under this final rule. Employers can already reduce nontipped employees' overall compensation by lowering cash wages, but this requires tradeoffs: morale and productivity would fall, and it would become more difficult to recruit and

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tip based only on the specific performance of one or more tipped employees or, instead, on an assessment of the customer's broader experience. The intention(s) behind individual customers' tipping likely varies depending on context, customer, and circumstances.

retain qualified workers. Allowing nontraditional tip pools does not alter these tradeoffs and thus would not make employers more able or willing to reduce nontipped employees' overall compensation. While employers that share tips with nontipped employees under this rule could reduce cash wages paid to those same employees, economic reality makes it unlikely that they would do so in a way that reduces overall compensation unless the employer was already able and willing to reduce the employees' overall compensation for reasons unrelated to this rule.

On the other hand, the nontraditional tip pools allowed under this rule give employers a new way to increase nontipped employees' overall compensation and thereby improve morale, productivity, recruitment, and retention. Some employers will do so by keeping nontipped employees' cash wages the same while allowing them to share in tips. Others may reduce cash wages but share tips that, on average, more than offset the reduction in cash wages so that the net effect on overall compensation will be positive. Regardless of the approach, a nontipped employee's overall compensation will increase.

Additionally, it would be difficult, if not impossible, to develop and enforce a prohibition on employers' adjusting a nontipped employee's cash wage when the employer complies with the FLSA's minimum wage and overtime requirements. Given the fungible nature of money and the innumerable lawful reasons why an employer might set, raise, reduce, or maintain an employee's compensation, it would be difficult to distinguish between lawful reductions to compensation and unlawful "keeping" of "tips received by its employees." And although nontraditional tip pooling arrangements may affect pay decisions for nontipped workers who participate in a nontraditional pool—

including by allowing employers to pay a lower cash wage to retain or hire an employee in the non-tipped position—the Department disagrees with commenters' claims that any benefit an employer receives from a mandatory tip pool constitutes "keeping" tips in violation of 3(m)(2)(B). Indeed, for decades in what is currently section 3(m)(2)(A), Congress has expressly authorized mandatory traditional tip pools that afford employers similar indirect benefits. Congress also implicitly authorized these nontraditional tip pools when it suspended the Department's regulations prohibiting them, undercutting any claim that such tip pools were actually prohibited by the CAA.

Ultimately, the Department believes that employers will rarely reduce the cash wages of nontipped employees who participate in a nontraditional tip pool. Economic realities limit employers' practical ability to reduce compensation significantly and simultaneously retain employees. Further, employers are constrained by wage and hour laws. Because back-of-the-house and other employees who receive tips through a nontraditional tip pool are not employed in an occupation in which they customarily and regularly receive tips, an employer may not take a tip credit for these workers, and must pay them at least the full federal minimum wage. *See* 29 U.S.C. 203(m)(2), 206(a); *see also* S. Rep. No. 93-690, at 43 (1974); WHD Opinion Letter FLSA2008-18 (Dec. 19, 2008). And, in many workplaces, state and local laws require employers to pay nontipped workers a minimum wage that exceeds the federal minimum wage.

Further, though employers could theoretically do so, an ability under the rule to decrease nontipped employees' wages is unlikely, by itself, to motivate an employer to adopt a nontraditional tip pool. An employer that currently takes a tip credit that institutes a nontraditional tip pool would lose the tip credit and be required to pay tipped workers at

least the full minimum wage. Accordingly, the wage obligations required under a nontraditional tip pool could result in an increased transfer from employers to employees.

Finally, the Department declines to restore to § 531.52 the statement that a customer "has the right to determine who shall be the recipient" of a tip. This language is confusing in the context of section 3(m)(2) and the Department's tip regulations, which expressly permit employers to require employees to pool tips with each other regardless of which employee or employees the customer intended to receive the tip.

For these reasons, the Department finalizes the relevant changes to §§ 531.52, 531.54, and 531.59 as proposed. An employer may implement a nontraditional tip pool that includes tipped and nontipped employees, provided the pool does not include any employers, managers, or supervisors, and so long as the employer does not take a tip credit and pays the full minimum wage to both the tipped employees who contribute to the pool and the nontipped employees who receive tips from the pool.

C. *Recordkeeping Requirements for Employers that Have Employees Who Receive Tips—Section 516.28*

Section 516.28 imposes certain recordkeeping requirements on only those employers that take a tip credit. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit (*see* § 516.28(a)(1)) and maintain records regarding the weekly or monthly amount of tips received, as reported by the employee to the employer (*see* § 516.28(a)(2)). The employer

may use information on IRS Form 4070 (Employee's Report of Tips to Employer) to satisfy the requirements under § 516.28(a)(2).[11]

The Department proposed revisions to the recordkeeping requirements in § 516.28 to improve consistent and effective administration of section 3(m)(2)(B). The revisions would require similar recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. Proposed § 516.28(b)(1) would require these employers to identify on their payroll records each employee who receives tips. Proposed § 516.28(b)(2) would also require those employers to keep records of the weekly or monthly amount of tips received by each employee, as reported by the employee to the employer (this may consist of reports from the employees to the employer on IRS Form 4070).

The Department received only two comments concerning the proposed recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. One commenter recommended that the Department require additional recordkeeping beyond the proposed requirements, while the other argued that the proposed recordkeeping was not required. The proposed recordkeeping requirements would help the Department determine whether employers are complying with their tip pooling obligations. Accordingly, the Department adopts the addition of § 516.29(b)(1) and § 516.28(b)(2) as proposed.

D. Dual Jobs – Section 531.56(e)

i. Summary of the Final Rule

[11] For information regarding IRS Form 4070, *see* https://www.irs.gov/businesses/small-businesses-self-employed/tip-recordkeeping-and-reporting.

Section 531.56(e) addresses instances in which an employer employs an employee in both a tipped occupation, for which the employer may take a tip credit, and a non-tipped occupation, for which the employer may not take a tip credit. The Department proposed to amend § 531.56(e) to codify its recent subregulatory guidance regarding when an employer can take a tip credit for hours that a tipped employee performs non-tipped duties related to his or her tipped occupation. *See* WHD Opinion Letter FLSA2018-27 (Nov. 8, 2018); FAB No. 2019-2 (Feb. 15, 2019). Before it was amended to reflect this recent guidance, the FOH had stated that an employer may not take a tip credit for non-tipped duties related to an employee's tipped occupation if the time spent on those duties exceeds 20 percent of the employee's workweek. As described above, stakeholders and courts sometimes referred to this guidance as the "80/20 rule," although it was not, in fact, a regulation. However, as the Department observed in the NPRM, this policy was difficult for employers to administer and led to confusion, 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.

The final rule, which (with the exception of two changes) adopts the changes to § 531.56(e) as proposed and clarifies, consistent with the Department's current 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 duties contemporaneously with the tip-producing activities or within a reasonable time immediately before or after the tipped activities. This updated approach to the related-duties standard is consistent

with the plain text of the FLSA, which permits employers to take a tip credit based on whether an employee is engaged in a tipped "occupation," not on whether the employee is performing certain kinds of duties within the tipped occupation.

To facilitate the administration of this approach, the final rule also complements the examples already in § 531.56(e) by adopting the Occupational Information Network (O*NET) as a source of guidance for determining when a tipped employee's non-tipped duties are related to his or her tipped occupation. As explained in more detail below, the final rule states that 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. As the Department explained in the NPRM, O*NET is a comprehensive database of worker attributes and job characteristics, and is available to the public at www.onetonline.org. O*NET includes information on work activities for more than 900 occupations based on the Standard Occupational Classification system, a statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

ii. Comments Regarding the Updated Related Duties Approach

The Department received many comments expressing support for the proposed changes to § 531.56(e). Those commenters suggested that the updated related duties approach is a substantial improvement over the 80/20 approach because it is more consistent with the FLSA's text, structure, and purpose; and it is a more practical and administrable approach. *See, e.g.*, Inspire Brands; the Center for Workplace Compliance; Littler Mendelson.

On the first point, several commenters observed that the Department's proposal aligns the tip credit regulations with the plain language of the FLSA. For example, Littler stated that "the FLSA says nothing about slicing an employee's duties into creditable and non-creditable categories, nor does it say anything about capping an employee's related duties at 20%." Instead, the statutory language "suggests that all work within the tipped occupation is eligible for a credit—not just some arbitrary percentage of the work." Inspire Brands stated that the Department's proposal parallels other FLSA regulations. In particular, "in the context of the FLSA's white collar exemptions, the Department long ago abandoned any notion that employees must spend a specific amount of time performing exempt work to qualify for an exemption." *See* 29 CFR 541.700(b) ("The amount of time spent performing exempt work can be a useful guide . . ., [but] time alone . . . is not the sole test").[12] Inspire Brands also stated that the Department's proposal best approximates "what Congress intended to achieve when it first amended the FLSA to include tip credit rules. Specifically, when Congress amended sections 203(m) and 203(t) in 1966, it did so to permit 'the continuance of existing practices with respect to tips' in the hotel and restaurant industries[,] S. Rep. No. 89-1487 (1966)," and there was no evidence that employers in 1966 had an "existing practice" of paying servers or bartenders full minimum wages whenever related non-tipped duties exceeded a specific time limit.

On the second point, a number of commenters observed that the Department's proposal is easier to administer than the 80/20 approach. Employers noted they will no

[12] The Department maintains a proportion-of-time standard in other contexts. That standard is not appropriate in the dual jobs context because of the fluid nature of the work required in many tipped occupations.

longer feel that they have to try to track their employees minute by minute or task by task. Nor will they have to wrestle with which duties are related to their employees' tipped work. Instead, they can refer to the list of tasks for that occupation in O*NET. An employer that does so may take a tip credit for the employee's entire shift (as long as any non-tipped duties are performed contemporaneously with or for a reasonable time immediately before or after tipped work). This approach increases compliance, reduces employer costs, and avoids litigation. *See, e.g.*, Littler; Center for Workplace Compliance; Inspire Brands; Bloomin' Brands; *cf. Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff'd*, 291 F. App'x 310 (11th Cir. 2008) (describing the practical difficulties of administering the contrary 80/20 approach). Inspire Brands stated that under the proposed rule, employers will no longer need to devote significant time to monitoring duties performed by tipped employees or tracking employees' time spent on various specific duties, and "in the place of such activities," supervisors will be able to spend "more time tending to customers" and helping servers and bartenders with non-tipped work, such as cleaning tables and stocking stations. Since a tipped employee "would have otherwise performed such tasks," Inspire Brands also stated that tipped employees will be able to "use that time savings to interact with customers and generate more in tips." Bloomin' Brands noted that the proposal remedied a "particularly unrealistic unintended consequence" of the existing regulation, which required employers to "evaluate[] a tipped employee's entitlement to the tip credit on a task-by-task basis." Littler commended the Department's proposal for "solv[ing] . . . in one stroke" the monitoring problems associated with the 80/20 approach. The Center for Workplace Compliance stated that by "not focusing on the specific amount of time spent

on various tasks," the proposal "will be easier to understand and will make compliance simpler."

The Department also received several comments skeptical of or opposed to its proposal or recommending that the Department adopt a different approach. The National Restaurant Association, for example, suggested that the Department loosen the proposed limitations on non-tipped work and "specify in the Final Rule that so long as [non-tipped] work occurs during the same shift or workday in which the employee engages in the main duties of a tipped occupation, the tip credit is available for the entire shift or workday." In contrast, several commenters, including those representing employees, 19 State Attorneys General, and Democratic Members of Congress, expressed concern that the updated related duties approach was not sufficiently stringent and would allow an employer to take a tip credit even when a tipped employee spends a substantial amount of time performing non-tipped work. These commenters urged the Department to return to the 80/20 approach (or adopt a more protective standard), and stated that a return to the 80/20 approach would be more workable than the proposed approach. They also argued that the Department has not sufficiently explained why the new standard would be more easily administrable than the 80/20 approach.

In addition, Senator Murray and Representative DeLauro asserted that the Department's proposal violates newly added section 3(m)(2)(B), which prohibits employers from keeping any portion of employees' tips for any purposes. They contended that to read section 3(m)(2)(B) as permitting a tip credit for any time an employee spends on non-tipped duties (whether related or unrelated) would produce an

"absurd result"; that is, it would allow employers to reassign non-tipped workers' duties to tipped workers and use tips to fulfill their minimum wage obligations for that work.

After considering the comments, the Department finalizes § 531.56(e)(2) as proposed (with the exception of one word that was changed for consistency). The Department disagrees that the updated related duties test allows an employer to take a tip credit when a tipped employee performs a substantial amount of non-tipped work and agrees with other commenters that a return to the 80/20 approach would be unwise for several reasons.

First, the updated related duties test does not permit employers to take a tip credit when tipped employees are, in fact, engaged in a non-tipped occupation. Instead, an employer may take a tip credit for non-tipped related duties only when those duties are performed "contemporaneously with or for a reasonable time immediately before or after" tipped work. As a result, when a tipped employee engages in a substantial amount of separate, non-tipped related duties, such that he or she has effectively ceased to be engaged in a tipped occupation, the tip credit is no longer available. Thus, an employer could not take a tip credit for the entire shift when a tipped employee spends "five hours, or more" of a 6-hour shift doing non-tipped work, *see* NELA, nor could it claim the tip credit for all hours worked by a dishwasher who picks up a few serving shifts per week, *see* Patriotic Millionaires. In these examples, the employee would not be performing the non-tipped related duties contemporaneously with or for a reasonable time immediately before or after performing tipped work. By contrast, an employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing

those intertwined duties. Rather, such duties are generally properly considered a part of the employee's tipped occupation, as is consistent with the statute.

Second, the Department disagrees that the proposed rule's language is not specific enough to furnish useful guidance. The requirement that related duties be performed contemporaneously with tipped duties is not difficult to administer in practice. For example, a barber who cleans the combs she is using as she is cutting a customer's hair is performing that duty during the same time as—contemporaneously with—the tip-producing work. The regulatory term "contemporaneously" does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.

Moreover, the allowance for related duties performed "for a reasonable time immediately before or after" a tipped duty creates a sufficiently intelligible distinction between employees engaged in tipped occupations and non-tipped occupations. It is true that this limit does not create as bright a line as a firm cap on the amount of time an employee may spend on particular duties (although the 80/20 approach creates significantly greater uncertainty in other ways as discussed below). But the concept of reasonableness is a cornerstone of modern common law and is familiar to employers in a variety of contexts. *See, e.g.*, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946) (factfinder may base FLSA back wages award on reasonable estimates); 29 CFR 825.302(a) (requiring employee to furnish notice of need for FMLA leave "as soon as practicable"); 42 U.S.C. 12112(a), (b)(5)(A) (requiring reasonable accommodations for disabled employees); 29 U.S.C. 1108(b)(2), (c)(2) (ERISA fiduciaries are entitled to receive reasonable compensation from a plan for services provided); 29 CFR 1604.11(a)

(conduct is sexual harassment if it unreasonably interferes with an individual's work performance); *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006) (Title VII prohibits employers from taking actions that a reasonable employee would find to be materially adverse); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (employer is vicariously liable under Title VII unless it took reasonable steps to prevent and correct harassing behavior); *Green v. Brennan*, 136 S.Ct. 1769, 1776–78 (2016) (constructive discharge occurs when a reasonable employee would feel compelled to resign). Reasonableness balances a flexible accounting of circumstances with a sufficiently definite limit on acceptable conduct in those contexts. This flexible approach is appropriate to apply to the question of whether particular duties are a part of an employee's tipped occupation.

For example, consider the following scenario: a hotel bellhop continuously performs tipped duties such as carrying luggage to guests' rooms during a busy 8-hour shift and then works for an additional 2 hours performing related non-tipped duties such as cleaning, organizing, and maintaining bag carts in storage. The 2 hours of related non-tipped duties would not be "for a reasonable time" after the performance of tipped duties. Accordingly, the bellhop was engaged in a tipped occupation (bellhop) for 8 hours and a non-tipped occupation (cleaner) for 2 hours.

On the other hand, consider a second scenario in which this hotel employee works a 10-hour shift that is less busy. Because there are fewer hotel guests to assist, there are times during the bellhop's shift when he is not transporting bags for customers. Rather, every hour, he transports bags for customers for approximately 48 minutes and in between transporting bags, spends approximately 12 minutes performing related non-

tipped duties, such as sweeping and mopping the entrance and cleaning bag carts. At the end of the shift, the employee in this scenario would have spent a total of 8 hours on tipped duties and 2 hours on non-tipped related duties—the same amounts as in the first scenario. But unlike in the first scenario, each period of related non-tipped duties would have been performed "for a reasonable time immediately before or after" the performance of tipped duties. As such, the employee would have been engaged in a tipped occupation (bellhop) for the entire 10-hour shift.

Even though the two above scenarios are different, the previous 80/20 approach drew no distinction between them because it focused solely on the precise ratio of time spent on tipped versus related non-tipped duties. But that focus obscures the relevant question of whether an employee is functionally engaged in one occupation or two. To answer this question, it is necessary to examine the context in which time is spent on tipped versus related non-tipped duties. If tipped and related non-tipped duties were performed at distinct times that never overlap, the employee would be engaged in two distinct occupations, even if the tipped-to-related-non-tipped ratio were more than 80/20. Conversely, if tipped and related non-tipped duties were performed alongside each other, the employee would be engaged in a single occupation, even if the tipped-to-related-non-tipped ratio were less than 80/20. The final rule's "reasonable time" standard considers the critical context in which tipped and related non-tipped duties are performed and focuses on the key issue of whether non-tipped duties form a substantial, segregable part of an employee's work. The 80/20 approach does not adequately address this issue.

Third, the guidance establishing the 80/20 approach did not adequately consider the practical difficulties in complying with a hard quantitative cap. To do so, employers

attempted to track the amount of time employees spend performing duties that are not tip-producing but are related to each employee's tipped occupation. *See* Littler. But as several commenters explained, this proved extremely difficult, if not impossible. Inspire Brands, for example, stated that it implemented policies within its timekeeping system intended to allow employees to switch between different job codes when engaging in different duties, but found that doing so "required substantial managerial resources" and that it was impossible to "keep track of tipped versus non-tipped duties at such a micro level." Another commenter representing employers stated, "[t]imekeeping systems are not designed to deal with that level of granularity," nor "do tipped employees' jobs allow them sufficient time to constantly clock in under a different code when finishing one task but before starting another." This is especially true "when the tasks are often measured in seconds and are frequently part of a 'multi-tasking' approach." *See* Johnson Jackson. The practical difficulties of complying with the 80/20 approach are also evident in case law. For example, as the District Court for the Southern District of Florida observed in a decision affirmed by the Eleventh Circuit, the non-tipped duties performed by the employees at issue were so "intertwined with indirect tip-producing tasks throughout the day" that determining precisely how much time was spent on non-tipped related duties was indeed "infeasible." *Pellon*, 528 F. Supp. 2d at 1314.

The updated related duties test, in contrast, does not require employers to attempt a minute-by-minute accounting of tipped employees' work to ensure that non-tipped related work does not exceed a quantitative cap. Each employee can instead perform the related, non-tipped work of his or her tipped occupation as needed in conjunction with his or her tipped work—either contemporaneously with or for a reasonable time immediately

before or after the tipped work—and employers may confidently take a tip credit without precisely tracking the time spent by the employee as he or she moves between duties.

Fourth, the 80/20 approach was difficult to administer because it required employers to distinguish with precision between non-tipped duties (which were subject to the 20 percent cap) and tipped duties (which were not). In general, determining whether a duty is tip-producing is straightforward; WHD and courts ask whether the task involves direct interaction with customers. *See* WHD Opinion Letter FLSA2018-27 (referring to tipped duties as those "involv[ing] direct customer service"); *Barnhart v. Chesapeake Bay Seafood House Assocs., L.L.C.*, No. CV JFM-16-01277, 2017 WL 1196580, at *6 (D. Md. Mar. 31, 2017) ("tasks that involve direct customer interaction would fall squarely into the tip-producing category, and tasks that are not customer-facing would not"); *Belt v. P.F. Chang's China Bistro, Inc.,* 401 F. Supp. 3d 512, 519-20 (E.D. Pa. 2019) (considering tasks that "did not involve interacting with, nor serving food and beverages to customers" to be untipped work). But the 80/20 approach requires precision, not generality, and, as commenters noted, the precise minute when an employee ceases to perform a tip-producing duty and begins performing a non-tipped, related duty (and vice-versa) is not always clear. *See, e.g.*, Inspire Brands. One court, for example, observed that applying the 80/20 approach to the plaintiff skycaps, who "me[t] airline travelers at the curb and assist[ed] them with their luggage," would require it to determine, "for instance, how far from the curb could Plaintiffs even walk before they are too far to be considered tipped employees[.]" *Pellon*, 528 F. Supp. 2d at 1315.

The updated related duties approach adopted in this final rule continues to distinguish between tip producing and non-tip producing duties. But because the updated

test eschews a numerical analysis, it no longer requires precise parsing of whether tasks performed in close conjunction with one another are tipped duties or are non-tipped related duties that must be aggregated against a 20 percent cap. Instead, an employer may take a tip credit whether an employee is performing a tipped duty or is performing a related duty contemporaneously with or for a reasonable time immediately before or after tipped duties. In addition, as discussed further below, by using O*NET to identify duties related to the tipped occupation, courts will be able to better and more consistently apply the dual jobs regulation.

Fifth, the Department disagrees that the 80/20 approach is more administrable than the proposed rule. An 80/20 approach may well be easy to administer once the precise amount of time an employee has spent on various tasks has been tabulated, but it is the categorizing of tasks and tracking of each employee's time that makes the 80/20 approach difficult to administer.

Sixth, the updated related duties test better effectuates the text of section 3(m) than did the 80/20 approach. Section 3(m) permits employers to take a tip credit based on whether an employee is engaged in a tipped "occupation," not whether the employee is performing certain kinds of duties or tasks within the tipped occupation. *See* 29 U.S.C. 203(m) and (t). Because the 80/20 approach imposed a hard cap on related non-tipped work, regardless of the context, applying this policy sometimes precluded an employer from taking the tip credit, even for time when a tipped employee arguably continued to be engaged in his or her tipped "occupation." By permitting the tip credit for the time an employee spends performing non-tipped related duties contemporaneously with or for a reasonable time immediately before or after tipped work, the updated approach better

approximates the point at which a tipped employee has ceased to be engaged in his or her tipped occupation and becomes engaged in a non-tipped occupation.

The updated related duties test also draws this line more effectively than the alternative proposed by the National Restaurant Association, which would permit an employer to take a tip credit for a full shift when an employee performs any tipped work during the course of the shift. For example, under that approach an employer could take a tip credit for the entire shift of a cook or dishwasher whom it had directed to perform a token amount of tipped work during the shift.[13] This is inconsistent with the commonsense understanding of the statutory term "occupation" in the FLSA, which permits an employer to take a tip credit only for the hours that an employee spends working in a tipped occupation, not for all hours worked by an employee who spends part of his or her time working in a tipped occupation. Removing the rigid 20 percent limitation, but permitting an employer to take a tip credit for time spent on non-tipped work only when that work is related to the tipped occupation and performed in conjunction with tipped work, reasonably interprets the statutory text while striking a balance that is both protective of employees and manageable for employers.

Seventh, it is not clear what time frame should be used to determine compliance with the 80/20 approach. As commenters noted, there was confusion with how the 80/20 approach would be determined on a workweek basis. Nor is it clear whether a workweek approach would, in the dual jobs context, produce results consistent with the FLSA's language that allows an employer to take a tip credit based on hours worked, not a

[13] The employee would also need to earn at least $30 per month in tips to meet the full criteria set forth in 29 U.S.C. 203(t).

workweek. Consider a casino that requires its card dealers to make periodic security rounds at their pit in order to allow other employees to focus fully on the tip-producing work of dealing. Over the course of an 8-hour shift each week, a card dealer is required to make six half-hour rounds monitoring gaming tables to ensure the security of the game (for a total of 3 hours over the course of her shift). The hours she spends monitoring gaming tables constitute more than 20 percent of her shift devoted to non-tipped related duties, but less than 20 percent of her workweek. If the workweek were applied as the standard of measurement, then the casino would be permitted to take a tip credit for the time spent on security rounds—even if that task consumed a substantial portion of the card dealer's designated work day that she could have devoted to tip-producing work. If the 80/20 approach were applied on a shift basis, the employer would be denied the tip credit for all eight hours the employee worked even though she was working in her tipped occupation for the entire shift. This lack of clarity and potential for unintended outcomes counsels against continued use of the 80/20 approach and in favor of the updated related duties test.

Eighth, the Department disagrees with some commenters' argument that the updated related duties approach violates section 3(m)(2)(B) by allowing employers to use tips to meet their minimum wage obligations for non-tipped work. Section 3 of the FLSA makes clear that an employer that takes a tip credit in compliance with section 3(m)(2)(A) does not "keep" tips in violation of section 3(m)(2)(B). This is because the two sections must be read in harmony with each other to avoid internal contradiction. Section 3(m)(2)(A) permits an employer to take a tip credit for "tipped employee[s]," defined under section 3(t) as those "engaged in an occupation" in which they

"customarily and regularly receive tips." When a tipped employee performs non-tipped duties related to the employee's tipped occupation either contemporaneously with or for a reasonable time immediately before or after the employee's tipped duties, the employee continues to be "engaged" in the tipped occupation under section 3(t). As a result, an employer that takes a tip credit for this time does so in compliance with section 3(m)(2)(A) and thus does not violate section 3(m)(2)(B).

As long as an employee's direct cash wage plus tips equals the minimum wage (and the employer has met the other criteria for taking a tip credit) section 6 of the FLSA is satisfied. If tipped employees do not receive sufficient tips to cover the minimum wage, the employer must supplement the cash wage payment. Compliance with the FLSA's minimum wage requirement, therefore, requires sufficient tip-generating activity to satisfy that minimum wage obligation. It is consistent with the FLSA for an employer to use tips to cover an employee's non-tipped work that is related to the tipped occupation, so long as that employee is engaged in a tipped occupation when performing the non-tipped work and earns at least the minimum wage for all hours worked. This is the exact result envisioned by the FLSA's scheme of satisfying the minimum wage with a mixture of a direct cash wage and tips.

Ninth, the Department disagrees with commenters' suggestions that a return to the 80/20 approach is appropriate given that some federal courts have concluded the Department did not sufficiently explain its reasoning for the updated related duties test in its 2018 subregulatory guidance. *See Williams v. Bob Evans Rests., LLC*, No. 18-01353, 2020 WL 4692504, at *9 (W.D. Pa. Aug. 13, 2020); *Reynolds v. Chesapeake & Del. Brewing Holdings, LLC*, No. 19-2184, 2020 WL 2404904 (E.D. Pa. May 12, 2020);

Sicklesmith v. Hershey Entm't & Resorts Co., No. 19-1675, 2020 WL 902544 (M.D. Pa. Feb. 25, 2020); *O'Neal v. Denn-Ohio, LLC*, No. 19-280, 2020 WL 210801 (N.D. Ohio Jan. 14, 2020); *Belt*, 401 F. Supp. 3d at 512; *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545 (W.D. Va. 2019); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976 (W.D. Miss. 2019); *Esry v. P.F. Chang's China Bistro, Inc.*, 373 F. Supp. 3d 1205 (E.D. Ark. 2019); *Berger v. Perry's Steakhouse of Ill., LLC*, No. 14-8543, 2019 WL 7049925 (N.D. Ill. Dec. 23, 2019); *Flores v. HMS Host Corp.*, No. 18-3312, 2019 WL 5454647 (D. Md. Oct. 23, 2019). *But see Shaffer v. Perry's Rests., Ltd.*, No. 16-1193, 2019 WL 2098116, at *1 (W.D. Tex. Apr. 24, 2019). The Department has now explained through this notice-and-comment rulemaking process its reasoning for replacing the 80/20 approach with the updated related duties test.

In sum, the Department adopts the changes to § 531.56(e) as proposed, with minor exceptions. First, to ensure that it is read consistently with § 531.59(b), which makes the tip credit available "only for hours worked by the employee," the Department replaces the phrase "amount of time" in the fourth sentence of proposed § 531.56(e)(2) with "hours." This correction for consistency does not change the meaning of the proposed language. Thus, the fourth sentence of § 531.56(e)(2) as adopted reads: "An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties." Second, as discussed in more detail below, the Department does not use O*NET's list of duties for an occupation to definitively limit the non-tipped duties that are related to that occupation. Rather, it refers

to O*NET as the source of a list of non-tipped duties that are presumed to be related to a tipped occupation.

*iii. Comments Regarding the Use of O*NET*

The Department received several comments on proposed § 531.56(e)(3), which would use O*NET as a source for defining which non-tipped duties are related to a tipped occupation. Some commenters representing employers stated that using O*NET to define related duties would make the tip credit easier to administer. Littler, for example, stated that employers can "simply check O*NET and assign the duties appearing on that list. Upon doing that, employers can take a tip credit for the employee's entire shift." The Center for Workplace Compliance also supported the proposed update to the regulations, stating that it would "make compliance simpler."

The Department also received several comments expressing concerns about using O*NET to define related duties. Some commenters, including Littler, Fisher Phillips, and NELP, expressed concern about the fact that O*NET's listings and identified job duties are subject to change and could "even disappear in the future." Some commenters were concerned that the list of related duties could expand without limit or be manipulated, and some commenters recommended incorporating the O*NET definitions in place as of the date of this final rule. The National Restaurant Association and another commenter requested that the Department state that a task's appearance on O*NET is sufficient but not necessary to demonstrate that it is related to the occupation. Some commenters advocated for the Department to state that a tipped worker's related duties may encompass the duties of any tip-producing occupation within the same industry. Finally, State Attorneys General and some other commenters disputed whether further clarity

regarding related duties was necessary, pointing to numerous court cases applying the Department's prior guidance, which did not comprehensively define related duties.

After considering the comments, the Department finalizes § 531.56(e)(3) largely as proposed but with an addition to account for concerns raised by commenters. Specifically, the Department adds the phrase "presumed to be" in two locations in § 531.56(e)(3), so that the section now states that a non-tipped duty is presumptively related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET.

O*NET is the most current and comprehensive source of descriptive occupational information in the United States. O*NET has conducted extensive research and collects occupational data from multiple sources: incumbent workers, occupational experts, employers, and trade and professional associations.[14] This multiple-method approach ensures high quality data, which facilitates O*NET's ability to identify new and emerging occupations in high-growth industries, and new and changing skills requirements in existing occupations. O*NET also uses a flexible, common language-based system to describe the world of work, making it accessible and understandable. In addition to serving job seekers and students, O*NET is used by state workforce agencies and the Department's Employment and Training Administration. Therefore, the Department believes that O*NET is the best way to give employers and employees clear, comprehensible information on related duties that will remain current, even in a changing economy. As noted by commenters, employers may simply check O*NET and take the

[14] More detailed information about O*NET's data collection can be found at https://www.onetcenter.org/ombclearance.html

tip credit for time spent by their employees performing the related duties appearing on the list.

Although some commenters expressed concern that O*NET will not be maintained in perpetuity, the Department has no intention of making O*NET unavailable at any time in the near future. O*NET has existed for more than 20 years and replaced a similar product, the *Dictionary of Occupational Titles*, which had existed since the 1930s. Should O*NET be discontinued, the Department would revisit the regulation. The Department also declines to incorporate O*NET's current list of tasks into the regulation because doing so would limit its usefulness with regard to both changing and emerging occupations. In addition, this would require the Department to expend substantial resources to identify which of the nearly 1,000 occupations in O*NET are tipped and which are not, without the benefit of stakeholder input in making these determinations.

Moreover, some commenters suggested that adopting O*NET by reference is problematic because automatic updates to the database would not go through notice and comment. However, in response to those comments and others concerned with changes to O*NET, and in recognizing that O*NET is updated using occupational data from various sources and may not accurately capture all related non-tipped duties, the Department is not adopting the O*NET listings as binding requirements. Rather, the Department is adopting O*NET only to assist in determining when a tipped employee's non-tipped duties are related to his or her tipped occupation. Specifically, the final rule explains that the Department will look to the tasks listed within the tip-producing occupation in O*NET as guidance on whether a particular non-tipped duty is related to a tipped occupation. In other words, a non-tipped duty listed as a task of a tip-producing

occupation in O*NET indicates that this duty can be treated as related to the tipped occupation. However, if industry-wide practices and trends demonstrate that a listed duty is not actually related to the tipped occupation, or that an unlisted duty is actually related to that occupation, then employers would not be able to rely on O*NET as a compliance assistance tool in that particular case. In sum, because any updates to O*NET will not result in additional legal requirements for affected parties, those changes are not subject to notice and comment.

Adopting fluctuating databases and standards as guidance is a common regulatory practice. For example, the Department refers to the *Dictionary of Occupational Titles*, O*NET's predecessor, when determining whether a public employee's volunteer activity is in the "same type of services" that he is paid to perform. *See* 29 CFR 553.103; FLSA2008-16 at *3 (Dec. 18, 2008) (clarifying that referring to O*NET for this determination is also acceptable). Other federal agencies also use this approach in a variety of contexts. Social Security Administration regulations, for instance, refer to the Department's Dictionary of Occupational Titles, several Census publications, and the Occupational Outlook Handbook published by the Bureau of Labor Statistics to rule on benefits applications. *See* 20 CFR 416.966(d). Meanwhile, the Department of Education requires postsecondary schools to be accredited, but outsources those accrediting decisions to accrediting bodies, each of which makes its own accreditation rules. *See* 34 CFR part 602.

Although some commenters expressed concerns about potential manipulation of O*NET, the Department is confident that O*NET, upon which numerous stakeholders and governmental entities depend, is reliable. O*NET's data collection process ensures

this reliability by incorporating, among other methods, surveying and random sampling, data cleaning, weighting, and the use of experts and occupational analysts.

Several commenters asked the Department to allow employers to deem as "related" to a tipped occupation additional duties that are neither included in the O*NET duties list for the occupation nor as examples in the regulation. The Department does not believe that this explicit approach is necessary. Under § 531.56(e)(3) as proposed, O*NET's list of non-tipped duties for an occupation was exhaustive; non-tipped duties were not related to the occupation unless they appeared in the O*NET list of duties. But under § 531.56(e)(3) as adopted, O*NET's lists are no longer exhaustive—O*NET lists duties that are presumed to be related to the tipped occupation, but that list is no longer exhaustive.

The Department disagrees with the commenters who dispute the need for further clarity regarding related duties. The extensive litigation over the 80/20 approach attests to the difficulty in determining whether particular non-tipped duties were related to an employee's tipped occupation. In many of these cases, courts declined to dismiss at the pleading stage the plaintiffs' claims that they performed unrelated duties for which they were improperly compensated because facts developed through discovery could ultimately show that those duties were related to the plaintiffs' tipped occupations. *See, e.g., Knox v. Jones Grp*., 201 F. Supp. 3d 951, 959 (S.D. Ind. 2016) (citing precedent in reasoning that "the division between permissible, related duties and impermissible, unrelated duties is not categorical"; the court would ultimately need to consider "the qualitative and quantitative nature of the allegedly unrelated duties"); *Stokes v. Wings Inv., LLC*, 213 F. Supp. 3d 1097, 1102 (S.D. Ind. 2016) ("After conducting discovery,

Defendant might be able to show that all of the duties identified by Plaintiff are related to her tipped occupation[.]"). Using O*NET to identify non-tipped duties that are presumed to be related to particular tipped occupations will make it simpler for employers, employees, and courts alike to distinguish related duties for which employers can take a tip credit from unrelated duties for which for which they cannot. Section 531.56(e)(3) as adopted may not furnish as much certainty as that section did as proposed, but it furnishes much more certainty than the regulatory text prior to this final rule, which identified few duties as related or unrelated. Additionally, the Department sought and received comment on the use of O*NET as a tool for identifying non-tipped duties that would be related to a tipped occupation, and the majority of commenters agreed that using the database would be useful and would provide much-needed clarity.

Finally, the Department declines commenters' requests to expand the related duties for a particular occupation beyond the O*NET tasks associated with that occupation to include any tasks associated with any other tipped occupation in the same industry. One commenter, by way of example, noted an overlap in a number of tasks shared by bartenders and servers. That example itself demonstrates why adopting that same-industry standard would be inappropriate. As reflected in O*NET, the North American Industrial Classification System (NAICS) places bartenders and servers within the Accommodation and Food Services industry—an industry that also includes occupations such as hotel maids and gaming dealers. It is not part of a hotel bartender's tipped occupation to equip rooms with linens, nor is it part of a hotel maid's tipped occupation to deal cards or collect wagers.

In light of these considerations, the Department finalizes the regulation to include the O*NET database as a source of non-tipped duties that are presumed to be related to a tipped occupation. The Department will continue to evaluate and refine its approach with respect to O*NET to address concerns that may arise.

E. Civil Money Penalties

i. Civil Money Penalties for Violations of Section 3(m)(2)(B)

Section 1201(b)(3) of the CAA amended FLSA section 16(e)(2) by adding new penalty language: "Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b)." The Department's current enforcement policy states that the CAA amendments give the Department discretion to impose civil money penalties (CMPs) up to $1,100[15] when employers unlawfully keep employee tips (including when they allow managers or supervisors to keep any portion of employees' tips). *See* FAB 2018-3. The Department currently follows its normal procedures for FLSA CMPs with regard to violations of section 3(m)(2)(B), "including by determining whether the violation is repeated or willful." *See id.*

The Department proposed to incorporate this current guidance into the regulations: to use the same guidelines and procedures that it follows for assessing CMPs

[15] The CMP amounts in this rule are adjusted for inflation as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. No. 114-74, sec. 701).

for violations of the minimum wage (section 6) and overtime (section 7) requirements of the FLSA as it does for violations of section 3(m)(2)(B). That means the Department proposed to assess CMPs for violations of section 3(m)(2)(B) only when it determines the violation is repeated or willful.

Some commenters generally supported the proposal regarding CMPs. The National Federation of Independent Business (NFIB) noted that the Department "has taken into account the practical realities of labor compliance for small businesses" by proposing to exercise its discretion by assessing CMPs for "violations of section 3(m)(2)(B) only if committed repeatedly or willfully." Other commenters, such as the National Employment Lawyers Association, the National Women's Law Center, and NELP, opposed the proposal, arguing that because "Congress used the words 'repeatedly or willfully' for minimum wage and overtime violations [in section 16(e)(2)] but omitted such words with respect to section 3(m)(2)(B)," that "demonstrates Congress' clear intent that civil penalties for this latter section do not require a repeated or willful violation." Senator Murray and Representative DeLauro stated that the relevant language "clearly provides for a civil penalty . . . against 'any person' and for 'each' violation of the tip-protection language" and argued that the Department's proposal was "in direct contravention of this plain language."

The CAA amendments state that "[a]ny person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, *as the Secretary determines appropriate* . . . ." 29 U.S.C. 216(e)(2) (emphasis added). The plain meaning of this language is that the Department has the discretion to determine when civil penalties are appropriate. While Senator Murray and Representative

DeLauro's comment acknowledged that this language gives the Secretary discretion, they argued "that discretion is to be used to determine the amount of the penalty up to $1,100 depending on the particular circumstances," rather than whether to assess a CMP at all. The Department does not see any inconsistency with its approach here. Effectively, the Department is exercising its discretion "to determine the amount of the penalty . . . depending on the particular circumstances"; it has determined to assess a CMP of $0 for violations that are not repeated or willful. Section 216(e) also authorizes the Department to assess CMPs "not to exceed" a specified amount in the context of child labor, minimum wage, and overtime violations, and the Department has long used such discretion to determine the amount of penalties assessed in those areas. Unlike the CAA, however, those authorizations do not include the language "as the Secretary determines appropriate." Therefore, the CAA language granting the Secretary discretion to determine the appropriateness of CMPs for violations of section 3(m)(2)(B) must refer to the Secretary's discretion to determine whether to assess CMPs at all.

The Department in the 2019 NPRM proposed to explain in the regulations its intent to exercise its discretion by limiting the assessment of CMPs to repeated and willful violations of section 3(m)(2)(B). Assessing CMPs only when an employer has repeatedly or willfully violated section 3(m)(2)(B), as opposed to doing so for a first-time violation, is consistent with how the Department enforces other FLSA wage violations. The Department has been assessing CMPs for repeated or willful violations of the minimum wage and overtime requirements of the FLSA using the guidelines in part 578 and procedures in part 580 for nearly three decades. This consistency of approach creates familiarity with the Department's requirements in both the public and in the

Department's staff, in turn engendering consistency of compliance among employers and consistency in enforcement by the Department's staff, and ultimately improves public trust in the law and the Department's enforcement of it. For these reasons, the Department finalizes the revisions to the regulations at 29 CFR 578.1, 578.4, 579.1, 580.2, 580.3, 580.12, and 580.18 as proposed.

In addition to clarifying the circumstances under which it will seek CMPs, the Department proposed to revise 29 CFR 578.3 and 579.2 to clarify how it determines whether a violation is willful for purposes of assessing CMPs. *See* 84 FR 53964–65. As explained in the NPRM, the Department's definition of a "willful" violation in §§ 578.3 and 579.2 is based on *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer "knew or showed reckless disregard" for whether its conduct was prohibited by the FLSA. Sections 578.3(c)(1) and 579.2 incorporate this holding and state that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful." The Department proposed no changes to this language.

Previous §§ 578.3(c)(2) and (3) and 579.2 stated that "an employer's conduct shall be deemed knowing" if the employer received advice from WHD that its conduct is unlawful. These sections further stated that "an employer's conduct shall be deemed to be in reckless disregard" of the FLSA's requirements "if the employer should have inquired further" into whether its conduct complied with the FLSA "and failed to make adequate further inquiry." In the NPRM, the Department discussed concerns with this language that two appellate courts had identified. *See* 84 FR 53964–65 (discussing *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1030–32 (D.C. Cir. 2016), and *Baystate Alt. Staffing,*

Inc. v. Herman, 163 F.3d 668, 680–81 (1st Cir. 1998)). Those courts noted the inconsistency between the regulation's language, on the one hand, that conduct "shall be deemed knowing" if the employer was previously advised by WHD that the conduct was unlawful, and its language, on the other hand, derived from *Richland Shoe* that WHD shall take into account "[a]ll of the facts and circumstances surrounding the violation" when determining willfulness. *See id.* The Department explained in the NPRM that it does evaluate all of the facts and circumstances surrounding a violation when litigating willfulness and that while an employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to prove willfulness, notwithstanding the regulatory language that appears to be to the contrary, it would not necessarily be so. *See* 84 FR 53965. In light of the appellate courts' opinions and the Department's acknowledgement of how it litigates willfulness, the NPRM proposed to revise §§ 578.3(c)(2)–(3) and 579.2 to clarify that, in considering all of the facts and circumstances, an employer's receipt of advice from WHD that its conduct is unlawful and its failure to inquire further regarding the legality of its conduct are each "a relevant fact and circumstance" in determining willfulness. *See* 84 FR 53978.

Some commenters supported the proposed revision. The Center for Workplace Compliance (CWC) explained that, under the proposal, "advice from [WHD] about the lawfulness of conduct would be a relevant factor in determining willfulness, but would not automatically trigger the standard." CWC stated that the proposed revision "more closely aligns with federal court precedent" and is "a more practical interpretation that recognizes that employers should not be automatically subject to civil money penalties where legitimate questions exist concerning coverage of the FLSA." Fisher Phillips

described the proposed revision as "vague" but asserted that "there is [often] a legitimate dispute with the Department's position"—suggesting that an employer's receipt of advice from WHD that its conduct was unlawful should not always mean that the violation was willful.

Other commenters, such as Texas RioGrande Legal Aid and NELA, opposed the proposed revision. They described § 578.3(c) as stating "longstanding, bright line rules" that "promote consistency in application and certainty for employers." They asserted that, "in redefining willfulness, the Department is using the need to implement new worker protections in the FLSA as a pretext to weaken worker protections—in this case, far beyond the context of tipped occupations." They stated that the Department "is misguided at best . . . to apply a vaguer, weaker standard to the new statutory provision at hand, and it is beyond the pale to apply the same proposal to minimum wage, overtime, and child labor standards that are not at issue in this rulemaking." They criticized the proposed revision as treating, in Texas RioGrande Legal Aid's words, "an employer's decision to ignore advice from the Department as a mere factor to be considered rather than" evidence that is "sufficient" to show that the violation was willful. Finally, NELA stated that the Department did not furnish adequate notice of its intent to change "nontip" portions of the regulations and that the NPRM's statement that § 578.3(c) contradicts Supreme Court precedent was considered and rejected when it was promulgated in 1992.

Having considered the comments, the Department adopts the proposed revisions with some modifications. The final rule revises § 578.3(c)(2) and corresponding language in § 579.2 to state that, in considering all of the facts and circumstances, an employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to show that

the violation is willful but is not automatically dispositive. This revision addresses concerns raised by commenters that one fact should not automatically result in a violation being willful but that the fact identified in § 578.3(c)(2) can be "sufficient" for a violation to be willful. In addition, the final rule deletes § 578.3(c)(3) and corresponding language in § 579.2. Upon further consideration, § 578.3(c)(3) does not just identify a fact and address how that fact impacts a willfulness finding (like § 578.3(c)(2) does). Instead, it addresses a scenario—should have inquired further but did not do so adequately—that is tantamount to reckless disregard. *See Davila v. Menendez*, 717 F.3d 1179, 1185 (11th Cir. 2013). Accordingly, revising § 578.3(c)(3) in the same manner as § 578.3(c)(2) did not seem helpful, and retaining § 578.3(c)(3) without modifying it would not resolve the concerns raised by the appellate decisions discussed above.

These modified revisions, including deleting § 578.3(c)(3) and corresponding language in 579.2, resolve the tensions identified within the Department's regulations and with the Supreme Court's decision and comport more precisely with how the Department litigates willfulness than did the original proposed revisions. An employer's receipt of advice from WHD that its conduct is unlawful is a relevant, and may be a determining, factor regarding that employer's willfulness—but the law also requires examining all facts and circumstances surrounding the violation. Among other situations, proof that an employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is only one indicium of reckless disregard. Finally, the Department gave adequate notice of its intent to revise §§ 578.3(c)(2)–(3) and 579.2, and the *Rhea Lana* and *Baystate* decisions give a sufficient basis for reconsidering its regulations on willfulness.

F. Additional Proposed Regulatory Revisions

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

The Department received little comment on these proposed regulatory revisions, which merely update the regulations to reflect the new statutory language and citations added by the CAA amendments and clarify other references consistent with the statutory text. Accordingly, the Department adopts as proposed the updates to §§ 531.50, 531.51, 531.52, 531.55, 531.56, 531.59, and 531.60 to reflect the new statutory citation to the FLSA's existing tip credit language, previously cited as section 3(m), as section 3(m)(2)(A) and to revise § 531.50 to reflect the language that the CAA added to the

FLSA. Additionally, the Department adopts as proposed the clarifying references in §§ 531.56(d), 531.59(a) and (b), and 531.60 to the amount an employer can take as a tip credit under section 3(m)(2)(A).

In the NPRM, the Department proposed to amend the tip language of its Executive Order 13658 regulations. Executive Order 13658 raised the hourly minimum wage paid by contractors to workers performing work on or in connection with covered federal contracts. *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. Section 4(c) of the Executive Order encourages the Department, when promulgating regulations under that Order, to incorporate existing "definitions, procedures, remedies, and enforcement processes" from a number of laws that the agency enforces, including the FLSA, and the Department's current Executive Order 13658 regulations are modeled after the Department's current FLSA tip regulations. The Department proposed to amend § 10.28, consistent with its proposed rescissions to portions of the Department's FLSA regulations, to remove restrictions on an employer's use of nontraditional tip pools and to otherwise align those regulations with the authority in the Executive Order. The Department also proposed to amend § 10.28, consistent with its proposed revisions to § 531.56(e), to reflect its current guidance on when an employee performing non-tipped work constitutes a tipped employee for the purposes of 3(t). The Department received few comments on the proposal to amend § 10.28. The Center for Workplace Compliance indicated that they "support DOL's corresponding revisions to the regulations implementing the federal contractor minimum wage." The Department continues to believe that since many federal

contractors also are subject to the FLSA regulations proposed, it is important to align the corresponding regulations in part 10. Accordingly, in this final rule the Department adopts § 10.28 as proposed, with these exceptions: As with the fourth sentence in § 531.56(e)(2), the Department replaces the phrase "amount of time" in the fourth sentence of § 10.28(b)(2)(ii) with "hours," so that sentence as adopted reads: "An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties." Additionally, as with the changes to § 531.56(e)(3), the Department adds the phrase "presumed to be" in two locations in § 10.28(b)(2)(iii).

The Department attempted to use gender-neutral phrasing in its proposed regulations. Texas RioGrande Legal Aid appreciated the Department's efforts but noted some omissions. In response, the Department has made revisions to §§ 531.54(a) and 531.56(a), (c), and (e) to make these sections gender-neutral.

Finally, in this final rule the Department corrects a typographical error in the NPRM, identified by the NFIB. In the authority section of the regulatory text, the Department corrects the authority to cite Title 5, not Title 4. The Department also corrects an additional typographical error in § 10.28(b)(2)(iii) referencing examples described in sub-paragraph (b)(2)(ii).

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 impact of paperwork and other information collection burdens imposed on the public. This final

rule will revise the existing information collection burden estimates previously approved under OMB control number 1235-0018 (Records to be Kept by Employers—Fair Labor Standards Act) because employers may choose to pay the full federal minimum wage and not take a tip credit, and collect tips to operate an employer-required, mandatory tip pooling arrangement, thereby triggering the new recordkeeping requirement in § 516.28(b).

In accordance with the PRA, the Department solicited comments on the FLSA information collections in the NPRM published October 8, 2019, *see* 84 FR 53956, as the NPRM was expected to impact these collections. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). The Department opened OMB control number 1235-0NEW for this action and OMB assigned control number 1235-0030 for this action.[16] As the PRA requires, the Department submitted the information collection revisions to OMB for review to reflect changes that would result from this final rule. The Department reports a slight burden increase for employers keeping records concerning employees who receive tips. OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule.

[16] The NPRM for this final rule cited 1235-0NEW as the OMB control number for revising information collection burdens previously approved under control number 1235-0018. A different control number was needed for this action because a revision of 1235-0018 was already under review for another of the Department's rulemakings. The creation of a new control number allowed OMB to process this action. On December 10, 2019, OMB issued a notice of action assigning new control number 1235-0030. Upon conclusion of this action by OMB, the Department will submit a nonsubstantive change request to combine the control numbers 1235-0018 with 1235-0030.

Circumstances Necessitating Collection: FLSA section 11(c) requires covered employers to make, keep, and preserve records of employees and their wages, hours, and other conditions of employment, as prescribed by regulation. The Department's regulations at 29 CFR part 516 establish the basic FLSA recordkeeping requirements. Section 516.28(a) currently requires employers to keep certain records concerning tipped employees for whom the employer takes a tip credit under the FLSA. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit, identify the hourly tip credit for each such employee, and maintain records regarding the weekly or monthly amount of tips received (which may consist of IRS Form 4070) as reported by the employee to the employer. The new recordkeeping regulations found at § 516.28(b)(1) and (b)(2) require an employer that does not take a tip credit, but that collects employees' tips to operate a mandatory tip pooling arrangement, to indicate on its pay records each employee who receives tips and to maintain records of the weekly or monthly amount of tips that each such employee receives (this may consist of reports that the employees make to the employer on IRS Form 4070). The increase in the number of respondents and, accordingly, the burden hours associated with records to be kept under § 516.28(b)(1)–(2), is attributable to an expanding economy increasing the number of establishments employing individuals who receive tips since the last PRA revision of this recordkeeping requirement.

Public Comments: The Department sought public comments regarding the burdens imposed by information collections contained in the NPRM. The Department received few comments relevant to the PRA. The Pennsylvania Department of Labor and

Industry expressed support for the § 516.28 requirement "that employers who take a tip credit must record which employees are tipped employees."

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information-collection contained in the NPRM to OMB for review under the PRA for control number 1235-0030. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collections to OMB for approval, and intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at http://www.reginfo.gov or by contacting the Wage and Hour Division as shown in the For Further Information Contact section of this preamble.

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

Type of Review: Revision of a currently approved collection.

Agency: Wage and Hour Division, Department of Labor.

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

OMB Control Number: 1235-0030.

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

Estimated Number of Respondents: 3,763,890 (29,296 from this rulemaking)

Estimated Number of Responses: 43,709,493 (703,104 from this rulemaking)

Estimated Burden Hours: 983,359 hours (1,953 from this rulemaking)

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

Frequency: Various (unaffected by this rulemaking)

Other Burden Cost: $0

V. Analysis Conducted in Accordance with Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[17] Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Because the annual effect of this rule would be greater than $100 million, this rule is economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to

[17] 58 FR 51735 (Sept. 30, 1993).

impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and states 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.

B. Economic Analysis

i. Introduction

In March 2018, Congress amended section 3(m) and sections 16(b), (c), and (e) of the FLSA to prohibit employers from keeping their employees' tips, to permit recovery of tips that an employer unlawfully keeps, and to suspend the operations of the portions of the 2011 final rule that restricted tip pooling when employers do not take a tip credit. This analysis examines the economic impact associated with the Department's implementation of those amendments. Specifically, it examines the possible transfers resulting from employers who implement a new nontraditional tip pool that includes "back-of-the-house" employees (i.e., janitors, chefs, dishwashers, and food-preparation workers) who formerly either did not claim a tip credit and previously did not have a mandatory tip pool, or who only had a traditional tip pool limited to "front-of-the-house" employees. The Department is also amending its "dual jobs" regulation to replace the 80/20 approach with the updated related duties test. The Department qualitatively discusses potential economic impacts of this update but does not quantify them due to lack of data and the wide range of possible responses by market actors that cannot be predicted with specificity. Commentators provided neither needed data nor a reliable

quantitative estimate of economic impacts that the Department could use. The Department quantified rule familiarization costs and qualitatively discusses additional costs, cost savings, and benefits. To perform the quantitative analysis, the Department compared the impact relative to a pre-statutory baseline (i.e., before Congress amended the FLSA in March 2018). If the Department were to look at economic impacts relative to a post-statutory baseline, there would likely be no impact of the tip pooling aspect of the final rule, aside from rule familiarization costs, as the transfers arise from the changes put forth in the statute.

The economic analysis covers employees in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic Beverages)) and 722511 (Full-service Restaurants); referred to in this analysis as "restaurants and drinking places." The two occupations are classified under Bureau of Labor Statistics (BLS) Standard Occupational Classification (SOC) codes SOC 35-3031 (Waiters and Waitresses) and SOC 35-3011 (Bartenders).[18] The Department understands that there are other occupations beyond servers and bartenders with tipped workers, such as SOC 35-9011 (Dining room and Cafeteria Attendants and Bartender Helpers), SOC 35-9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop), and others, as well as other industries that employ workers who receive tips, such as NAICS 722515 (snack and nonalcoholic beverage bars), NAICS 722513 (limited service restaurants), NAICS

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

721110 (hotels and motels), and NAICS 713210 (casinos). Nonetheless, the Department concentrates its analysis on the above two occupations because they constitute a large percentage of total tipped workers and more than half (56.5 percent) of the workers in these occupations receive tips (*see* Table 1 for shares of workers in these occupations who report receiving tips).

The analysis presents its estimates over a 10-year time horizon. When summarizing the costs and transfers of the rule, the Department presents the first year's impact, as well as the 10-year annualized costs and transfers with 3 percent and 7 percent discounting.[19]

Since the Department's analysis relies on data collected before 2020, it reflects the state of the economy prior to the COVID-19 pandemic. The Department acknowledges that data on tipped workers will possibly look different following the economic effects of the pandemic, and discusses potential effects here.

The COVID-19 pandemic has greatly affected the restaurant industry and tipped workers. The unemployment rate for the Food Services and Drinking Places industry jumped from 5.7 percent in February 2020 to 35.4 percent in April 2020. Although the rate has fallen by more than half of its peak, 16.4 percent of these workers were still unemployed as of September 2020.[20] Even as restaurants begin to reopen across the nation, and tipped workers return to their jobs, uncertainty exists regarding the long-term impacts. Even in areas with limited pandemic-related restrictions, business may be affected as some customers may remain reluctant to eat at restaurants due to the

[19] Discount rates are directed by OMB. *See* Circular A-4, OMB (Sept. 17, 2003).
[20] BLS Current Population Survey, https://data.bls.gov/timeseries/LNU04034262?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true.

pandemic. As a result, employers may not be hiring or staffing at pre-pandemic levels, at least in the near term. In a survey of full service restaurant operators conducted by the National Restaurant Association from August 26 through September 1, 2020, staffing plans were mixed—26 percent of operators said they plan to add employees and 25 percent said they plan to lay off or furlough employees.[21] During the short term, as the economic effects of the pandemic linger, the labor market for tipped workers will be less predictable, and aggregate tips may be reduced, though the amount of tips per employee may or may not be impacted. Because unemployment in tipped industries is still higher than it was at the beginning of the year, the transfer estimate for the first year of the RIA's time horizon could be reduced. The Department lacks data to determine how much the transfer estimate will be reduced, and believes that this effect will be temporary.

The Department acknowledges these changes in the industry but believes that the justifications for the Rule remain as strong as—if not more so than—before the pandemic. More flexibility in compensation and labor allocation will help businesses retain workers and maintain capacity. Further, the increased cooperation and efficiency that the final rule promotes will help businesses maintain quality of service—and therefore support tipped-employee compensation and provide increased certainty to tipped workers—at a time when the industry as a whole is struggling.

ii. Estimated Transfers

Under this regulation, transfers could arise when employers that already pay the full federal minimum wage and previously did not have a mandatory tip pool or had only

[21] National Restaurant Association, Restaurant Employment Recovery is in Danger of Stalling, Sept. 4, 2020, https://restaurant.org/articles/news/restaurant-employment-recovery-is-in-danger.

a traditional tip pool institute nontraditional tip pools in which tipped employees, such as servers and bartenders, are required to share tips with employees who do not customarily and regularly receive tips, such as cooks and dishwashers. The Department believes that including back-of-the-house workers in tip pools could help promote cooperation and collaboration among employees. This increased cooperation and flexibility could lead to Pareto improvement: efficiencies that allow employers to engage in tip-pooling without decreasing wages for anyone while increasing wages for some. However, even in the event that tip-pooling requires a transfer from the front-of-the-house, directly observable transfers will mainly occur among employees because the statute prohibits employers from keeping employee tips.

It is possible that there will be subsequent transfers after the initial tip pooling and redistribution takes place. Because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as employers do not reduce the employees' direct wages below the applicable minimum wage), and such an outcome is what is modeled to produce the quantitative estimate of transfers. However, there are reasons to believe this may not be common in practice. Consider a pastry chef currently making $20 per hour. The Department assumes that, in practice, this established wage would restrict an employer's ability to reduce the total compensation wage (i.e., wages plus pooled tips) below that rate. The chef, who last year was paid $20 per hour in Georgia, could in theory, with this rule, have her direct wage reduced to the federal minimum wage of $7.25, with tip pooling adding to that wage and bringing the total take-home to near or above $20. However, even if the pooled tips amounted to $15 per hour,

the minimum wage would prevent the employer from reducing her direct wage to $5. If pooled tips account for only $3 per hour on average, it is unlikely the employer would be able to reduce her hourly wage rate below $17, more than twice as much as is allowed by law, because of the market effects impacting wages.

A number of commenters raised the prospect that employers could use tip pooling to ultimately transfer tips to themselves by reducing the base wages of back-of-the-house workers since those workers would now be earning tips to offset the wage reduction. However, employers in states that permit tip credits—which is a majority of states—may already transfer to themselves up to the full amount of the tip credit (up to $5.12 per hour) directly from front-of-the-house workers without first initiating a system of tip pooling for back-of-the-house workers by taking the credit and paying those front-of-the-house workers the lower direct cash wage (at least $2.13 per hour).

The analysis assumes that employers will institute nontraditional tip pools with employees who do not customarily and regularly receive tips only in situations that are beneficial to them. Accordingly, it assumes that employers will include back-of-the-house employees in their tip pools only if they believe that they can do so without losing their front-of-the-house staff and without reducing the overall quality of the customer experience. To attract and retain the tipped workers that they need, employers must pay these workers as much as their "outside option," which is the hourly earnings that they could receive from another employer in a non-tipped job with a similar skill level requirement to their current position. For each tipped worker, the Department assumes a transfer could occur only if their total earnings, including tips, is greater than the predicted outside-option wage from a non-tipped job. While the Department identified

serious methodological faults with a commenter's outside option analyses, which are discussed later in this document, the approach comports in principle to expected market behavior, and therefore the Department built an outside option calculation into this analysis to frame the potential upper bound of total transfers.

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

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

The Department does not attempt to definitively interpret individual states' laws. However, some servers and bartenders work in states that either prohibit mandatory tip pooling or impose stricter limits on who can participate in a mandatory tip pool than are in this rule,[22] or in states in the Tenth Circuit where, as a result of *Marlow*, 861 F.3d at 1159, employers that do not take a tip credit were already permitted to institute nontraditional tip pools at the time Congress amended the FLSA. The transfer estimate excludes tipped employees in these states whom the changes in this rule may not affect.[23] The Department first determined total transfers for all servers and bartenders using the method described above. The Department then excluded workers whom the changes would not affect due to their respective state laws. Finally, the Department further reduced the total transfer amount to account for the uncertain number of employers who are expected to decline to change their tip pooling practices because it will require changes to practices to which employers and employees are accustomed, including payroll and recordkeeping changes.

To compute potential tip transfers, the Department used individual-level microdata from the 2017 Current Population Survey (CPS), a monthly survey of about

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

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

60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Merged Outgoing Rotation Group (CPS-MORG) and give more detailed information about those surveyed.[24] Because the CAA went into effect in March 2018, the Department used CPS data from 2017, the most recent full year of data that predates the CAA, to calculate the transfer. In this analysis, 2017 wage data are inflated to 2019 dollars using the GDP deflator. For purposes of rule familiarization costs, the Department used the most recent year of data (2019) to reflect employers reading the rule after it is published.

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips.[25] CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes

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

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

very few bartenders and wait staff at restaurants and drinking places receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.[26] Therefore, when bartenders and wait staff responded affirmatively to this question, the Department assumed that they receive tips. Based on CPS data, the Department identified 2,546 observations (unique data points), which based on the survey's methodology represent 2.2 million individuals, of respondents claiming to fall in the two categories of Waiters and Bartenders. The number of observations decreases as the analysis refines the universe of applicable employees.

All data tables in this analysis include estimates for the year 2017 as the baseline. To identify the relevant population, the Department removed from the analysis workers who do not receive tips. Table 1 presents the estimates of the share of bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2017. Approximately 64 percent of bartenders and 55 percent of wait staff reported usually earning OTTC in 2017. These numbers include workers in all states, including states where the changes in this rule are assumed not to affect. These numbers also include workers who are paid a direct cash wage below the full FLSA minimum wage of $7.25 (that is, employees whose employers are using a tip credit). Both these populations are excluded from the transfer calculation. Only 56.5 percent of workers in these occupations report earning tips, which may be low and could result in an underestimation of transfers. The Department did not adjust for this possibility because it lacked the data to do so and also estimates there is sufficient downward pressure on the total transfer

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

estimate due to other factors that were not adjusted for. Discussions of these can be found in section V.B.ii (Estimated Transfers and Outside-Option Wage Calculation).

Table 1. Share of Bartenders and Waiters/Waitresses in Restaurants and Drinking Places Who Earned Overtime Pay, Tips, or Commissions

Occupation	Total Workers (Millions)	Workers Responding to Question on OTTC (Millions)	Report Earning OTTC	
			Workers (Millions)	Percent
Total	2.21	1.92	1.08	56.5%
Bartenders	0.34	0.27	0.17	63.5%
Waiters/Waitresses	1.88	1.65	0.91	55.4%

Source: CEPR, 2017 CPS-MORG

Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110)

Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690)

Of the 1.08 million bartenders and wait staff who receive OTTC, only 688,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As shown in Table 2, 54 percent of bartenders' earnings (an average of $281 per week) and 49 percent of waiters'

and waitresses' earnings (an average of $238 per week) were from overtime pay, tips, and commissions in 2017. For workers who reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported their OTTC amounts (54 or 49 percent) was applied to their weekly total income to estimate weekly tips. Nonhourly workers, who are not asked the question on receipt of OTTC, are assumed to not be tipped employees.

Table 2. Portion of Income from Overtime Pay, Tips, and Commissions for Bartenders and Waiters/Waitresses in Restaurants and Drinking Places

Occupation	Those Who Report the Amount Earned in OTTC			
	Workers	Average Weekly Earnings	Average Weekly OTTC	Percent of Earnings Attributable to OTTC
Total	688,171	$486.95	$244.48	50%
Bartenders	105,787	$521.51	$280.61	54%
Waiters/Waitresses	582,384	$480.67	$237.91	49%

Source: CEPR, 2017 CPS-MORG, 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)

1. Outside-Option Wage Calculation

As discussed above, to determine potential transfers of tips, the Department assumes that employers will redistribute tips from tipped employees to employees who are not customarily and regularly tipped in a nontraditional tip pool only if the tipped employee's total earnings, including the tips the employee retains, are greater than the "outside-option wage" that the tipped employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used quantile regression analysis to attempt 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.[27] The Department restricted the regression sample to workers earning at least the federal minimum wage of $7.25 per hour (inclusive of OTTC), and those who are employed. This analysis excludes states where the law prohibits non-tipped back-of-the-house employees from being included in the tip pool and states governed by the *Marlow* decision.

In calculating the outside-option wage for tipped workers, the Department developed a model that defined the comparator sample for tipped workers in two different ways: (1) All non-tipped workers (i.e., workers who are either not waiters, waitresses, or bartenders, or do not work in restaurants or drinking places), and (2) Non-tipped workers in a set of occupations that are likely to represent outside options. The Department selected the list of relevant occupations by exploring the similarity between

[27] 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.

the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the Occupational Information Network (O*NET) system for occupations that share important similarities with waiters and waitresses and bartenders—the occupations had to require "customer and personal service" knowledge and "service orientation" skills.[28] The list was further reduced by eliminating occupations that are not comparable to the waitress and bartender occupations in terms of education and training, as waiter and waitress and bartender occupations do not require formal education or training.[29] *See* Appendix Table 1 for a list of these occupations.[30]

The transfer estimates presented in this analysis use this sample of limited occupations to predict each tipped worker's outside-option wage, that is, the wage that the tipped worker could earn in a non-tipped job. The Department also ran the regression to predict the outside-option wage using all non-tipped workers as the outside-option

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

[29] Approximately 14 percent of waiters and waitresses and 16 percent of bartenders have college degrees, even though a degree is not generally required to obtain such positions. According to research, the degree itself may carry an earnings premium for these workers. Therefore, excluding outside option occupations based on education attainment inflates the transfer estimates produced from this analysis because it compares these workers to artificially suppressed wage alternatives (e.g., only those positions for which at least this 14 percent of servers would be over-qualified). However, since in most cases servers and bartenders are not required to have degrees, and it is unclear the degree to which including additional occupations in the outside option pool may skew the results, the Department opted to exclude these comparator occupations and simply highlight this fact here. BLS data on the share of workers with bachelor's degrees working in jobs that only require a high school diploma are presented in a study by Vedder, R., Denhart, C., and Robe, J. (2013), available here: https://eric.ed.gov/?id=ED539373.

[30] The Appendix and data tables are included in the rulemaking docket at www.regulations.gov.

sample, and found that transfers are approximately 30 percent lower in that specification. This implies that the resulting transfer estimate is likely a significant overestimate.

The regression calculates a distribution of outside-option wages for each worker. The Department considered two methods: (1) using the 50th percentile and (2) using the same percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.[31] The second method accounts for the fact that two workers may have the exact same characteristics (age, race, education, etc.), but one worker may have a higher or lower outside-option wage because he or she is a more or less effective employee. This method assumes that a worker's position in the wage distribution for wait staff and bartenders in restaurants and drinking places reflects his or her position in the wage distribution for the outside-option occupations. The Department believes this method is more appropriate than the 50th percentile method.[32]

To calculate the outside option wage, the Department first calculated the hourly wage decile (including tips) for each of the tipped workers identified above (i.e., in a tipped occupation/industry and report earning OTTC), relative to other tipped workers.[33]

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[31] 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.

[32] The 50th percentile method results in a higher transfer estimate ($176 million, compared to $109 million).

[33] All workers in tipped occupations/industries earning at least $7.25/hour when including tips were broken into deciles. This sample included about 1,500 observations (representing approximately 1.3 million workers) in the non-excluded states.

Second, the Department ran quantile regressions of the hourly wages of workers in non-tipped occupations that are similar to the tipped workers' occupations (Appendix Table 1). The regressions controlled for state dummy variables, education level, sex, age, race, citizenship status, marital status, veteran status, and metropolitan area status. Workers reporting an hourly wage with overtime, tips, and commissions of less than $7.25 were excluded from this analysis.[34] The regression results are included in Appendix A. Third, based on the regression estimates, the Department calculated a predicted wage in a non-tipped occupation for each worker in a tipped occupation, for each of the ten deciles. The Department then used the predicted wage from the decile regression applicable to each tipped worker (i.e., based on his or her wage percentile) as his or her outside wage. Lastly, for the workers in tipped occupations, the Department removed some that did not have applicable data, including workers as follows:

- without wage data,
- with negative or zero tips (after removing overtime pay),
- with hourly wages including tips less than or equal to than their outside option wage, and
- with hourly wages including tips less than the state minimum wage.

After making these exclusions, the analysis includes 237 observations.[35] Upon adjusting the universe of observations for employees who report earning tips, residing in

[34] The quantile regressions using non-tipped workers in comparable occupations included 21,086 observations.

[35] Based on the original CPS methodology, these observations were calculated to represent 205,170 individuals. Due to the subsequent calculations conducted in this analysis, the Department remains confident in its findings but recognizes methodological

states that may be impacted by this rule, individuals reporting wages lower than the applicable minimum wage, and those reporting wages higher than the minimum wage, only 37 observations remain, representing 24,743 workers.[36] The Department does not know the degree to which the reduced sample size may impact the findings of its analysis. Nonetheless, the Department remains confident that the outside option calculation is of sufficient merit to retain it in the analysis, insofar as it is instructive in setting an approximate upper bound for the potential total transfers due to tip pooling.

The Institute for Policy Integrity (IPI), in their comment, asserted that the assumptions used to calculate the Department's outside option were flawed because they do not account for the search and travel costs that an employee would incur when deciding to change jobs. According to IPI, this caused the Department to overestimate the value of the outside-option wage for affected workers, leading to an underestimate in the overall size of the transfer. The Department acknowledges that search and travel costs are part of an employee's decision to leave his or her current job, but believes these costs to be relatively minimal (due to being time-limited) and highly variable from employee to employee and location to location. The Department does not have data to estimate these and other highly individualized costs employees might face in considering their outside option nor does the commenter provide or address them. Instead, the Department's outside option regression controls for location and other factors that may relate to differences in these costs.

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constraints may impact the ability to extrapolate the findings across the originally representative universe with as much accuracy.

[36] The same constraints apply to this extrapolation as described in the previous footnote, to an even greater degree.

2. Per Worker Transfer Calculation

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

A. The positive differential between a worker's current earnings (wage plus tips) and his or her predicted outside-option wage,

B. The positive differential between a worker's current earnings and the state minimum wage,

C. The total tips earned by the worker, or

D. Zero if the worker currently earns a direct cash wage above the full applicable minimum wage.

The second number is included for cases where the outside-option wage predicted by the analysis is below the state minimum wage, because the worker will not earn less than his or her applicable state minimum wage. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than his or her total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. For hourly-paid workers, the Department subtracted predicted overtime pay to better estimate total tips.[37] For workers who reported receiving overtime, tips, and commissions, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for all waiters and waitresses and bartenders in their state (*see* Table 2).

[37] Predicted overtime pay is calculated as (1.5 × base wage) × weekly hours worked over 40.

The Department set the transfer to zero if the worker currently earns a direct cash wage above the full applicable minimum wage. If the employer is paying a tipped employee a direct cash wage above the required full minimum wage, this indicates the wage is set at the market clearing wage and any reduction in the wage (e.g., by requiring tips to be transferred to back-of-the-house workers) would cause the employee to quit and look for other work commensurate with the value they provide. Therefore, where an employer is paying a tipped employee above the full applicable minimum wage, the Department assumes the employer would generally not require the employee to contribute tips to a nontraditional tip pool.

The Department includes an example to demonstrate how the outside option and the hourly transfers are calculated. Suppose a worker, with tips, earns $16.82 per hour. She earns a direct cash wage of $8.33 per hour, which is the relevant state minimum wage (both values adjusted to 2019 dollars using the GDP deflator), and $8.49 per hour in tips. The outside option wage for her wage decile is $15.44. We then calculate the following values:

- hourly wage ($16.82) minus state minimum wage ($8.33): $8.49
- hourly wage ($16.82) minus outside option wage ($15.44): $1.38
- hourly tips ($16.82 minus $8.33): $8.49

The lesser of these three numbers is $1.38 per hour; therefore, hourly transfers are determined to be $1.38.

One notable constraint to this methodology is that it does not account for variations in total number of hours worked or the number of weeks worked per year,

which have a direct impact on compensation.[38] If the averages of usual hours differ between a restaurant service job and an outside option, not adjusting the resultant figures accordingly could present a transfer estimate above or below reality. For example, a bartender working 4 hours per night and 5 days per week might make $30 per hour, but work only 20 hours per week (earning $600 per week). Comparing that wage to her outside option wage, set at $20 per hour but with 40 hours per week, would result in a $10 per hour loss, totaling $200 per week. Yet in reality she would earn more in the outside option role than in the original restaurant service role ($800 total, or $200 more), and the transfer calculation could be drastically overestimated. Conversely, the outside option transfer calculation would be underestimated if the same bartender works five 12-hour shifts at the same wage rate. The Department recognizes this as a constraint to its approach. It nonetheless maintains that the resultant transfer estimate is instructive.

3. Total Annual Transfer

Next, the Department estimates total weekly transfers. Estimated per worker hourly transfers were multiplied by usual hours to estimate weekly transfers per worker (on average $192.40 per week). Estimated weekly transfers were then aggregated over the relevant population (24,743 workers, based on the 37 CPS observations in the refined employee universe).

To determine the potential annual total tip transfer, the Department first multiplied the estimated weighted sum of weekly tip transfers for all wait staff and bartenders who work at full-service restaurants and bars in the United States by 45.2

[38] On average, from the dataset employed for the regression analysis, the tipped workers included in the outside option calculation usually work 14 percent fewer hours per week than the non-tipped workers included in the regression (30 hours versus 35 hours).

weeks—the average weeks worked in a year for waiters and waitresses and bartenders in the 2017 CPS Annual Social and Economic Supplement. Using this methodology, the maximum possible transfer from front-of-the-house employees is estimated not to exceed $217.2 million (24,743 workers x $194.20 per week x 45.2 weeks).[39] This represents the total transfers that the Department estimates would occur in the extremely unlikely situation where every employer that does not take a tip credit institutes tip pools that include back-of-the-house workers and where none of the front-of-the-house workers see an increase in total tips. In reality, even when it is seemingly economically beneficial when considering the wage dimension, many employers may not change their tip pooling practices because it would require changes to current practices to which they and their employees are accustomed, including their payroll and recordkeeping systems.

The Department was unable to determine what proportion of the total tips estimated to be potentially transferred from these workers will realistically be transferred. For a range of reasons presented in this analysis, the Department expects that the potential transfers fall significantly below the above-calculated $217.2 million, and therefore considered the midpoint between this amount and zero to be a reasonable estimate of the potential transfers. The Department accordingly estimates that transfers of tips from front-of-the-house workers will be $109 million in the first year that this rule is

[39] An additional source of uncertainty with regard to the magnitude of the estimated transfers is due to sampling error, the use of sample data to make inferences about the population. The estimated standard error on the point estimate of total potential tip transfers per year is large. The 95 percent confidence interval around this estimate is $128.6 million to $305.3 million, a 41 percent swing either higher or lower than the provided estimate. Additionally, this confidence interval itself is too narrow due to the inability to take into account the stratified sampling design of the CPS, which means the spread is likely larger.

effective. Assuming these transfers occur annually, and there is no real wage growth, this results in 10-year annualized transfers of $109 million at both the 3 percent and 7 percent discount rates. These transfers, in and of themselves, could have benefits which are discussed further below.

The $217 million transfer amount could also be an overestimation because employers do not have perfect information about employees' outside option wages. Employers could decide not to implement a nontraditional tip pool in order to ensure that they do not lose any of their front-of-the-house workers.

The earnings reduction for front-of-house workers could also be reduced if instituting a nontraditional tip pool leads to increased cooperation and productivity among workers, which the Department expects will occur. This, in turn, could lead to better service for customers, and higher tip amounts. Such effects would be categorized as benefits of the rule, rather than transfers, so please *see* section V.B.iii.3. for further discussion of these potential benefits.

As noted above, the Department acknowledges that it is possible some employers might choose to respond to the rule by decreasing back-of-the-house workers' wages, as the rule will allow these employees' wages to be supplemented with tips, and such an outcome is what is modeled to produce the $109 million estimate of transfers from front-of-house employees to employers. (The Department notes that, because employers cannot take a tip credit for employees in nontraditional tip pools, an employer who institutes such a program would be precluded from taking a tip credit for their front-of-the-house workers and would have to pay those workers at least the full minimum wage.)

Furthermore, although some employers may consider implementing a tip pooling system that substitutes back-of-the-house workers' hourly wages for tips, tips fluctuate at any given time. Thus, employers' ability to do so would be limited by market forces, such as, potentially, workers' aversion to risk and the endowment effect (workers potentially valuing their set wages more than tips of the same average amount). Furthermore, the minimum wage limits an employer's ability to decrease back-of-the-house wages. In the NPRM, the Department stated that it lacked data to quantify the extent to which this will occur, and this remains true. The Department requested information during the comment period on this point and received no applicable data.

In its comment, IPI asserted that the Department's transfer calculation wrongly assumes the restaurant industry is perfectly competitive. According to IPI's comment, the assumption of perfect competition underestimates the degree to which employers will be able to transfer wages from employees and understates the total volume of transfers. The Department acknowledges that, the less competitive the labor market, the greater the ability of employers to reduce worker wages to an amount near the minimum wage.[40] However, the Department does not have sufficient information to estimate the magnitude of this effect beyond the controls it already applied in its outside-options regression, and maintains that existing data on average wages indicate that employers face constraints consistent with market competition.

Some commenters asserted that the Department failed to provide a quantitative analysis of the potential transfer between employees and employers. For example, IPI

[40] The Department further notes, however, that even a worker who receives minimum wage and also participates in the tip pool will in every conceivable scenario make more than a worker whose sole compensation is the minimum wage.

suggested that, "DOL could, using its already stated assumptions, isolate the subset of employers that would be able to capture the transfer. The Department could then construct a range of values for that subset using the same data sources and methods used to construct the overall transfer estimate." The Department acknowledges that employers could ultimately capture some transfers, as stated above. Employers would be more able to lower the base wages of back-of-the-house employees, and therefore capture the transfer, over a longer time horizon. It is unlikely that they could immediately lower wages of existing employees. Importantly, by instituting a nontraditional tip pool, employers would disqualify themselves from taking a tip credit for front-of-the-house workers, which is already permitted by law. Moreover, it is probably less complex and more direct for employers to continue such established arrangements than it is to set up a new nontraditional tip pool to reduce overall employee wages, if that is their objective.

Finally, even if employers are able to lower the base wages of back-of-the-house employees, it is possible that they would reinvest these wage savings back into the business, or use it to generate additional efficiencies. This, in turn, could lead to improvements in the overall customer experience, which could lead to customers leaving higher tips. This increase in tips would ultimately benefit all employees in the tip pool.

Employers face a strong incentive to take action that will boost productivity and maximize long-term profits. The Department did not attempt to account for this point in the outside option analysis, but nonetheless holds that employers face real incentives. All of the employers in the population sample used for the regression analysis are eligible to take a tip credit, and therefore already have means by which to transfer tips to themselves via reduced wait staff wages if that were their goal. Thus, the employers who decide to

implement tip pooling will likely do so because they believe it will boost productivity and profits. If employees have the incentive for greater cooperation because they all share in the tip pool, it is quite possible the quality of service will increase and result in a higher absolute value of tips in the pool. Consider a cook who, motivated by his participation in a tip pool, walks past a table and decides to stop and chat for a minute to ask about how the patrons are enjoying the food—this would likely be well received and may very well result in higher tips in the pool, in which the cook would now be eligible to partake. Conceivably, such quality and efficiency improvements could result in back-of-the-house and front-of-the-house workers all receiving higher tipped wages.

One commenter, IPI, said that the Department should consider social costs and transfers when promulgating this rule, such as an increase in reliance on public benefits and adverse health consequences. If total compensation were reduced and if that reduction caused individual workers to rely on public benefits, then the transfers described as being borne by front-of-house workers would instead be partially borne by the federal, state, or local government funding the benefits program. However, such an outcome is uncertain, and an attempted analysis of it would be characterized by lack of data. The Department notes that these same or newly hired workers may receive more compensation due to the rule and thus there could be a reduction in any reliance they presently have on social welfare benefits.

iii. Estimated Costs, Cost Savings, and Benefits

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

associated with the rule. Lastly, the Department qualitatively discusses the potential costs, transfers, and benefits associated with the revisions to § 531.56(e).

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.[41] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple restaurants, and may also require chain restaurants to familiarize themselves with the regulation at the establishment level. To reduce the chance of underestimating costs, the Department used the number of establishments in its cost estimate—which is larger than the number of firms—and assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

The Department assumes that all establishments will incur some regulatory familiarization costs regardless of whether the employer decides to change its tip pooling practices as a result of the rule.[42] There may be differences in familiarization cost by the size of establishments; however, our analysis does not compute different costs for establishments of different sizes. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments in the two industries, Drinking

[41] An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments, where each establishment may participate in a different predominant economic activity. *See* BLS, "Quarterly Census of Employment and Wages: Concepts," https://www.bls.gov/opub/hom/cew/concepts.htm.

[42] This includes establishments in states excluded from the transfer calculation.

Places (Alcoholic Beverages) and Full-Service Restaurants; (2) the wage rate for the employees reviewing the rule; and (3) the number of hours that it estimates employers will spend reviewing the rule. Table 3 shows the number of establishments in the two industries. To estimate the number of potentially affected establishments, the Department used data from BLS's Quarterly Census of Employment and Wages (QCEW) for 2019.

Table 3. Number of Establishments with Tipped Workers

Industry	Establishments
NAICS 722410 (Drinking Places (Alcoholic Beverages))	42,912
NAICS 722511 (Full-service Restaurants)	250,056
Total	292,968

Source: QCEW, 2019

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13-1141) (or a staff member in a similar position) with a mean wage of $33.58 per hour in 2019 will review the rule.[43] Given the change in this rule, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further,

[43] A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, "13-1141 Compensation, Benefits, and Job Analysis Specialists," https://www.bls.gov/oes/current/oes131141.htm (last visited July 27, 2020).

the change effected by this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment is $13.68 for 15 minutes of review time. The number of establishments in the selected industries was 292,968 in 2019. Therefore, regulatory familiarization costs in Year 1 are estimated to be $4.01 million ($13.68 × 292,968 establishments), which amounts to a 10-year annualized cost of $469,902 at a discount rate of 3 percent or $570,700 at a discount rate of 7 percent. Regulatory familiarization costs in future years are assumed to be *de minimis*.

2. Other Costs

The Department also assumes that there will be a minimal increase in recordkeeping costs associated with this rule. Under the Department's previous regulations, employers were only required to keep records of which employees receive tips, the hours those employees worked, and how much each employee receives if the employer takes a tip credit. Some employers also kept records of the time employees spent on tipped duties and non-tipped duties to demonstrate compliance with the Department's 80/20 approach to enforcing the dual-jobs regulation. Under this rule, employers that do not take a tip credit but collect tips to institute a mandatory tip pool must keep records showing which employees are included in the tip pool, and the amount of tips they receive, as reported by employees to the employer. As those records are already required under IRS Form 4070, there will be minimal additional recordkeeping costs for employers that pay the full federal minimum wage in direct cash wages and choose to institute a nontraditional tip pool.

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

3. Benefits

In their comment, IPI stated that the Department should better support its assertions regarding the proposed rule's benefits. In response, the Department has further elaborated on the benefits discussed in this section.

Section 3(m)'s tip credit language allows an employer to meet a portion of its federal minimum wage obligation from the tips customers give employees. If an employer takes a tip credit, section 3(m)(2)(A) applies, along with its requirement that only employees who customarily and regularly receive tips be included in any mandatory tip pool. When an employer does not take a tip credit, however, the rule would allow the employer to act in a manner currently prohibited by regulation—that is, by distributing tips to employees who are employed in occupations in which they do not customarily and regularly receive tips (e.g., cooks or dishwashers) through a tip pool. The rule, therefore, gives employers greater flexibility in determining their pay policies for tipped and non-tipped workers. Allowing employers and employees to structure tip pools in a manner that fits the needs of their business will improve efficiency and enhance cooperation amongst employees. By creating an atmosphere of cooperation, diminishing incentives for employees to unduly compete amongst themselves, and allowing workers at all levels to profit directly from quality service, employers with nontraditional tip pools may realize efficiencies and take on more business and more tips. This could cause an overall

increase in business, employment, tips, and wages for all workers, not to mention increased job security and job satisfaction.

The Department conducted a literature review of relevant academic studies that address the nexus of service quality and remuneration. One analysis has suggested that tip pooling promotes and rewards cooperation among employees as serving customers is often a cooperative endeavor among front- and back-of-the-house employees; this study further suggests that tip pooling leads to uniformly better service, which in turn, leads to increased patronage and increased tipping.[44] Another study indicates that tip pooling may foster customer-focused service, promote employee camaraderie, and increase productivity.[45] Additionally, under the changes in this rule and per the transfer analysis discussed above, the employer will be able to distribute customer tips to back-of-the-house employees like cooks and dishwashers, possibly resulting in increased earnings for those employees. This would allow employers to hire more or higher quality workers for those roles. Finally, the Department believes that allowing employers to expand tip pools beyond customarily and regularly tipped workers like servers and bartenders could help incentivize back-of-the-house workers to perform better, which may improve the customer's experience.

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[44] Samuel Estreicher & Jonathan R. Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation*, 59 B.C.L. Rev. 1 (2018), http://lawdigitalcommons.bc.edu/bclr/vol59/iss1/2.

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

As noted above, Estreicher and Nash (2018) assert that tip pooling leads to uniformly better service, which in turn, leads to increased tipping.[46] The potential for increased tipping deserves some additional consideration. Theoretically, if the tip pool amount increases due to improved service, then the possible reduction in earnings noted in the transfer analysis for front-of-the-house workers could be overestimated. The Department conducted a literature review of both (1) the direct relationship between tip pooling and tips and (2) the indirect relationship between dining experience and tips received. The Department did not identify studies that show a direct empirical relationship between tip pooling and tip levels, although studies such as Estreicher and Nash (2018) present related findings. There is some literature on the relationship between dining quality (e.g., service quality, food quality) and tip amounts. However, much of this literature is based on relatively small, locality-specific, non-representative samples. That does not mean their findings are inaccurate, but tempers the Department's interest in extrapolating the findings across the U.S. economy. Several particularly applicable papers are briefly described here. The key takeaway is the relationship between dining quality and tip amount varies, so, despite having relative confidence in the direction of the impact (i.e., improved quality leads to higher tips), the amount non-traditional tip pooling may impact tips is unknown.

The literature generally found a positive but small to moderate impact of quality of service on tips. The following are examples:

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[46] Samuel Estreicher & Jonathan R. Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation*, 59 B.C.L. Rev. 1 (2018), http://lawdigitalcommons.bc.edu/bclr/vol59/iss1/2.

- Conlin, Lynn, and O'Donoghue (2003) find that a one-point increase in service quality (on scale from 1 to 5) increases tip percent by either 1.43 or 1.464 percentage points (depending on the model, both statistically significant).[47] The average tip percent is 17.56 percent so this is approximately an 8 percent increase. A one-point increase in food quality (which may improve after implementation of a non-traditional tip pool) increased the tip percent by either 0.585 or 1.481 percentage points (depending on the model; only the latter is statistically significant).
- Lynn (2003) finds that service ratings explained an average of less than two percent of the variation in a restaurant's tip percentages.[48] Although the paper cites empirical findings of increases in tips for servers who take certain actions (e.g., smiling, writing "thank you" on check, drawing a picture such as a smiley face on check), actions taken by back-of-the-house workers may also increase tips.
- Bodvarsson and Gibson (1997) estimated that within the seven central Minnesota restaurants in their survey, a one unit increase in service quality (on a scale of 1-5) was associated with slightly higher tips (0.44 to 0.54 percent of the bill or $0.14 on average).[49]

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[47] Conlin, M., Lynn, M., and O'Donoghue, T. (2003). The Norm of Restaurant Tipping. Retrieved October 16, 2020 from Cornell University, School of Hospitality Administration site: http://scholarship.sha.cornell.edu/articles/133.
[48] Lynn, M. (2003). Tip Levels and Service: An Update, Extension, and Reconciliation. Cornell Hotel and Restaurant Administration Quarterly. October-December.
[49] Bodvarsson, B. and Gibson, W.A. (1997). Economics and Restaurant Gratuities: Determining Tip Rates. The American Journal of Economics and Sociology, 56(2): 187-203, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1536-7150.1997.tb03460.x.

- Whaley, Kim, and Kim (2019) find that tipping size is positively related to server quality, food quality, and ambiance (although indirectly and occur through an intermediary variable of customer value).[50] However, the magnitudes of these impacts on tips are relatively small.

4. Cost Savings

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

This rule may also reduce deadweight loss. Deadweight loss is the loss of economic efficiency that occurs when the perfectly competitive equilibrium in a market for a good or service is not achieved. Minimum wages may prevent the market from reaching equilibrium and thus result in fewer hours worked than would otherwise be efficient. Allowing nontraditional tip pools may cause a shift in the labor demand or supply curves for wait staff and bartenders. This could result in the market moving closer to the competitive market equilibrium. Although deadweight loss reductions are most commonly thought about in quantitative terms, such as new hiring or expanded hours for existing workers, quality could be how it manifests itself; in this case, deadweight loss

[50] Whaley, J., Kim, S., and Kim, Y. (2019). Drivers and Impact of Restaurant Tipping Behavior, Journal of Foodservice Business Research, 22:2, 117-131, https://www.tandfonline.com/doi/abs/10.1080/15378020.2019.1570773.

reduction would be another term for some of the same benefits discussed elsewhere in this regulatory impact analysis.

The Department did not quantify the potential reduction in deadweight loss because of uncertainty (e.g., what the appropriate demand and supply elasticities may be).

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

The Department is amending its dual jobs regulation to reflect its recent guidance replacing the 80/20 approach with the updated related duties test.

In the NPRM, the Department stated the removal of the arbitrary 20 percent cap on tasks that are not directly tied to receipt of a tip may result in tipped workers such as wait staff and bartenders performing more non-tipped related duties such as "cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses." Consequently, employment of workers currently performing these duties, such as dishwashers and cooks, may fall on the margin. In addition, the Department acknowledged that one possibility from taking on related, non-tipped duties would be that tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage (total compensation would nonetheless remain at or above the minimum wage). However, the Department did not suggest that this was the only possible outcome; another distinct possibility, for instance, is that these "non-tipped" activities could result in greater overall tips for the worker.[51]

[51] For example, if cleaning and setting tables helps a restaurant turn over tables more quickly and the server is able to wait on one additional party at each table during a shift,

The Department stated that it lacked the data to quantify any potential reduction in tips or employment, because data does not exist on the amount of time that tipped employees currently spend on tipped duties or related, non-tipped duties.[52] Several commenters criticized the Department's lack of a quantitative analysis, but did not themselves provide data on the amount of time that tipped employees currently spend on tipped or related, tipped duties. *See, e.g.*, NELP, NELA; State Attorneys General; National Women's Law Center; Leadership Conference on Civil and Human Rights. The Economic Policy Institute (EPI), in particular, asserted that the removal of the 20 percent cap on related duties could cost workers millions each year. In its comment, EPI cited to a blog post where it had published an analysis claiming, "the proposed rule would cost workers more than $700 million annually if finalized."[53] EPI argued that employers will

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the "non-tipped" work may, in fact, result in an increase in the total tip and total compensation that the employee receives for a shift.

[52] Note that the Department quantified a potential transfer in the tip pooling portion of this analysis, unlike the impacts due to the related duties test, because the Department has greater confidence in the ability to model a simpler system (i.e., interplay between the minimum wages with and without a tip credit, for front-of-the-house workers) than the complexities of the related duties system (e.g., ambiguous baseline, competing incentives of market actors, uncertain magnitudes of changes, etc.). It is consistent for the Department to not attempt to quantify impacts for a portion of the regulation for which it has less confidence in accurately estimating the input variables for a more dynamic interplay of factors. The Department requested comments and data to inform these approaches, and while it received a number of comments, none of them provided data or sufficient methodological parameters to increase the Department's confidence in a quantitative analysis.

[53] The Department notes that the comment itself lacks any specificity to replicate the estimates it purports to support the conclusions. To better understand the basis for these assertions, the Department reviewed the blog post at one point in time (and is unaware whether the post was modified at any time during the notice and comment period or thereafter) which itself lacks certain data and calculations necessary to reproduce it and evaluate its rigor. Further, because the comment itself merely concludes without the blog's analysis that transfers would occur, the Department treats those conclusions as unsupported assertions. However, because the comment pointed to the blog post and the

"exploit" this new regulation by shifting non-tipped work from traditionally non-tipped to tipped staff, paying an hourly rate less than the full minimum wage for that work, and then applying a tip credit from tips received by the tipped staff for tipped work. The blog post estimates the change in total earnings that could occur if this shift took place. The Department carefully considered EPI's blog analysis, but concluded that flaws in EPI's premise and methodology render the analysis an inadequate estimate of any potential transfer.[54]

The Department conducted additional sensitivity analyses of the outside-options estimate conducted in the tip pooling section. For example, two variations were evaluated that more closely align with the EPI's outside option wage regression used to estimate the impacts of the 80/20 provision. When EPI's linear regression model is used instead of a quartile regression, estimated transfers are approximately 42 percent higher, but this analysis did not include control variables, which the Department believes would better analyze whether location is simply being captured by the transfer calculation rather than regional variability. The Department believes a quantile regression is more appropriate because it compares more similar workers. In addition, EPI did not include veteran status and metro status as control variables in the regression; when these are removed from the Department's model, the results are essentially unchanged. Furthermore, EPI did not provide information on the methodological specifications, including details on central assumptions, upon which their analysis relied.

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blog post itself contains a number of errors, which color the conclusions cited in the comment, the Department evaluates the blog post here.

The analysis described in EPI's blog post does not consider the amount of time tipped employees currently spend on tipped versus related, non-tipped duties or how this final rule would affect that amount. Instead, it assumes that the final rule would enable certain duties-shifting practices that employers may use to reduce tipped employees' earnings and estimates the amount of that reduction. This assumption, which undergirds EPI's entire analysis, proceeds from a fundamental misunderstanding of this final rule and the 80/20 approach it replaces.

According to the blog post, EPI is concerned that replacing the 80/20 approach with the final rule would enable the following type of duties-shifting practice: "a restaurant that employs a cleaning service to clean the restaurant each night" could avoid paying a direct cash wage of at least the full federal minimum wage of $7.25 per hour for cleaning services by "requir[ing] servers to spend an extra hour or two performing such work and only pay them the tipped minimum wage of $2.13 per hour," and then applying a tip credit to make up the difference. However, taking a tip credit under these circumstances is clearly prohibited under this final rule. Consistent with the discussion in Section III.D.ii, an employee who performs related, non-tipped duties for "an extra hour or two" each night after the end of a shift would not be performing those related, non-tipped duties contemporaneously with tipped duties or for a reasonable time immediately before or after tipped duties. As such, the employer could not take a tip credit for time spent on the related, non-tipped duties performed well after tipped duties. Moreover, the practice that EPI is concerned about is presently permitted under the 80/20 approach, which allows a restaurant to apply a tip credit to time a server spends cleaning each night at the end of his or her shift if the arbitrary ratio is maintained. For example, a restaurant

could apply a tip credit where it requires its servers to clean the dining area for up to 2 hours after finishing an 8-hour shift.

As a second example, EPI's blog post envisions a situation in which a restaurant that needs three dishwashers would purposefully employ only a single dishwasher and "require all servers to wash dishes periodically over the course of their shifts" to fill the expected gap. Again, this practice is permitted under the 80/20 approach, as long as the restaurant maintains the arbitrary ratio between tipped service duties and non-tipped dishwashing duties. A restaurant with a dozen servers could easily require them to perform the work of two dishwashers and still maintain the 80/20 ratio needed to apply a tip credit to the dishwashing work. But this same practice would actually not be feasible under the final rule, which requires related non-tipped dishwashing duties to be performed contemporaneously or for a reasonable time immediately before or after tipped service duties. To be sure, a restaurant could theoretically micromanage servers to ensure that they perform dishwashing and service duties in close temporal proximity, but that effort would likely be prohibitively costly. The restaurant would have to hire managers to supervise servers' minute-by-minute tasks, and major business disruptions would result because servers' use of time would be dictated by maintaining temporal proximity between serving and dishwashing, rather than by any actual need to serve customers or wash dishes.[55] No rational restaurant would bear these managerial expenses and business

[55] The second example in EPI's blog post is distinguishable from the Department's example in section III.D.ii explaining that the final rule would permit a hotel to take a tip credit for time when a bellhop performing related, non-tipped duties in between serving guests during a slow shift. In the Department's example, the natural pace of business needs dictates when the bellhop performs related, non-tipped duties versus tipped customer service duties. By contrast, in EPI's example, maintaining close temporal

disruptions just to save a maximum of approximately $5 per hour on dishwashing.[56] As such, it would be highly infeasible for a restaurant to shift dishwashing duties onto servers as contemplated by EPI under the final rule. Furthermore, this does not even begin to address the shock this supposed shift in duties would deliver to the underlying business model that relies on many duties occurring simultaneously to provide quality of service concentrated around common meal times, which would make it impossible for wait staff and bartenders to take on the full scope of additional duties that EPI hypothesized.

In sum, EPI's calculation is based entirely on the premise that replacing the 80/20 approach with this final rule would increase certain duties-shifting practices that it deems exploitative. But the opposite may very well be true because those "exploitative" practices are permitted under the 80/20 approach and prohibited under the final rule. The Department does not believe it is possible to overcome the flawed premise that is central to EPI's attempt to quantify the potential transfers occasioned by the rule. That said, the Department acknowledges that such transfers could occur in some cases, but believes that employees will nonetheless benefit from this rule. For instance, replacing the 80/20 approach with this final rule would prevent the exploitative practices described in EPI's

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proximity between non-tipped and tipped duties, as oppose to actual business needs, dictates when servers perform service versus dishwashing duties. The restaurant would need to direct servers' minute-by-minute tasks to ensure this artificial objective is given priority over the restaurant's actual business needs of serving customers and washing dishes.

[56] According to EPI's blog post, the duties-shifting enables a restaurant to pay $2.13 per hour for non-tipped duties instead of the federal minimum wage of $7.25 per hour, thus achieve labor cost saving of $5.12 per hour for the non-tipped duties.

blog post. And employees may receive higher earnings as a result of the efficiencies that this rule advances.

As explained in the NPRM, the Department believes there will be considerable cost savings and efficiencies associated with this change. In particular, the Department believes—and several commentators agreed—that by eliminating the cost to scrutinize employees' time to demonstrate compliance with the 80/20 approach, employers will see a reduction in regulatory cost and be able to adopt work arrangements that better serve customers, leading to more business and greater tips. Additionally, the revisions add clarity by referring to the list of duties presumed to be related on O*NET. The Department anticipates that the cost of occasionally referring to O*NET to ensure that employees' non-tipped duties are related to their tipped duties will be significantly less than the cost of continually monitoring the time employees have spent performing particular tasks.

iv. Summary of Transfers and Costs

Below is a summary table of the quantified transfers and costs for the RIA. Transfer costs in years two through ten are assumed to be the same as in Year 1.

Table 4. Summary of Transfers and Costs Calculations (2019 Dollars)

	Potential Tip Transfers (Millions)	Regulatory Familiarization Costs (Millions)
	$108.6 (range: $0 to $217.2)	$4.0
10-year Annualized Estimates		
3% Discount Rate	$108.6 (range: $0 to $217.2)	$0.5
7% Discount Rate	$108.6 (range: $0 to $217.2)	$0.6

VI. Regulatory Flexibility Act Analysis—Certification

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, Pub. L. No. 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their rules on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined the regulatory requirements of the rule to determine whether they would have a significant economic impact on a substantial number of small entities.

In its analysis, the Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status.[57] According to the 2017 standards, Full-service Restaurants (NAICS 722511) and Drinking Places (Alcoholic Beverages) (NAICS 722410) have a size standard of $7.5 million in annual revenue.[58] The Department used this number to estimate the number of small entities. Any establishments with annual sales revenue less than this amount were considered small entities.

The Department used the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments (operating the entire year) and annual sales/receipts for the two industries in the analysis: Full-service Restaurants and Drinking Places (Alcoholic Beverages).[59] From annual receipts/sales, the Department can estimate how many establishments fall under the size standard. Table 5 shows the number of private, year-round establishments in the two industries by revenue.[60]

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13-1141) (or a staff member in a similar position) with a mean wage of

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[57] SBA, Summary of Size Standards by Industry Sector, 2017, www.sba.gov/document/support--table-size-standards.
[58] *Id.*, Subsector 722.
[59] U.S. Census Bureau, 2012 Economic Census, Accommodation and Food Services: Subject Series—Estab. & Firm Size: Summary Statistics by Sales Size of Establishments for the U.S., 2012, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml.
[60] The small-business size standard for the two industries is $7.5 million in annual revenue. However, the final size category reported in the table is $5 million–$9 million. This is a data limitation because the 2012 Economic Census reported this category of $5 million–$9 million and not $5 million–$7.5 million. Thus, the total number of firms shown may be slightly higher than the actual number of small entities.

$33.58 per hour in 2019 will review the rule.[61] Given the change in this rule, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further, the change effected by this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment is $13.68 for 15 minutes of review time. The Department applied this cost to all sizes of establishments since each establishment would incur this cost regardless of the number of affected workers. Finally, the impact of this rule was calculated as the ratio of annual cost per establishment to average sales receipts per establishment. As shown, the annual cost per establishment is less than 0.02 percent of average annual sales for establishments in all small entity size classes. The impact of this rule on small establishments will be *de minimis*. The Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Table 5. Costs to Small Entities

[61] A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, "13-1141 Compensation, Benefits, and Job Analysis Specialists," https://www.bls.gov/oes/current/oes131141.htm (last visited July 27, 2020).

Annual Revenue/Sales/Receipts	Number of Establishments [a]	Average Annual Sales per Establishment ($) [b]	Annual Cost per Establishment ($) [c]	Annual Cost per Establishment as Percent of Sales/Receipts
722511 Full-service Restaurants				
< $100,000	10,211	$69,548	$13.68	0.02%
$100,000 to $499,999	28,651	$197,202	$13.68	0.01%
$250,000 to $499,999	39,554	$412,801	$13.68	0.00%
$500,000 to $999,999	46,793	$806,378	$13.68	0.00%
$1,000,000 to $2,499,999	45,173	$1,759,168	$13.68	0.00%
$2,500,000 to $4,999,999	17,039	$3,816,221	$13.68	0.00%
$5,000,000 to $9,999,999	3,531	$7,252,978	$13.68	0.00%
722410 Drinking Places (Alcoholic Beverages)				
< $100,000	4,622	$70,992	$13.68	0.02%
$100,000 to $249,999	11,610	$192,269	$13.68	0.01%

$250,000 to $499,999	9,059	$394,111	$13.68	0.00%
$500,000 to $999,999	5,138	$775,656	$13.68	0.00%
$1,000,000 to $2,499,999	3,386	$1,694,767	$13.68	0.00%
$2,500,000 to $4,999,999	755	$3,772,747	$13.68	0.00%
$5,000,000 to $9,999,999	164	$7,445,953	$13.68	0.00%

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

[b] Inflated to $2019 using the GDP deflator.

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

VII. Unfunded Mandates Reform Act Analysis

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

in any one year. *See* section V.B for an assessment of anticipated costs and benefits to the private sector.

VIII. Executive Order 13132, Federalism

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

IX. Executive Order 13175, Indian Tribal Governments

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

List of Subjects

29 CFR Part 10

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

29 CFR Part 516

Minimum wages, Reporting and recordkeeping requirements, Wages

29 CFR Part 531

Wages

29 CFR Part 578

Penalties, Wages

29 CFR Part 579

Child labor, Penalties

29 CFR Part 580

Administrative practice and procedure, Child labor, Penalties, Wages

Signed in Washington, D.C. this 21st day of December, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division

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

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

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

AUTHORITY: 5 U.S.C. 301; section 4, E.O 13658, 79 FR 9851; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

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

§ 10.28 Tipped employees.

* * * * *

(b) ***

(2)(i) In some situations an employee is employed in a dual job, as, for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than $30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as

a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

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

(iii) *"Related" duties defined.* In addition to the examples described in (b)(2)(ii), a non-tipped duty is presumed to be related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at www.onetonline.org. Occupations not listed in O*NET may qualify as tipped occupations. For those occupations, duties usually and customarily performed by employees are presumed to be related duties as long as they are included in the list of duties performed in similar O*NET occupations.

(c) *Characteristics of tips.* A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when

paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive Order.

* * * * *

(e) *Tip pooling.* Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive Order. There is no maximum contribution percentage on mandatory tip pools. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

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

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

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

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

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

§ 516.28 Tipped employees and employer-administered tip pools.

* * * * *

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

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

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

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

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

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

6. Amend § 531.50 by:

a. Revising paragraph (a) introductory text and adding paragraph (a)(3);

b. Redesignating paragraph (b) as paragraph (c); and

c. Adding a new paragraph (b).

The revisions and additions read as follows:

§ 531.50 Statutory provisions with respect to tipped employees.

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

* * *

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

(b) Section 3(m)(2)(B) provides that an employer may not keep tips received by its employees for any purposes, including allowing managers and supervisors to keep any

portion of employees' tips, regardless of whether the employer takes a tip credit under section 3(m)(2)(A).

* * * * *

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

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

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

8. Revise § 531.52 to read as follows:

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

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

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

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

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

9. Revise § 531.54 to read as follows:

§ 531.54 Tip pooling.

(a) *Monies counted as tips*. Where employees practice tip splitting, as where waiters give a portion of their tips to the busser, both the amounts retained by the waiters and those given the bussers are considered tips of the individuals who retain them, in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where an accounting is made to an employer for his or her information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his or her own are counted as his or her tips for purposes of

the Act. Section 3(m)(2)(A) does not impose a maximum contribution percentage on mandatory tip pools.

(b) *Prohibition against keeping tips.*

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

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

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

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

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

(3) An employer may not participate in such a tip pool and may not include managers and supervisors in the pool.

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

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

§ 531.55 Examples of amounts not received as tips.

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

* * * * *

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

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

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

* * * * *

(c) *Individual tip receipts are controlling.* An employee must him- or herself customarily and regularly receive more than $30 a month in tips in order to qualify as a tipped employee. The fact that he or she is part of a group which has a record of receiving more than $30 a month in tips will not qualify him or her. For example, a server who is newly hired will not be considered a tipped employee merely because the other servers in the establishment receive tips in the requisite amount. For the method of applying the test in initial and terminal months of employment, *see* § 531.58.

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

difference between the minimum wage required by section 6(a)(1) and the cash wage paid (at least $2.13 per hour)).

(e) *Dual jobs.* (1) In some situations an employee is employed in a dual job, as for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than $30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

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

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

performed by employees are presumed to be related duties as long as they are included in the list of duties performed in similar O*NET occupations.

12. Revise § 531.59 to read as follows:

§ 531.59 The tip wage credit.

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

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a "tipped employee." Pursuant to section 3(m)(2)(A), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m)(2)(A) of the Act, i.e.: The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section. The credit allowed on account of tips may

be less than that permitted by statute (minimum wage required by section 6(a)(1) minus the cash wage paid (at least $2.13)); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a tip pool limited to employees who customarily and regularly receive tips as described in § 531.54, section 3(m)(2)(A) also requires employers that take a tip credit to permit employees to retain all tips received by the employee.

13. Revise § 531.60 to read as follows:

§ 531.60 Overtime payments.

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee's regular rate of pay is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. (*See* part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m)(2)(A), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus the cash wage paid (at least $2.13)), the reasonable cost or fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part 531, and the cash wages including commissions and certain bonuses paid by

the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

PART 578—[AMENDED]

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

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

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

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

16. Revise § 578.1 to read as follows:

§ 578.1 What does this part cover?

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act to provide that any person who repeatedly or willfully violates the minimum wage (section 6) or overtime provisions (section 7) of the Act shall be subject to a civil money penalty not to exceed $1,000 for each such violation. In 2001, WHD adjusted this penalty for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, section 31001(s)). *See* 66 FR 63503 (Dec. 7, 2001). The Genetic Information Nondiscrimination Act of 2008 amended section 16(e) of the Act to reflect

this increase. *See* Pub. L. 110-233, sec. 302(a), 122 Stat. 920. Section 1201(b)(3) of the Consolidated Appropriations Act, 2018, amended section 16(e) to add that any person who violates section 3(m)(2)(B) of the Act shall be subject to a civil money penalty not to exceed $1,100. The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, section 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74, section 701), requires that inflationary adjustments be annually made in these civil money penalties according to a specified cost-of-living formula. This part defines terms necessary for administration of the civil money penalty provisions, describes the violations for which a penalty may be imposed, and describes criteria for determining the amount of penalty to be assessed. The procedural requirements for assessing and contesting such penalties are contained in part 580 of this chapter.

17. Revise § 578.3 to read as follows:

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

(a)(1) A penalty of up to $1,162 may be assessed against any person who repeatedly or willfully violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to $2,074 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

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

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

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

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

(2) For purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

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

§ 578.4 Determination of penalty.

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

* * * * *

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

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

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

20. Amend § 579.1 by

a. Revising paragraph (a) introductory text;

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

c. Adding paragraph (a)(2)(ii).

The revisions and additions read as follows:

§ 579.1 Purpose and scope.

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

** * * *

(2) ***

(ii) Any person who repeatedly or willfully violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed $1,162 for each such violation.

* * * * *

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

* * * * *

Willful violations under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be *willful* for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

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

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

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

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

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579, and for assessment of civil money penalties for any repeated or willful violation of the tip retention provisions of section 3(m)(2)(B), the minimum wage provisions of section 6, or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. * * *

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

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 3(m)(2)(B), section 6, or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. * * *

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

§ 580.12 Decision and Order of Administrative Law Judge.

* * * * *

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful

violation of section 3(m)(2)(B), section 6, or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. * * *

* * * * *

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

§ 580.18 Collection and recovery of penalty.

* * * * *

(b) * * *

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