



For economic and racial justice

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Submitted via www.regulations.gov

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Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W., Room S-3502
Washington, DC 20210

Re: RIN 1235-AA21, Comments in Response to Proposed Rulemaking: Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Ms. DeBisschop:

The Shriver Center on Poverty Law writes in response to the Department of Labor’s (the Department) Notice of Proposed Rulemaking (NPRM),¹ whereby the Department seeks to align its tip regulations with the new section 3(m)(2)(B) of the Fair Labor Standards Act (FLSA), enacted in the Consolidated Appropriations Act (CAA) of 2018,² and withdraw the prior rulemaking on the subject that the CAA amendments to the FLSA were intended to block.³ As an organization dedicated to economic and racial justice we are committed to promoting fairness in the workplace and supporting the economic security of low-wage workers. We support the legislative compromise reflected in the CAA amendments—which makes clear that tips belong to workers, not their employers—and appreciate the Department’s efforts to implement the new law, although we believe that the proposed definition of managers and supervisors should be revised as detailed in our comments below.

We strongly oppose, however, the Department’s additional proposals in this rulemaking—namely, to codify its abandonment of the “80/20 rule” regulating employers’ use of the tip credit for non-tipped work, and to make it harder for the Department to collect civil money penalties for willful violations of a wide range of labor laws. As explained in the comments that follow, the Department should withdraw the proposed changes to the willfulness standard and the dual jobs rule—and it should codify a standard no less protective than the 80/20 rule to ensure that

¹ U.S. Dep’t of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 84 Fed. Reg. 53,956 (proposed Oct. 8, 2019) [hereinafter “2019 Tip Rule”].

² Public Law 115-141, Div. S., Title XII, § 1201, 132 Stat. 348, 1148-49 (2018).

³ U.S. Dep’t of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57,395 (proposed Dec. 5, 2017) [hereinafter “2017 Tip Rule”].

employers do not regularly pay their employees less than the full minimum wage when they are performing work for which they will not earn tips.

I. The Department should clarify that tips—including shared tips—are meant to solely benefit employees who do not hold managerial or supervisory positions, and ensure that the definition of managers and supervisors aligns with this intention.

In March of 2018, tipped workers across the country won critical new protections in the FLSA with the addition of section 3(m)(2)(B), which states unequivocally that an “employer may not keep tips received by its employees for any purposes.” The FLSA now *does* authorize employers to establish mandatory tip pools between tipped restaurant workers in the “front of the house,” such as bartenders and servers, and those who work in the “back of the house,” such as line cooks and dishwashers.⁴ Such a tip pool is only permissible, however, if two conditions are met: 1) the employer pays *all* employees at least the full minimum wage, before tips (rather than taking a “tip credit” that counts a portion of employee tips toward its minimum wage obligation), and 2) the employer, managers, and supervisors do not keep any portion of employees’ tips.

In the present rulemaking, the Department should make clear that Congress did not authorize employers to simply take a tip credit in another form by reducing the wages it pays back-of-house staff, then supplementing them with the earnings of tipped employees. The Department’s suggestion in the proposed rule that such activity is permissible runs contrary to Congress’s intent to ensure that tips inure to the benefit of employees rather than their employers,⁵ and the Department must ensure that the final rule makes no such suggestion.

The Department also must ensure that employers do not similarly subsidize the pay of managers and supervisors by allowing them to capture a portion of employee tips. We appreciate that the definition of managers and supervisors the Department has proposed is not an unduly narrow one that would clearly exclude only high-level management from tip pools, and we agree that the executive duties test at 29 C.F.R. § 541.100(a)(2)-(4) outlines core principles of managerial and/or supervisory responsibilities.

However, we are concerned that this duties test may in fact be overbroad, and could be interpreted to exclude individuals who should be permitted to participate in tip pools. An employer might incorrectly identify as a supervisor, for example, a more experienced line cook who “manages” the line and “customarily and regularly directs the work” of two other cooks—but who spends most of their time cooking, and is paid only \$28,000 a year. Such employees lack the bargaining power and authority that the statute intended to attribute to the managers and supervisors who should be barred from sharing tips.

As the Department has recognized in the overtime context, a compensation-based test can be a useful tool to help clarify the contours of a duties-based exemption, on the basis that employees

⁴ While the statute does not expressly limit tip pooling to the restaurant environment, in practice, this is largely an issue for the restaurant industry. Other tipped workers such as valets, airport attendants, and nail technicians work in a more solitary fashion and are unlikely to have other people in the “line of service” with whom to share tips.

⁵ See 2019 Tip Rule, 84 Fed. Reg. at 53957 and 53968 (“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-house workers (as long as they do not reduce these employees’ wages below the applicable minimum wage)”).

paid less than a specified level are unlikely to be bona fide exempt employees.⁶ Here, too, a compensation level test would help to ensure that individuals who are categorically excluded from tip pools are bona fide managers or supervisors. Therefore, in addition to the duties test borrowed from the overtime rules, we recommend that the Department incorporate a compensation level test into the definition of manager or supervisor for purposes of the rule implementing section 3(m)(2)(B). Given that tip pooling typically arises in the restaurant context, we propose that the Department tailor the pay threshold accordingly—specifically, by setting a threshold that corresponds to the median wage for “supervisors of food preparation and serving workers” (35-1010) based on the most recent National Occupational Employment and Wage Estimates from the U.S. Bureau of Labor Statistics, Occupational Employment Statistics (OES), which could be met on an annual or hourly basis. This level should be defined in regulation by reference to the OES source so that it is automatically adjusted each year; the current level, based on May 2018 data, is \$33,890 annually or \$16.30 per hour.⁷

We recognize that \$33,890 is similar to the salary test the Department recently established at 29 C.F.R. § 541.100(a)(1) (i.e., \$35,568 as of January 1, 2020); the latter level thus could be an acceptable alternative test for the rule at hand. Should the Department adopt this approach, however, we urge it to incorporate the \$35,568 standard itself rather than a general reference to the test at section 541.100(a)(1), and allow it to be met on an hourly basis. If and when the Department again raises the overtime EAP salary threshold, the Department should separately evaluate whether it remains a reasonable proxy for the compensation level indicative of whether an employee is a bona fide manager or supervisor who should be excluded from any tip pool.

II. The Department should incorporate the 80/20 rule—or a more protective standard—in the dual jobs regulation, not repeal it.

With the modifications noted above, the proposed rule’s provisions implementing the FLSA’s revised section 3(m) will take important steps to ensure that employers fairly compensate their tipped (and non-tipped) employees. The proposed amendments to the “dual jobs” regulation codifying the Department’s repeal of the “80/20 rule” do just the opposite, and will particularly harm the women and people of color who comprise the majority of the tipped workforce. The Department should abandon its effort to enshrine its ill-conceived guidance in regulations, and instead affirm or strengthen the longstanding 80/20 rule, which is aligned with the overarching goal of the CAA amendments to the FLSA: to improve economic security for tipped workers.

A. The proposed repeal of the 80/20 rule is inconsistent with the purpose of the dual jobs regulation and the intent of the FLSA.

As the Department recognizes, the FLSA at section 3(m) only allows employers to take a tip credit for a “tipped employee,” defined at section 3(t). The “dual jobs” regulation at 29 C.F.R. § 531.56(e) distinguishes between an employee who holds both a non-tipped and a tipped occupation (e.g., “a maintenance man in a hotel also serves as a waiter”) and a person in a tipped

⁶ See 84 Fed. Reg. at 51,230.

⁷ U.S. Dept’ of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2018 National Occupational Employment and Wage Estimates (March 2019), *available at* <https://www.bls.gov/oes/special.requests/oesm18nat.zip> (occupation code 35-1010).

occupation who performs some related non-tipped tasks, such as a “waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses.” Between 1988 and 2018, guidance from the Department further clarified the dual jobs regulation with the “80/20 rule,” which provided a necessary temporal limit: when an employee spends more than 20 percent of their time during a work week on activities that do not produce tips, the employee is no longer a tipped employee who “occasionally” performs non-tipped related work and is instead an employee who is engaged in two occupations, only one of which is a tipped occupation (and only one of which permits an employer to take the tip credit).⁸

Notwithstanding the 80/20 rule’s consistent use and acceptance by employers, courts, and the Department itself over a 30-year period, the Department now asserts that the 80/20 rule “was difficult for employers to administer and led to confusion.”⁹ The alternative proposed in this rule, however—which the Department recently issued in guidance¹⁰ and seeks to formalize here—is sure to produce far greater confusion. As numerous courts have already recognized in refusing deference to the identical policy in guidance, replacing the longstanding 80/20 standard with vague “reasonable time” language removes any meaningful temporal limit on the time spent on non-tipped duties for which an employer may claim a tip credit.¹¹ The lack of any bright line around what constitutes a “reasonable amount of time” spent on duties related to tipped work will sow confusion for employers and employees alike and could be abused even by well-intentioned employers—especially in combination with the wide range of duties deemed “related” to tip-producing occupations under the Department’s proposed reliance on the O*Net database.¹²

B. *The elimination of the 80/20 rule will have far-reaching harms to working people, especially women and people of color—but the Department once again has failed to quantify these harms.*

⁸ See U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); *see also, e.g., Belt*, 2019 WL 3829459 at *25.

⁹ As its sole support for this assertion, the Department cites to *Pellon*—in which the court concluded that determining the validity of the 80/20 rule was “unnecessary” given the facts of the case. *See Pellon v. Bus. Representation Int’l*, 528 F.Supp.2d 1306, 1314 (S.D. Fla. 2007).

¹⁰ U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA 2018-27, 2018 WL 5921455 (Nov. 8, 2018); Field Operations Handbook § 30d00(f)(1)-(5) (Feb. 15, 2019); Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019).

¹¹ *See, e.g., Flores v. HMS Host Corp.*, No. 8:18-CV-03312-PX (D. Md. Oct. 23, 2019); *Belt*, 2019 WL 3829459 at *25; *Spencer v. Macado’s, Inc.*, No. 6:18-CV-00005, 2019 WL 2931304, at *6 (W.D. Va. July 8, 2019); *Esry v. P.F. Chang’s China Bistro, Inc.*, 373 F. Supp. 3d 1205, 1210-11 (E.D. Ark. 2019); *Cope v. Let’s Eat Out, Inc.*, 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019).

¹² For example, O*Net tasks for waiters and waitresses include “cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and *cleaning bathrooms*” —when from 1988 until 2018, the Department’s Field Operations Handbook specified as an example, “maintenance work (e.g., *cleaning bathrooms* and washing windows) [is] not related to the tipped occupation of a server; such jobs are non-tipped occupations.” *See* O*Net Online, Summary Report for: 35-3031.00 – Waiters and Waitresses, Tasks, <https://www.onetonline.org/link/summary/35-3031.00#Tasks> (last visited Nov. 20, 2019) (emphasis added), and U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988) (emphasis added).

Women—disproportionately women of color—represent more than two-thirds of tipped workers nationwide.¹³ In 38 states, at least 7 in 10 tipped workers are women.¹⁴ Median hourly earnings for people working in common tipped jobs like restaurant server and bartender are less than \$11, including tips,¹⁵ and poverty rates for tipped workers are more than twice as high as rates for working people overall—with tipped workers who are women at a particular disadvantage and women of color disadvantaged yet further.¹⁶ Reducing the pay that working people can take home to their families will undoubtedly harm this already low-paid workforce, especially the women and people of color who disproportionately hold these roles.

Yet this is precisely what the proposed rule would do. As the Department concedes, tipped employees could “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.”¹⁷ A server who formerly could spend no more than 1.2 hours of a six-hour shift, on average, doing non-tipped work like rolling silverware, cleaning tables, or sweeping floors can now be required to spend two hours—or four hours, or whatever the manager deems “reasonable”—doing such side work, foregoing tipped income while still being paid just \$2.13 an hour.¹⁸

This scenario has already played out in workplaces across the country in which unscrupulous employers ignored their obligations under the 80/20 rule.¹⁹ With the regulatory barriers to abuse of the tip credit—and tipped employees—all but removed, millions of working people will undoubtedly be required to do more work for less pay.

This is not an idle threat to the well-being of workers and their families. Across the country there is a proliferation of businesses asking its customers for tips—fast food and fast casual restaurants, car washes, nail salons, etc.--tip jars are now common, as is point of sale software

¹³ Women make up 69 percent of tipped workers. Women of color are 28 percent of tipped workers, compared to 18 percent of all workers. NWLC calculations based on U.S. Census Bureau, American Community Survey 2017 one-year estimates (ACS 2017) using IPUMS USA. Figures include all workers employed in a set of predominantly tipped occupations identified by the Economic Policy Institute (EPI). *See* David Cooper, Zane Mokhiber & Ben Zipperer, EPI, Minimum Wage Simulation Model Technical Methodology (Feb. 2019), <https://www.epi.org/publication/minimum-wage-simulation-model-technical-methodology/>.

¹⁴ *See* NWLC, WOMEN IN TIPPED OCCUPATIONS, STATE BY STATE (May 2019), <https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf>.

¹⁵ Median hourly wages, including tips, are \$10.47 for waiters and waitresses and \$10.84 for bartenders, the two largest groups of tipped workers. *See* U.S. Dep’t of Labor, Bureau of Labor Statistics, May 2018 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/current/oes_nat.htm (last visited Nov. 21, 2019). Tipped workers in other occupations have similarly low wages, such as gaming services workers (\$10.07), barbers/hairdressers/hairstylists/cosmetologists (\$11.94), and other personal appearance workers (\$11.94). *Id.*

¹⁶ *See generally* Morgan Harwood, Jasmine Tucker & Julie Vogtman, NWLC, ONE FAIR WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (May 2019), <https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2019/05/Tipped-Worker-New-2019-v2.pdf>.

¹⁷ 2019 Tip Rule, 84 Fed. Reg. at 53,972.

¹⁸ Even if an employer ensures that an employee’s total compensation (including tips) amounts to the minimum wage, the employer is not excused from its obligation under the FLSA to pay at least the minimum wage, without a tip credit, for any time the employee spends in a non-tipped occupation—an obligation the Department’s proposal will encourage employers to evade.

¹⁹ *See generally supra* note 11.

that asks customers to add on a tip to their bill. With the requirement of only \$30.01 a month in tips to be eligible to receive the tipped subminimum wage, the elimination of the 80/20 rule will make millions of workers who currently earn the full minimum wage eligible to be classified as tipped workers and have their hourly wage reduced to the tipped subminimum wage.²⁰ In addition to lower incomes, this will only exacerbate the negative outcomes already associated with the tipped subminimum wage—increased rates of wage violations, increased rates of sexual harassment, and increased rates of poverty experienced by tipped workers.²¹

Despite the Department’s concessions regarding the possibility of reduced income for a range of tipped (and non-tipped²²) employees as a result of its amendments to the dual jobs rule, it fails to estimate the costs of its proposal to working people—violating its responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible.²³ The Economic Policy Institute, which conducted the type of analysis that the Department claims it cannot, estimates that tipped workers will lose more than \$700 million dollars in tips each year if the Department’s rule goes into effect.²⁴

Abandoning decades of consistent agency policy without a rational explanation is arguably arbitrary and capricious in its own right.²⁵ Doing so with no attempt to quantify the human impact makes this action far worse.

²⁰ 29 USC § 203(t).

²¹ Restaurant Opportunities Centers United, *Better Wages, Better Tips: Restaurants Flourish With One Fair Wage* (Feb. 13, 2018), https://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

²² Back-of-house employees will also lose out under the Department’s amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on “related” tasks like cleaning and food prep that have traditionally been performed by back-of-house staff, that will drive down wages for—or even eliminate—back-of-house positions in restaurants. The Department acknowledges this possibility as well; *see* 2019 Tip Rule, 84 Fed. Reg. at 53,972. The proposal will have damaging impacts beyond the restaurant industry, too, since it applies equally to all tipped employees.

²³ *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

²⁴ Heidi Shierholz & David Cooper, EPI, *Workers Will Lose More than \$700 Million Annually Under Proposed DOL Rule* (Nov. 30, 2019), <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

²⁵ While the arbitrary and capricious standard is a narrow one, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” A reviewing court may conclude that a rule is arbitrary and capricious if, for example, the agency has “offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Manufacturers Assoc. of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). Moreover, “[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action.” *Pfaff v. United States Dep’t of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

C. *If the Department seeks to clarify the dual jobs regulation, it should incorporate the 80/20 rule—or a more protective standard—into the regulation itself.*

DOL should abandon this ill-conceived proposal, both in this rule and in the guidance documents where it is currently in effect. To provide the clarity in the dual jobs regulation that the Department claims to desire, the Department can and should incorporate the 80/20 rule into section 531.56(e), or adopt a stronger standard that further restricts the amount of non-tipped work for which an employer can pay employees anything less than the full minimum wage.

III. The Department must not use this rulemaking to make it harder to hold employers accountable for willful violations of labor laws.

Finally, 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.

In assigning civil monetary penalties to willful violations of the new FLSA section 3(m)(2)(B), Congress surely did not presume that the Department would then redefine willfulness to characterize an employer’s decision to ignore advice from the Department as a mere factor to be considered rather than what it is: clear evidence that an employer knew it was violating labor laws and chose to proceed with the violation—evidence that should therefore be sufficient to deem an employer’s conduct “knowing,” as provided in existing FLSA regulations. The existing regulations similarly make clear that an employer’s conduct is “in reckless disregard of the requirements of the Act” if the employer failed to make adequate inquiry into whether its conduct was compliant. These longstanding, bright line rules promote consistency in application and certainty for employers.

It is misguided at best for the Department 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.

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Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact me at 312-368-3303 or wendypollack@povertylaw.org to provide further information.

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