

public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. The public comment period was originally scheduled to close on April 6, 2020. On April 2, 2020, the NRC published a document in the **Federal Register** (85 FR 18477) extending the deadline to May 6, 2020. During the comment period, on March 5, 2020 (ADAMS Accession No. ML20069A022), and March 24, 2020 (ADAMS Accession No. ML20085H593), the NRC held public meetings to discuss the NRC's request for public input. In addition, the NRC requested input from agency staff through various methods of internal outreach. The NRC received comment submissions from the Nuclear Energy Institute, agency staff, and a member of the public, for a total of 100 individual comments. The evaluation summary of these comments is available in ADAMS under Accession No. ML21012A439.

## II. Discussion

For this Retrospective Review of Administrative Requirements (RROAR) initiative, the NRC developed criteria with which to evaluate potential regulatory changes. In addition to the following five criteria, the NRC considered programmatic experience, intent of the requirement, impact to the NRC's mission, and overall impact to resources when determining whether to pursue a change to the regulations.

1. Submittals resulting from routine and periodic recordkeeping and reporting requirements, such as directives to submit recurring reports that the NRC has not consulted or referenced in programmatic operations or policy development in the last 3 years.

2. Requirements for reports or records that contain information reasonably accessible to the agency from alternative resources that, as a result, may be candidates for elimination.

3. Requirements for reports or records that could be modified to result in reduced burden without impacting programmatic needs, regulatory efficiency, or transparency, through: (a) Less frequent reporting, (b) shortened record retention periods, (c) requiring entities to maintain a record rather than submit a report, or (d) implementing another mechanism that reduces burden for collecting or retaining information.

4. Recordkeeping and reporting requirements that result in significant burden.

5. Reports or records that contain information used by other Federal agencies, State and local governments, or Federally recognized Tribes will be

dropped from the review provided the information collected is necessary to support the NRC's mission or to fulfill a binding NRC obligation.

To be screened in for rulemaking consideration, comments had to meet at least one of Criteria 1 through 4 and not meet Criterion 5.

Once screened in for rulemaking consideration, the staff organized the comments into three categories of action: (1) To be further evaluated in a new RROAR-related rulemaking (44 comments), (2) to be incorporated in an annual administrative corrections rulemaking (5 comments), or (3) to be considered in an ongoing rulemaking activity outside the RROAR initiative (5 comments). For comments that need further evaluation within the context of a new RROAR rulemaking effort, the NRC will consider the comments, in combination with its preliminary evaluation of the comments, in the rulemaking process. However, this is not a final determination and could change as NRC proceeds through rulemaking activities.

The NRC's evaluation identified 46 comments that did not meet the criteria. The staff plans no further action on 44 of these comments, and identified two comments to be reviewed for potential non-rulemaking solutions under the agency's innovation and transformation efforts.

## III. Public Meeting

The NRC will conduct a public meeting to discuss the comment evaluation process and answer stakeholder questions.

The meeting will be held on June 30, 2021, from 10:00 a.m. to 12:00 p.m. Eastern Standard Time. Interested members of the public can participate in this meeting via WebEx at: <https://usnrc.webex.com/usnrc/onstage/g.php?MTID=e01dcfc6971f79f394a24d902b4e0e9b3>, or by phone conference at (888) 390-2141, passcode 8801623.

This is an Information Public Meeting with a question and answer session. The purpose of this meeting is for the NRC staff to meet directly with individuals to discuss regulatory and technical issues. Attendees will have an opportunity to ask questions of the NRC staff or make comments about the issues discussed throughout the meeting; however, the NRC is not actively soliciting comments towards regulatory decisions at this meeting. For additional information or to request reasonable accommodations, please contact Andrew Carrera, phone: 301-415-1078, email: [Andrew.Carrera@nrc.gov](mailto:Andrew.Carrera@nrc.gov), or Solomon Sahle, phone: 301-415-3781, email: [\[nrc.gov\]\(https://www.nrc.gov/public-invoke/public-meetings/index.cfm\). Stakeholders should monitor the NRC's public meeting website for information about the public meeting; <https://www.nrc.gov/public-invoke/public-meetings/index.cfm>.](mailto:Solomon.Sahle@</a></p>
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Dated: June 14, 2021.

For the Nuclear Regulatory Commission.

**Kevin A. Coyne,**

*Deputy Director, Division of Rulemaking, Environmental Review and Financial Support, Office of Nuclear Material Safety and Safeguards.*

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## DEPARTMENT OF LABOR

### Office of the Secretary

#### 29 CFR Part 10

#### Wage and Hour Division

#### 29 CFR Part 531

RIN 1235-AA21

### Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

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

**DATES:** Submit written comments on or before August 23, 2021.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments. *Mail:* Address written submissions to:

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. *Instructions:* Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Please submit only one copy of your comments by only one method. Commenters submitting file attachments on <https://www.regulations.gov> are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. WHD posts comments gathered and submitted by a third-party organization as a group under a single document ID number on <https://www.regulations.gov>. All comments must be received by 11:59 p.m. on August 23, 2021 for consideration in this NPRM; comments received after the comment period closes will not be considered. The Department strongly recommends that commenters submit their comments electronically via <https://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this proposal may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

The Fair Labor Standards Act (FLSA or Act) generally requires covered employers to pay employees at least the federal minimum wage, which is currently \$7.25 per hour. *See* 29 U.S.C. 206(a)(1). Section 3(m) of the FLSA allows an employer that meets certain requirements to count a limited amount of the tips its tipped employees receive as a credit toward its federal minimum wage obligation (known as a "tip credit"). *See* 29 U.S.C. 203(m)(2)(A). Section 3(t) of the FLSA defines a "tipped employee" for whom an employer may take a tip credit under section 3(m) as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." *See* 29 U.S.C. 203(t). The FLSA regulations addressing tipped employment are codified at 29 CFR 531.50 through 531.60. *See also* 29 CFR 10.28 (establishing a tip credit for federal contractor employees covered by Executive Order 13658 who are tipped employees under section 3(t) of the FLSA).

The current version of § 531.56(e) recognizes that an employee may be employed both in a tipped occupation and in a non-tipped occupation, "as[,] for example, where a maintenance man in a hotel also serves as a waiter", explaining that in such a "dual jobs" situation, the employee is a "tipped employee" for purposes of section 3(t) only while the employee is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. At the same time, the current regulation also recognizes that a distinguishable situation can exist where an employee in a tipped occupation may perform duties related to their tipped occupation that are not "themselves . . . directed toward producing tips," such as, for example, a server "who spends part of her time" performing non-tipped duties, such as "cleaning and setting tables, toasting bread, making coffee and occasionally

washing dishes or glasses." 29 CFR 531.56(e).

For three decades, the Department issued subregulatory guidance to provide further clarity to the terms "occasionally" and "part of [the] time" found in § 531.56(e). The Department's guidance recognized that because the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, it is important to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute. The guidance explained that an employer could continue to take a tip credit for the time an employee spent performing duties that are related to the employee's tipped occupation but that do not produce tips, but only if that time did not exceed 20 percent of the employee's workweek (80/20 guidance). *See* WHD Field Operations Handbook (FOH) 30d00(e), Revision 563 (Dec. 9, 1988). The 80/20 guidance and its tolerance permitting the performance of a limited amount of non-tipped, related duties provided an essential backstop to prevent abuse of the tip credit, and a number of courts deferred to the guidance.<sup>1</sup>

In 2018, the Department rescinded the 80/20 guidance. In 2018 and 2019, the Department issued new subregulatory guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. *See* WHD Opinion Letter FLSA2018-27 (Nov. 8, 2018); Field Assistance Bulletin (FAB) 2019-2 (Feb. 15, 2019); FOH 30d00(f) (2018-2019 guidance). The Department explained that, in addition to the examples listed in § 531.56(e), it would use the Occupational Information Network (O\*NET) to determine whether a tipped employee's non-tipped duties are related to their tipped occupation. On December 30, 2020, the Department published the 2020 Tip final rule updating § 531.56(e) largely incorporating the 2018-2019 guidance addressing situations where an employee performs both tipped and non-tipped duties (dual jobs portion of the 2020 Tip final rule). *See* 85 FR 86771.

<sup>1</sup> *See, e.g., Marsh v. J. Alexander's LLC*, 905 F.3d 610, 632 (9th Cir. 2018) (en banc); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011).

On February 26, 2021, the Department published a final rule extending the effective date of the 2020 Tip final rule from March 1, 2021, until April 30, 2021, in order to allow it the opportunity to review issues of law, policy, and fact raised by the 2020 Tip final rule before it took effect. *See* 86 FR 11632. On March 25, 2021, in a second NPRM, the Department proposed to further extend the effective date of three portions of the 2020 Tip final rule. *See* 86 FR 15811. This delay provided the Department additional time to consider whether to withdraw and re-propose the dual jobs portion of the 2020 Tip final rule, and to complete a separate rulemaking addressing the two other portions of the rule. Having considered the dual jobs portion, the Department now believes that the 2020 Tip final rule may fall short of providing the intended clarity and certainty for employers and could harm tipped employees and non-tipped employees in industries that employ significant numbers of tipped workers. On April 29, 2021, the Department published a final rule confirming the delay as proposed and announcing that it would undertake a separate rulemaking on dual jobs. *See* 81 FR 22597.

The Department is now proposing to withdraw the dual jobs portion of the 2020 Tip final rule and to re-propose new regulatory language that it believes would provide more clarity and certainty for employers while better protecting employees. Specifically, the Department is proposing to amend its regulations to clarify that an employee is only engaged in a tipped occupation under 29 U.S.C. 203(t) when the employee either performs work that produces tips, or performs work that directly supports the tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time. Under the Department's proposal, work that "directly supports" tip-producing work is work that assists a tipped employee to perform the work for which the employee receives tips. In the proposed regulatory text, the Department explains that an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds, in the aggregate, 20 percent of the employee's hours worked during the workweek or (2) is performed for a continuous period of time exceeding 30 minutes. The Department believes it is important to provide a clear limitation on the amount of non-tipped work that tipped employees perform in support of

their tip-producing work, because if a tipped employee engages in a substantial amount of such non-tipped work, that work is no longer incidental to the tipped work, and thus, the employee is no longer employed in a tipped occupation. The Department requests comment on all aspects of its proposal, including its proposal to withdraw the dual jobs portion of the 2020 Tip final rule.

## II. Background

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

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

Section 3(t) defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. 203(t). The legislative history accompanying the 1974 amendments to the FLSA's tip provisions identified tipped occupations to include "waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (Feb. 22, 1974). The legislative history also identified "janitors, dishwashers, chefs, [and] laundry room attendants" as occupations in which employees do not customarily and regularly receive tips within the meaning of section 3(t). *See id.* Since the 1974 Amendments, the Department's guidance documents have identified a number of additional occupations, such as barbacks, as tipped occupations. *See, e.g.,* FOH 30d04(b). However, Congress left "occupation," and what it means to be "engaged in an occupation," in section 3(t) undefined. Thus, Congress delegated to the Department the authority to determine what it means to be "engaged in an occupation" that customarily and regularly receives tips. *See* Fair Labor Standards Amendments of 1966, Public

Law 89-601, 101, § 602, 80 Stat. 830, 830, 844 (1966).

### B. The Department's "Dual Jobs" Regulation

The Department promulgated its initial tip regulations in 1967, the year after Congress first created the tip credit provision. *See* 32 FR 13575 (Sept. 28, 1967); Public Law 89-601, sec. 101(a), 80 Stat. 830 (1966). As part of this rulemaking, the Department promulgated a "dual jobs" regulation recognizing that an employee may be employed both in a tipped occupation and in a non-tipped occupation, providing that in such a "dual jobs" situation, the employee is a "tipped employee" for purposes of section 3(t) only while the employee is employed in the tipped occupation, and that an employer may only take a tip credit against its minimum wage obligations for the time the employee spends in that tipped occupation. *See* 32 FR 13580-81; 29 CFR 531.56(e). At the same time, the regulation also recognizes that an employee in a tipped occupation may perform related duties that are not "themselves . . . directed toward producing tips." It uses the example of a server who "spends part of her time" performing non-tipped duties, such as "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." 29 CFR 531.56(e). In that example where the tipped employee performs non-tipped duties related to the tipped occupation for a limited amount of time, the employee is still engaged in the tipped occupation of a server, for which the employer may take a tip credit, rather than working part of the time in a non-tipped occupation. *See id.* Section 531.56(e) thus distinguishes between employees who have dual jobs and tipped employees who perform "related duties" that are not themselves directed toward producing tips.

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

Over the past several decades, the Department has issued guidance interpreting the dual jobs regulation as it applies to employees who perform both tipped and non-tipped duties. The Department first addressed this issue through a series of Wage and Hour Division (WHD) opinion letters. In a 1979 opinion letter, the Department considered whether a restaurant employer could take a tip credit for time servers spent preparing vegetables for use in the salad bar. *See* WHD Opinion Letter FLSA-895 (Aug. 8, 1979) ("1979 Opinion Letter"). Citing the dual jobs regulation and the legislative history

distinguishing between tipped occupations, such as server, and non-tipped occupations, such as chef, the Department concluded that “salad preparation activities are essentially the activities performed by chefs,” and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.*

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

In 1985, the Department issued an opinion letter addressing non-tipped duties both unrelated and related to the tipped occupation of server. *See* WHD Opinion Letter FLSA-854 (Dec. 20, 1985) (“1985 Opinion Letter”). First, the letter concluded (as had the 1979 Opinion Letter) that “salad preparation activities are essentially the activities performed by chefs,” not servers, and therefore “no tip credit may be taken for the time spent in preparing vegetables for the salad bar.” *Id.* Second, the letter explained, building on statements in the 1980 Opinion Letter, that although a “tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the [servers’] regular duties and are assigned generally to the [server] staff,” if “specific employees are routinely assigned to maintenance-type work or . . . tipped employees spend a substantial amount of time in performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities.” *Id.* Under the circumstances described by the employer seeking an opinion—specifically, “one waiter or

waitress is assigned to perform . . . preparatory activities,” including setting tables and ensuring that restaurant supplies are stocked, and those activities “constitute[] 30% to 40% of the employee’s workday”—a tip credit was not permissible as to the time the employee spent performing those activities. *Id.*

WHD’s FOH is an “operations manual” that makes available to WHD staff, as well as the public, policies “established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” In 1988, WHD revised its FOH to add section 30d00(e) which distilled and refined the policies established in the 1979, 1980, and 1985 Opinion Letters. *See* WHD FOH Revision 563. According to the 1988 FOH entry, § 531.56(e) “permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities),” if those duties are “incidental” and “generally assigned” to tipped employees. *Id.* at 30d00(e). To illustrate the types of related, non-tip-producing duties for which employers could take a tip credit, the FOH listed “a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses,” the same examples included in § 531.56(e). *Id.* But “where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” Consistent with WHD’s interpretations elsewhere in the FLSA, the FOH noted a “substantial” amount of time spent performing general preparation or maintenance work as being “in excess of 20 percent,” creating a substantial but limited tolerance for this work. *Id.* This guidance recognized that if a tipped employee performs too much related, non-tipped work, the employee is no longer engaged in a tipped occupation.

WHD did not revisit its 80/20 guidance until more than 20 years later, when it briefly superseded its 80/20 guidance in favor of guidance that placed no limitation on the amount of duties related to a tip-producing occupation that may be performed by a tipped employee, “as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time

immediately before or after performing such direct-service duties.” *See* WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009). This guidance further stated that the Department “believe[d] that guidance [was] necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation . . . .” *Id.* Accordingly, it stated that the Department would consider certain duties listed in O\*NET for a particular occupation to be related to the tip-producing occupation. *See id.* The guidance cited *Pellon v. Bus Representation Int’l, Inc.*, 291 F. App’x 310 (11th Cir. 2008) (unpublished), *aff’g* 528 F. Supp. 2d 1306 (S.D. Fla. 2007), in which the district granted summary judgment to the employer based in part on the infeasibility of determining whether the employees spent more than 20 percent of their work time on such duties; significantly, however, the court believed such a determination was unnecessary because the employees had not shown that their non-tipped work exceeded that threshold. *See* 528 F. Supp. 2d at 1313–15. However, WHD later withdrew this guidance on March 2, 2009, and reverted to and followed the 80/20 approach for most of the next decade. *See* WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009); WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018).

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

In November 2018, WHD reinstated the January 16, 2009, opinion letter

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

A large number of district courts have considered the 2018 Opinion Letter and 2019 FAB and declined to defer to the Department's interpretation of the dual jobs regulation in this guidance. Among other concerns, these courts have noted that the guidance: (1) Does not clearly define what it means to perform related, non-tipped duties “contemporaneously with, or for a reasonable time immediately before or after, tipped duties,” thus inserting “new uncertainty and ambiguity into the analysis,” *see, e.g., Flores v. HMS Host Corp.*, No. 18–3312, 2019 WL 5454647 at \*6 (D. Md. Oct. 23, 2019), and companion case *Storch v. HMS Host Corp.*, No. 18–3322; (2) is potentially in conflict with language in 29 CFR 531.56(e) limiting the tip credit to related, non-tipped duties performed “occasionally” and “part of [the] time,” *see Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019); and (3) potentially “runs contrary to the remedial purpose of the FLSA—to ensure a fair minimum wage,” *see Berger v. Perry's Steakhouse of Illinois*, 430 F. Supp. 3d 397 (N.D. Ill. 2019).<sup>3</sup> In

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

<sup>3</sup> *See also Roberson v. Tex. Roadhouse Mgmt. Corp.*, No. 19–628, 2020 WL 7265860 (W.D. Ky. Dec. 10, 2020); *Rorie v. WSP2*, 485 F. Supp. 3d 1037 (W.D. Ark. 2020); *Williams v. Bob Evans Restaurants*, No. 18–1353, 2020 WL 4692504 (W.D. Pa. Aug. 13, 2020); *Esry v. OTB Acquisition*, No. 18–255, 2020 WL 3269003 (E.D. Ark. June 17, 2020); *Reynolds v. Chesapeake & Del. Brewing Holdings*, No. 19–2184, 2020 WL 2404904 (E.D. Pa. May 12,

addition, some courts have also expressed doubts about whether it is reasonable to rely on O\*NET to determine related duties. *See O'Neal*, 2020 WL 210801, at \*7 (employer practices of requiring non-tipped employees to perform certain duties would then be reflected in O\*NET, allowing employers to influence the definitions).<sup>4</sup> After declining to defer to the Department's 2018–2019 guidance, many of these district courts have independently concluded that the 80/20 approach is reasonable, and applied a 20 percent tolerance to the case before them.<sup>5</sup>

#### D. The 2020 Tip Final Rule

The NPRM for the 2020 Tip final rule (2019 NPRM) proposed to codify the Department's 2018–2019 guidance regarding when an employer can continue to take a tip credit for a tipped employee who performs related, non-tipped duties. *See* 84 FR 53956, 53963 (Oct. 8, 2019). Although, as noted above, multiple circuit courts had deferred to the Department's 80/20 guidance, the Department opined in its 2019 NPRM that this guidance “was difficult for employers to administer and led to confusion, in part because employers lacked guidance to determine whether a particular non-tipped duty is ‘related’ to the tip-producing occupation.” *Id.* Some employer representatives raised similar criticism in their comments on the NPRM. In its comment on the 2019 NPRM, for instance, law firm Littler

2020); *Sicklesmith v. Hershey Ent. & Resorts Co.*, 440 F. Supp. 3d 391 (M.D. Pa. 2020); *O'Neal v. Denn-O'Ohio*, No. 19–280, 2020 WL 210801 (N.D. Ohio Jan. 14, 2020); *Spencer v. Macado's*, 399 F. Supp. 3d 545 (W.D. Va. 2019); *Esry v. P.F. Chang's China Bistro*, 373 F. Supp. 3d 1205 (E.D. Ark. 2019); *Cope v. Let's Eat Out*, 354 F. Supp. 3d 976 (W.D. Mo. 2019).

A few other courts have followed the guidance. *See Rafferty v. Denny's Inc.*, No. 19–24706, 2020 WL 5939064 (S.D. Fla. Sept. 4, 2020); *Shaffer v. Perry's Restaurants, Ltd.*, No. 16–1193, 2019 WL 2098116 (W.D. Tex. Apr. 24, 2019).

<sup>4</sup> District courts have also declined to defer to the 2018–19 guidance on the grounds that it did not reflect the Department's “fair and considered judgment,” because the Department did not provide a compelling justification for changing policies after 30 years of enforcing the 80/20 guidance. *See e.g., Williams*, 2020 WL 4692504, at \*10; *O'Neal*, 2020 WL 210801, at \*7; *see also* 85 FR 86771 (noting that the 2020 Tip final rule addressed this criticism by explaining through the notice-and-comment rulemaking process its reasoning for replacing the 80/20 approach with an updated related duties test).

<sup>5</sup> *See, e.g., Rorie*, 485 F. Supp. 3d at 1042; *Sicklesmith*, 440 F. Supp. 3d at 404–05; *Belt*, 401 F. Supp. 3d at 536–37; *Esry v. P.F. Chang's*, 373 F. Supp. 3d at 1211; *Berger*, 430 F. Supp. 3d at 412; *Cope*, 354 F. Supp. 3d at 987; *Spencer*, 399 F. Supp. 3d at 554; *Roberson*, 2020 WL 7265860, at \*7–\*8; *Williams*, 2020 WL 4692504, at \*10; *Esry v. OTB Acquisition*, 2020 WL 3269003, at \*1; *Reynolds*, 2020 WL 2404904, at \*6.

Mendelson argued that the 80/20 guidance was challenging to administer because it did not include a “comprehensive list of related duties or even a way to determine which duties were related”; among other concerns, it also argued that employers found it challenging to track employees' duties.<sup>6</sup> Littler Mendelson and the National Restaurant Association (NRA) also argued that the 2018–2019 guidance was more consistent with the FLSA than the 80/20 guidance because the statute refers to tipped employees being “engaged in an occupation” in which they receive tips, 29 U.S.C. 203(t), and therefore does not distinguish between duties of a tipped employee for which employers can and cannot take a tip credit.<sup>7</sup> However, the NRA argued that the Department's retention of a distinction between tipped and non-tipped duties was still a “flawed analytical approach.”

The 2020 Tip final rule amended § 531.56(e) to largely reflect the Department's guidance issued in 2018 and 2019 that addressed whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation. *See* 85 FR 86771. The 2020 Tip final rule reiterated the Department's conclusion from the 2019 NPRM that its prior 80/20 guidance was difficult to administer “in part because the guidance did not explain how employers could determine whether a particular non-tipped duty is ‘related’ to the tip-producing occupation and in part because the monitoring surrounding the 80/20 approach on individual duties was onerous for employers.” *Id.* at 86767. The Department also asserted that the 80/20 guidance “generated extensive, costly litigation.” *Id.* at 86761. The 2020 Tip final rule provided, consistent with the Department's 2018–2019 guidance, that “an employer may take a tip credit for all non-tipped duties an employee performs that meet two requirements. First, the duties must be related to the employee's tipped occupation; second, the employee must perform the related duties contemporaneously with the tip-producing activities or within a reasonable time immediately before or after the tipped activities.” *Id.* at 86767.

Rather than using O\*NET as a definitive list of related duties, the final rule adopted O\*NET as a source of guidance for determining when a tipped employee's non-tipped duties are related to their tipped occupation. Under the final rule, a non-tipped duty

<sup>6</sup> WHD–2019–0004–0425.

<sup>7</sup> WHD–2019–0004–0438.

is presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O\*NET. *See id.* at 86771. The 2020 Tip final rule included a qualitative discussion of the potential economic impacts of the rule's revisions to the dual jobs regulations but "[did] not quantify them due to lack of data and the wide range of possible responses by market actors that [could not] be predicted with specificity." *Id.* at 86776. The Department noted that one commenter, the Economic Policy Institute (EPI), provided a quantitative estimate of the economic impact of this portion of the rule but concluded that its estimate was not reliable. *See id.* at 86785. This final rule was published with an effective date of March 1, 2021, *see id.* at 86756; however, as explained below, the Department has extended the effective date for this part of the rule until December 31, 2021.

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

On January 19, 2021, before the 2020 Tip final rule went into effect, Attorneys General from eight states and the District of Columbia filed a complaint in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule, including that portion amending the dual jobs regulations. (*Pennsylvania* complaint or *Pennsylvania* litigation).<sup>8</sup> The *Pennsylvania* complaint alleges that this portion of the 2020 Tip final rule is contrary to the FLSA. Specifically, the complaint alleges that the rule's elimination of the 20 percent limitation on the amount of time that tipped employees can perform related, non-tipped work contravenes the FLSA's definition of a tipped employee: An employee "engaged in an occupation in which [they] customarily and regularly" receive tips, 29 U.S.C. 203(t).<sup>9</sup> According to the complaint, "when employees 'spend more than 20 percent of their time performing untipped related work' they are no longer 'engaged in an occupation in which [they] customarily and regularly receive[.] . . . tips.'" <sup>10</sup>

The complaint also alleges that that this portion of the 2020 Tip final rule is arbitrary and capricious for several reasons. First, the complaint alleges that the 2020 Tip final rule's new test for when an employer can continue to take

a tip credit for a tipped employee who performs related, non-tipped duties relied on "ill-defined" terms—"contemporaneously with" and "a reasonable time immediately before or after tipped duties"<sup>11</sup>—which some district courts have also found to be unclear when construing the 2018–2019 guidance.<sup>12</sup> According to the complaint, the 2020 Tip final rule failed to "provide any guidance as to when—or whether—a worker could be deemed a dual employee during a shift or how long before or after a shift constitutes a 'reasonable time.'" <sup>13</sup> The complaint also alleges that the Department failed to offer a valid justification for replacing the 80/20 guidance with a new test for when an employer can take a tip credit for related, non-tipped duties. The complaint disputes the Department's conclusion in the 2020 Tip final rule that its former 80/20 guidance was difficult to administer, noting that courts consistently applied and, in many cases, deferred to the 80/20 guidance.<sup>14</sup> The complaint argues that the 2020 Tip final rule's new test, in contrast, will invite "a flood of new litigation" due to its "murkiness" and its reliance on "ill-defined" terms.<sup>15</sup>

The complaint further alleges that the rule's use of O\*NET to define "related duties" is "itself" arbitrary and capricious because O\*NET "seeks to describe the work world as it is, not as it should be" and "does not objectively evaluate whether a task is actually related to a given occupation."<sup>16</sup> According to the complaint, the use of O\*NET to define related, non-tipped duties "dramatically expand[ed] the universe of duties that can be performed by tipped workers," thereby authorizing employer "conduct that has been prohibited under the FLSA for decades."<sup>17</sup> Lastly, the complaint alleges that the Department "failed to consider or quantify the effect" that this portion of the rule "would have on workers and their families" in the rule's economic analysis and "disregard[ed]" the data and analysis provided by a

<sup>11</sup> *Id.* ¶ 128.

<sup>12</sup> *See, e.g., Belt*, 401 F. Supp. 3d at 533; *Flores*, 2019 WL 5454647, at \*6.

<sup>13</sup> *Commonwealth of Pennsylvania v. Scalia*, at ¶ 131; *see also id.* ¶ 129 ("The Department never provides a precise definition of 'contemporaneous,' simply stating that it means 'during the same time as' before making the caveat that it 'does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.'")

<sup>14</sup> *See id.* ¶ 127; *see also id.* ¶ 41 (noting that many courts awarded *Auer* deference to the 80/20 guidance).

<sup>15</sup> *Id.* ¶¶ 127–28.

<sup>16</sup> *Id.* ¶ 115.

<sup>17</sup> *Id.* ¶¶ 114–15.

commenter on the NPRM for the 2020 Tip final rule, the EPI.<sup>18</sup> The complaint claims that these asserted flaws in the Department's economic analysis are evidence of a "lack of reasoned decision-making."<sup>19</sup>

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

On February 26, 2021, the Department delayed the effective date of the 2020 Tip final rule until April 30, 2021, to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule, as contemplated by the Regulatory Freeze Memorandum and OMB Memorandum M–21–14. *See* 86 FR 11632. Commenters who supported the proposed 60-day delay of the 2020 Tip final rule, including numerous advocacy organizations and the Attorneys General who filed the *Pennsylvania* lawsuit, urged the Department to specifically reconsider the portion of the 2020 Tip final rule that revised the Department's dual jobs regulations. *Id.* at 11633. EPI supported the proposed delay because it would give the Department time to reassess the Department's economic analysis of this portion of the 2020 Tip final rule, which it argued was flawed. *Id.* On March 25, 2021, the Department proposed to further delay the effective date of three portions of the 2020 Tip final rule, including the portion of the rule that amended the Department's dual jobs regulations to address the FLSA tip credit's application to tipped employees who perform tipped and non-tipped duties, until December 31, 2021. *See* 86 FR 15811 (Partial Delay NPRM). The Department received comments on the merits of the delay and on the merits of the 2020 Tip final rule itself. On April 29, 2021, the Department finalized the proposed partial delay. *See* 86 FR 22597 (Partial Delay final rule).

### III. Discussion of Comments on the Partial Delay Rule

#### A. Comments Regarding the 2020 Tip Final Rule's Revisions to the Dual Jobs Regulations

Commenters who supported the Partial Delay NPRM raised multiple concerns with the substance of the dual jobs portion of the 2020 Tip final rule. In their comments in support of the Partial Delay NPRM, the Attorneys General who filed the *Pennsylvania* complaint and worker advocacy organizations raised legal and policy concerns similar to those raised in the

<sup>18</sup> *Id.* at § I(C)(i), ¶¶ 108–9.

<sup>19</sup> *Id.* ¶ 105.

<sup>8</sup> *See* Compl., *Commonwealth of Pennsylvania et al. v. Scalia* *et al.*, No. 2:21-cv-00258 (E.D. Pa.).

<sup>9</sup> *Id.*, ¶¶ 87–89.

<sup>10</sup> *Id.* ¶ 87 (citing *Belt*, 401 F. Supp. 3d at 526).

*Pennsylvania* lawsuit: That the new test for when an employer can take a tip credit for related, non-tipped duties will encourage employers to shift more non-tipped work to tipped employees, depressing tipped employees' wages and possibly eliminating non-tipped jobs, that the new test does not reflect the statutory definition of a tipped employee, that the terms used in the new test are so amorphous that they will lead to extensive litigation, and that O\*NET is not an appropriate tool to determine related duties. *See* 86 FR 22600. In its comment supporting the Partial Delay NPRM, EPI stated that the 2020 Tip final rule's revision to the dual jobs regulations created a "less protective" standard for tipped wages, replacing a firm 20 percent limitation on the amount of related, non-tipped duties that tipped employees could perform while being paid the tipped wage of \$2.13 per hour with "vague and much less protective" language. *Id.* EPI noted that because these new regulatory terms, such as "reasonable time," are not defined, they create an "ambiguity that would [be] difficult to enforce" and would create "an immense loophole that would be costly to workers." *Id.*

Commenters who supported the Partial Delay NPRM also raised concerns with how the dual jobs portion of the 2020 Tip final rule was promulgated, specifically, that the economic analysis may not have adequately estimated the impact of this portion of the rule. EPI suggested that the 2020 Tip final rule's economic analysis was flawed because it did not sufficiently estimate the economic impact on workers—as EPI did in a comment it submitted in the 2020 Tip rulemaking, which concluded that the rule "would allow employers to capture more than \$700 million annually from workers." *See id.* at 22600–01. The Attorneys General<sup>20</sup> and the National Employment Law Project (NELP)<sup>21</sup> also argued in their comments in support of the Partial Delay NPRM that the Department's failure to quantitatively estimate the impact of the dual jobs portion of the 2020 Tip final rule or to consider the estimates of the rule's impact submitted by EPI and other groups in the course of that rulemaking is evidence that the rulemaking process was flawed. *See id.* at 22601.

The Department also received comments on the substance of the 2020 Tip final rule from organizations that opposed the Partial Delay NPRM. The NRA<sup>22</sup> and Littler Mendelson's

Workplace Policy Institute (WPI)<sup>23</sup> argued that the 2020 Tip final rule reflects a better interpretation of the statutory term "tipped employee" than the 80/20 guidance because the FLSA refers to tipped employees being "engaged in an occupation" in which they receive tips, 29 U.S.C. 203(t), and therefore does not create any distinction between the tipped and non-tipped duties of the employee. *See id.* at 22602. WPI also argued that the 2020 Tip final rule, by removing the 20 percent limitation on related duties and using O\*NET to define related duties, would be easier for employers to administer, and both WPI and the NRA argued that the 2020 Tip final rule would avoid the litigation that the 80/20 guidance generated. *See id.* Additionally, the NRA argued that EPI's criticism of the 2020 Tip final rule was flawed because its impact analysis used the Department's 80/20 guidance as its baseline instead of the Department's 2018–2019 guidance. *See id.* More generally, the NRA noted that the restaurant industry has been "uniquely hurt" by the pandemic and stated that, in this challenging economic environment, restaurants need "clear guidelines" and "predictability." *See* NRA.

In the Partial Delay final rule, the Department stated that it shares the concerns of commenters who supported the proposed partial delay that the new test articulated in the 2020 Tip final rule for when an employer can take a tip credit for a tipped employee who performs related, non-tipped work may be contrary to the FLSA. Specifically, the Department stated that it shared commenters' concerns that the new test may not accurately identify when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation under section 3(t) of the statute. *See* 86 FR 22606. Additionally, the Department stated that it shares commenters' concerns that the economic analysis may not have adequately estimated the impact of this portion of the rule and that allowing this portion of the rule to go into effect without further consideration of its impact could potentially lead to a loss of income for workers in tipped industries. *See id.* at 22606–07.

#### *B. Recommendations for Future Rulemaking*

Commenters who supported the Partial Delay NPRM also urged the Department to engage in further rulemaking to better address the issue of when an employer can continue to take

a tip credit for tipped employees who perform tipped and non-tipped work. All of the advocacy organizations that supported the Partial Delay NPRM urged the Department to withdraw the portion of the 2020 Tip final rule that revised its dual jobs regulations and to re-propose revisions no less protective of workers than the 80/20 guidance. *See, e.g.,* NELP;<sup>24</sup> Restaurant Opportunities Center United (ROC United);<sup>25</sup> National Urban League;<sup>26</sup> National Women's Law Center;<sup>27</sup> One Fair Wage.<sup>28</sup> EPI also encouraged the Department to create a rule that is "stronger" than the previous 80/20 guidance "that further clarifies, and limits, the amount of non-tipped work for which an employer can claim a tip credit." *See* 86 FR 22600. EPI suggested that the Department could, among other things, consider tightening the definitions of related and unrelated duties, propose to adopt standards such as those adopted in states such as New York that, for example, bar an employer from taking a tip credit on any day during which a tipped employee spends more than 20 percent of their time in a non-tipped occupation, and/or promulgate enhanced notice and recordkeeping requirements. *See id.*

In its comments supporting the Partial Delay, NELP also stated that a delayed effective date of the dual jobs portion of the rule would give the Department the opportunity to consider how the rule "improperly narrows the protections of the FLSA for tipped workers in a variety of fast-growing industries including delivery, limousine and taxi, airport workers, parking, carwash, valet, personal services and retail, in addition to restaurants and hospitality." *See id.* at 22601.

Although WPI opposed the proposed delay of the dual jobs portion of the 2020 Tip final rule, it included some recommendations for the Department to consider in the event that it ultimately proposed to withdraw and revise this portion of the rule. WPI stated that any alternative should include "concrete guidance on where the lines are to be drawn," adding that, in its view, "there has been no clear definition of what duties are 'tipped' as opposed to merely 'related' or 'non-tipped.'" *See id.* at 22602. WPI further stated that any "quantitative limit" on duties that a tipped employee can perform "must precisely identify which duties fall on either side of the line," recognize that

<sup>24</sup> WHD–2019–0004–0515.

<sup>25</sup> WHD–2019–0004–0524.

<sup>26</sup> WHD–2019–0004–0516.

<sup>27</sup> WHD–2019–0004–0520.

<sup>28</sup> WHD–2019–0004–0523.

<sup>20</sup> WHD–2019–0004–0420.

<sup>21</sup> WHD–2019–0004–0453.

<sup>22</sup> WHD–2019–0004–0504.

<sup>23</sup> WHD–2019–0004–0519.

occupations can evolve over time, and draw upon O\*NET as a resource. *See id.*

#### IV. Need for Rulemaking

Delaying the effective date of this portion of the 2020 Tip final rule has provided the Department the opportunity to consider whether § 531.56(e) of the 2020 Tip final rule accurately identifies when a tipped employee who is performing non-tipped duties is still engaged in a tipped occupation, such that an employer can continue to take a tip credit for the time the tipped employee spends on such non-tipped work, and whether the 2020 Tip final rule adequately considered the possible costs, benefits, and transfers between employers and employees related to the adoption of the standard articulated therein. It has also allowed the Department to further consider the comments it received on this portion of the rule in response to its February 5, 2021 proposal to delay the effective date of the 2020 Tip final rule and its March 25, 2021 proposal to delay the effective date of this portion of the rule and to evaluate the legal concerns with this portion of the rule that were raised in the *Pennsylvania* complaint.

In light of the comments received on both delay NPRMs and the allegations raised in the *Pennsylvania* complaint, as well as a review and reconsideration of questions of law, policy, and fact, the Department believes that it is necessary to revisit that portion of the 2020 Tip final rule addressing whether an employee who is performing non-tipped duties is still engaged in a tipped occupation. Specifically, the Department is concerned that the lack of clear guidelines in the 2020 Tip final rule both failed to achieve its goal of providing certainty for employers and created the potential for abuse of the tip credit to the detriment of low-wage tipped workers. In this NPRM, the Department has further reviewed data provided by commenters, including conducting a thorough analysis on transfer estimates using that data. The Department requests comment on withdrawing the dual jobs portion of the 2020 Tip final rule.

##### A. The 2020 Tip Final Rule Did Not Define Its Key Terms

As noted above, the Department stated that one of its reasons for departing from the 80/20 guidance in the 2020 Tip final rule was that it “generated extensive, costly litigation.” 85 FR 86761. In their comments in opposition to the Partial Delay NPRM, the NRA and WPI argued that the 2020 Tip final rule created a standard that was less susceptible to litigation than

the 80/20 guidance. 86 FR 22606. However, the *Pennsylvania* litigants noted that the 2020 Tip final rule does not clearly define either “contemporaneously” or the phrase “for a reasonable time immediately before or after” and thus is “certain to cause a flood of new litigation.”<sup>29</sup> Commenters who supported the Partial Delay NPRM echoed this concern. *See* 86 FR 22600. After consideration, the Department believes that the lack of clear definitions of these key terms may undermine the stated goals of the 2020 Tip final rule.

For example, although the 2020 Tip final rule posited that the requirement that related duties be performed “contemporaneously” is “not difficult to administer in practice,” the Department now believes that the rule’s failure to provide a clear definition of the term may undermine the utility of the rule. *See* 85 FR 86768. Instead, as the *Pennsylvania* litigants noted, the 2020 Tip final rule both stated that the term “contemporaneously” means “during the same time as” and also that it “does not necessarily mean that the employee must perform tipped and non-tipped at the exact same moment in time.” *Id.* These potentially conflicting definitions may have caused confusion for employers and tipped employees alike. Additionally, by stating that a task that is performed “contemporaneously” does not have to be performed at the same time, the Department blurred the distinction between tasks performed contemporaneously and those performed “for a reasonable time immediately before or after” the performance of tipped duties. *See, e.g., id.* at 86769 (describing a scenario in which a bellhop works 48 minutes of every hour on tipped duties and 12 minutes of every hour on related, non-tipped duties as illustrating the new regulatory concept of work that is performed “for a reasonable time immediately before or after” the performance of tipped duties).

Although the 2020 Tip final rule stated that related duties could be performed “for a reasonable time immediately before or after” performing tipped duties, the rule also did not provide a specific definition for the term “reasonable.” In justifying the Department’s decision to use the term, the 2020 Tip final rule stated that “the concept of reasonableness is a cornerstone of modern common law and is familiar to employers in a variety of contexts.” *See* 85 FR 86768. Even if employers are familiar with the general concept of “reasonableness,” it is not

clear from the 2020 Tip final rule how reasonableness would be defined in the context of that rule—determining how long a tipped employee could perform non-tipped, related duties—and the reference to common law implicitly acknowledged that those boundaries would be left to the courts to draw.

The Department believes that because the 2020 Tip final rule did not define these key terms, the 2020 Tip final rule will invite rather than limit litigation in this area, and thus may not support one of the rule’s stated justifications for departing from the 80/20 guidance. Furthermore, a key justification for the 2020 Tip final rule was that it would be easier for employers to administer—but the absence of clear guidelines regarding the boundaries of “reasonable” means that employers would still face uncertain litigation risk. As noted above, the Department seeks comments on the merits of withdrawing the dual jobs portion of the 2020 Tip final rule; in particular, it seeks comments on the extent to which definitions of the key terms used in the dual jobs portion of the 2020 Tip final rule provide clarity and certainty, as compared with the proposed terminology the Department proposes herein.

##### B. Concerns About Using O\*NET To Identify “Related” Duties

In addition to not specifically defining key terms, the Department is concerned that the 2020 Tip final rule’s reliance on O\*NET to identify “related” duties may be flawed. As discussed above, the 2020 Tip final rule uses occupational task listings from O\*NET to identify which non-tipped duties, when performed for a limited or at a certain time, are part of an employees’ tipped occupation. O\*NET, however, is a tool for career exploration. *See* [www.onetonline.org](http://www.onetonline.org). It was not created to identify employer’s legal obligations under the FLSA. The Department now believes that O\*NET may not be an appropriate instrument to delineate the duties that are part of a tipped occupation for which an employer may take a tip credit.

O\*NET uses data obtained in part by asking employees which duties their employers are requiring them to perform.<sup>30</sup> As a result, when employers require tipped employees to perform the work of a non-tipped occupation, O\*NET may reflect these duties on the task list for their tipped occupation even though they are not the tasks of the tipped occupation. For example, the

<sup>29</sup> *Commonwealth of Pennsylvania v. Scalia*, at ¶ 128.

<sup>30</sup> More detailed information about O\*NET’s data collection can be found at <https://www.onetcenter.org/ombclearance.html>.

*Pennsylvania* litigants noted that, at the time of their complaint, O\*NET included cleaning bathrooms as tasks of servers, notwithstanding the Department's longstanding position that these duties are not part of the tipped occupation of a server. See Complaint, *Commonwealth of Pennsylvania et al. v. Scalia et al.*, No. 2:21-cv-00258, ¶ 117 (E.D. Pa., Jan. 19, 2021); see also Br. for Department of Labor as Amicus, at 18, 18 n.6, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011). At the same time, as commenters on the 2019 NPRM noted, O\*NET may not reflect all of the duties that are part of a tipped occupation. See Inspire Brands;<sup>31</sup> National Restaurant Association.<sup>32</sup>

In response to concerns that O\*NET may not accurately capture the non-tipped duties that are part of tipped occupations, the 2020 Tip final rule provided that a non-tipped duty is merely presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O\*NET. See 85 FR 86771. Regarding this presumption, the Department specified that when "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" in that case. See *id.* at 86772. As a result, the Department acknowledged, the regulation in the final rule does not afford the "certainty" that the Department sought to provide when it proposed to codify its subregulatory guidance in the 2019 NPRM. *Id.*

After further consideration, the Department has determined that this uncertainty could potentially harm both employers and employees. Although WPI noted in its comment to the Partial Delay NPRM that employers can simply review O\*NET's task lists to determine if a particular non-tipped duty is related to a tipped occupation, this is not necessarily the case under the 2020 Tip final rule; as noted above, "industry-wide practices and trends" may show that a task not listed on O\*NET is a related duty. See *id.* at 86722. The Department now believes, however, that the rule's reference to "industry-wide practices and trends" is insufficient guidance for employers or employees to determine whether a duty is "actually related to the tipped occupation," notwithstanding its inclusion in (or absence from) O\*NET. As a result, the Department believes that the 2020 Tip final rule may not provide clarity in

defining "related duties," and fails to support the rule's stated justification for departing from the previous 80/20 guidance because it was "difficult to administer" due to the problems with "categorizing of tasks." See *id.* at 86770. Given this, the Department is proposing a new functional test for identifying which non-tipped duties, when performed for a limited time, can be part of an employee's tipped occupation. The Department seeks comments on the use of O\*NET in the dual jobs portion of the 2020 Tip final rule.

### C. Harm to Workers

The Department shares the concerns raised in comments to the Partial Delay that enacting the dual jobs portion of the 2020 Tip final rule could harm tipped employees and non-tipped employees in industries that employ significant numbers of tipped workers. The Department is particularly concerned that the lack of clearly defined limits regarding when employers can continue to take a tip credit for tipped employees who perform related, non-tipped work could lead to employers shifting more non-tipped work to employees in tipped occupations. This concern is particularly acute during the COVID-19 pandemic, when, as ROC United noted in its comment on the Partial Delay NPRM, many restaurants may have shifted a significant portion of their tipped employees to perform more non-tipped work.<sup>33</sup> In their complaint, the *Pennsylvania* litigants cited to data from the Bureau of Labor Statistics (BLS) showing that servers in Massachusetts, Pennsylvania, and Illinois earn less than half the average annual income of workers in each state; for nail technicians, annual incomes were between 40 and 43 percent of the state average.<sup>34</sup> If employers require tipped

<sup>33</sup> WHD-2019-0004-0491.

<sup>34</sup> Specifically, the *Pennsylvania* litigants noted that according to the BLS's May 2020 Occupational Employment and Wages Statistics (OEWS) survey, average annual incomes for servers in Massachusetts, Pennsylvania, and Illinois were \$32,970, \$25,380, and \$23,340, respectively; for nail technicians, average annual incomes were \$28,620, \$21,630, and \$24,580. See *Commonwealth of Pennsylvania v. Scalia*, ¶ 150. According to the May 2020 OEWS, average annual incomes in Massachusetts, Pennsylvania, and Illinois were \$70,010, \$53,950, and \$58,070, respectively. See BLS, May 2020 State Occupational Employment and Wage Estimates Massachusetts, [https://www.bls.gov/oes/current/oes\\_ma.htm#00-0000](https://www.bls.gov/oes/current/oes_ma.htm#00-0000); May 2020 State Occupational Employment and Wage Estimates Pennsylvania, [https://www.bls.gov/oes/current/oes\\_pa.htm](https://www.bls.gov/oes/current/oes_pa.htm); May 2020 State Occupational Employment and Wage Estimates Illinois, [https://www.bls.gov/oes/current/oes\\_il.htm#00-0000](https://www.bls.gov/oes/current/oes_il.htm#00-0000). BLS notes that its "May 2020 estimates do not fully reflect the impact of the COVID-19 pandemic." Technical Notes for May 2020 OES Estimates, [https://www.bls.gov/oes/current/oes\\_tec.htm](https://www.bls.gov/oes/current/oes_tec.htm).

workers to perform more non-tipped work outside their tipped occupation, these low-wage workers' earnings could be reduced even further. As NELP and other advocacy organizations noted, if employers shift non-tipped work to tipped employees for whom they take a tip credit, this could also harm employees in non-tipped occupations. Specifically, this could "drive down wages for—or even eliminate—back-of-house positions in restaurants, and related maintenance and prep jobs in other workplaces like hotels, carwashes and parking lots, and service establishments." See NELP;<sup>35</sup> see also Oxfam;<sup>36</sup> NWLC;<sup>37</sup> ROC United;<sup>38</sup> National Urban League.<sup>39</sup>

As the NRA noted in its comment on the Partial Delay NPRM, employers in the restaurant industry have also been hit hard by COVID-19. The Department appreciates the strong desire of restaurants, particularly small and independently-owned restaurants, for certainty as they recover from the impact of the pandemic. However, as noted above, the Department is concerned that the 2020 Tip final rule's test for when an employer can continue to take a tip credit for related, non-tipped duties did not provide such certitude: The rule uses terms that may not be sufficiently clearly defined and may have failed to provide certainty when defining "related duties." Upon consideration of the comments received regarding the Partial Delay NPRM, the Department believes that revisions to the dual jobs portion of the 2020 Tip final rule are needed to better protect workers and to provide clarity to employers and workers alike. The Department seeks additional comments on the potential economic impact of the dual jobs portion of the 2020 Tip final rule on workers. The Department also seeks comments on whether the dual jobs portion of the 2020 Tip final rule provides enough clarity to employers and workers regarding when employers can continue to take a tip credit for non-tipped duties performed by tipped employees.

### V. Proposed Regulatory Revisions

The Department proposes to withdraw and amend the dual jobs regulation at § 531.56(e) to define when an employee is engaged in a tipped occupation for purposes of section 3(t) of the FLSA. As explained above, section 3(t) of the FLSA defines a

<sup>35</sup> WHD-2019-0004-0515.

<sup>36</sup> WHD-2019-0004-0503.

<sup>37</sup> WHD-2019-0004-0520.

<sup>38</sup> WHD-2019-0004-0524.

<sup>39</sup> WHD-2019-0004-0516.

<sup>31</sup> WHD-2019-0004-0456.

<sup>32</sup> WHD-2019-0004-0438.

“tipped employee” for whom an employer may take a tip credit as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. 203(t). As also explained above, since it was first promulgated in 1967, § 531.56(e) has recognized that an employee may be employed by the same employer in both a tipped occupation and in a non-tipped occupation.

A straightforward dual jobs scenario exists when an employee is hired by the same employer to perform more than one job, only one of which is in a tipped occupation: For example, when an employee is employed by the same employer to work both as a server and a maintenance person. A dual jobs scenario also exists when an employee is hired to do one job but is required to do work that is not part of that occupation: For example, when an employee is hired as a server but is required to do building maintenance.

Yet another dual jobs scenario exists where an employee is hired to work in a tipped occupation but is assigned to perform non-tipped work that directly supports the tipped producing work for such a significant amount of time that the work is no longer incidental to the tipped occupation and thus, the employee is no longer employed in the tipped occupation. From 1988 to 2018, the Department’s guidance, in recognition of the fact that every tipped occupation usually includes a limited amount of related, non-tipped work, provided a tolerance whereby employers could continue to take a tip credit for a period of time when a tipped employee performed non-tipped work that was related to the tipped occupation. The Department’s guidance also recognized, however, that it was necessary to cap the tolerance at a certain amount of non-tipped work, because at some point, if a tipped employee performs too much non-tipped work, even if that work were related to the tipped occupation, the work was no longer incidental to the tipped work and thus the employee was no longer engaged in a tipped occupation. As the Department explained in legal briefs defending its 80/20 guidance, particularly where the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, providing protections to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute is essential to prevent abuse.

As noted above, past criticisms of the Department’s 80/20 guidance from employer representatives included that the policy was contrary to the FLSA, and that it was difficult for employers to administer because it required employers to monitor employees’ duties and did not provide sufficient guidance for employers to determine whether a particular non-tipped duty was “related” to the tip-producing occupation. In comments received on the Partial Delay Rule, for instance, the NRA expressed its support for the 2020 Tip final rule’s revision to the dual jobs regulation because, in its view, the new test avoided this problem and was consistent with the plain statutory text of the FLSA, which permits employers to take a tip credit based on whether an employee is employed to work in a tipped occupation, not whether the employee is performing certain kinds of duties within the tipped occupation.<sup>40</sup> However, as the Eighth Circuit recognized in *Applebee’s*, Congress did not define “occupation” or what it means to be “engaged in an occupation” in section 3(t), leaving that for the Department to interpret. *See Applebee’s*, 638 F.3d at 879. In other enforcement contexts, the Department recognizes that job titles alone cannot be determinative, *see, e.g.*, 29 CFR 541.2; thus, merely because someone is hired to work as a server does not mean that they are always “engaged in the occupation” of a server. Furthermore, as explained above, the dual jobs test set forth in the 2020 Tip final rule also distinguished between related and unrelated duties, and therefore did not fully address the concern advanced by the NRA about the kinds of duties a tipped employee performs.

Additionally, many courts upheld the 80/20 guidance because it provided an essential backstop to prevent abuse of the tip credit and, conversely, criticized the dual jobs test set forth in the Department’s 2018–2019 guidance, which was largely codified by the 2020 Tip final rule, as being more difficult to administer than the 80/20 guidance.<sup>41</sup> Like some commenters that supported the Partial Delay rule and the *Pennsylvania* litigants, courts have found that the parameters of the 2020 Tip final rule’s test are so broad and indeterminate that they do not sufficiently define when an employee is employed in a tipped occupation within the meaning of section 3(t) of the FLSA, and that O\*NET is not an appropriate tool to use to identify related duties because it catalogues the duties that

employees have been required to perform rather than the duties that fall within the definition of an occupation.<sup>42</sup>

The Department believes that it is important to retain the longstanding regulatory dual jobs language addressing a straightforward dual jobs situation, where one employee is employed to perform two separate jobs, only one of which is in a tipped occupation. The Department also believes that it is important for its regulations to address the dual jobs scenario where a tipped employee is performing so much non-tipped work even though that non-tipped work is performed in support of the tipped work, that the work is no longer incidental and thus the employee is no longer employed in a tipped occupation. The Department rejects the argument put forth by the NRA and WPI that a regulation that analyzes a tipped employee’s duties and determines when a tip credit should be permitted and not permitted is inconsistent with the statutory language of 3(t), which says that an employer can take a tip credit for an employee who is employed in a tipped occupation. This argument fails to take into account the multiple scenarios outlined above, where an employer hires someone into a tipped occupation but then requires them to perform work outside of the occupation or requires the employee to perform so much non-tipped work that it can no longer be considered part of the tipped occupation.

Because concerns about its dual jobs tests have been identified over the years—both with its prior subregulatory guidance and the 2020 Tip final rule—the Department in this rulemaking is proposing a new test that the Department believes will address the concerns articulated about its prior tests, will be easier to administer, provide employers with more certainty, reduce litigation, and will protect tipped workers against abusive pay practices. In developing this proposed test, the Department also took into consideration the recommendations of organizations that commented on the Partial Delay NPRM, including the recommendation of numerous advocacy organizations that the Department re-propose a test no less protective than the 80/20 guidance and WPI’s recommendation that the Department “precisely identify” the duties for which employers can and cannot take a tip credit if it engages in further rulemaking. The Department believes that its proposed test will better identify when an employer can continue to take a tip credit for the time tipped

<sup>40</sup> WHD–2019–0004–0504.

<sup>41</sup> *See supra* note 4.

<sup>42</sup> *See supra* note 3.

employees spend on tasks that do not themselves produce tips but support the tip-producing work, and when an employer cannot take a tip credit for this work because the time spent performing these tasks is so great that work is no longer incidental and thus the employee is no longer engaged in a tipped occupation. Congress delegated to the Department the authority to determine what it means to be “engaged in an occupation” that customarily and regularly receives tips. See Fair Labor Standards Amendments of 1966, Public Law 89–601, § 101, § 602, 80 Stat. 830, 830, 844 (1966). The Department has decades of outreach, compliance assistance, stakeholder engagement, and enforcement experience in this area and has relied on that experience to develop a proposed test that provides clarity in determining what work an employer may take a tip credit for and also the flexibility to address unique workplaces and changing occupations.

Additionally, the Department believes the proposed test, because it provides clear and specific guidance, will ensure fair and consistent application of the tip credit in instances where tipped employees perform non-tipped duties in support of their tipped work.

The new test proposed in this rulemaking permits an employer to continue to take a tip credit for its tipped employees when they are performing work that is part of the tipped occupation. Work that is part of the tipped occupation includes any work that produces tips, as well as any work that directly supports the tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. To address the criticisms of its past rules that the Department has used largely undefined terms such as “related duties”, or used unhelpful tools such as O\*NET, to determine the sorts of duties that fall within the tipped occupation, the new test proposed in this rulemaking provides a number of examples to illustrate the kinds of tasks that would be included in each category of work covered by the regulation: Work that is part of the tipped occupation, which includes a non-substantial amount of directly supporting work, as well as work that is not part of the tipped occupation.

#### A. Proposed § 531.56(e)—Dual Jobs

Proposed § 531.56(e) would retain the longstanding regulatory dual jobs language which provides that when an individual is employed in a tipped occupation and a non-tipped occupation, the tip credit is available only for the hours the employee spends

working in the tipped occupation. The Department also proposes to make this section gender-neutral by using terms such as “server” and “maintenance person.”

#### B. Proposed § 531.56(f)

Proposed § 531.56(f) defines what it means for an employee to be engaged in a tipped occupation under section 3(t) of the FLSA. Specifically, an employee is engaged in a tipped occupation when they either perform work that produces tips, or perform work that directly supports the tip-producing work, provided the directly supporting work is not performed for a substantial amount of time. Because an employer may not take a tip credit for work that is not part of the tipped occupation, proposed § 531.56(f) defines the relevant term “tipped occupation” specifically and provides examples of tasks that fall into those categories.

The Department believes that these examples will assist employers and employees in understanding the parameters of those terms and will help ensure consistent application of the test. The proposed regulation lists tasks in three occupations—servers, bartenders, and nail technicians—that would fall within the three categories of work set out in the regulations. For example, the proposed regulations explain that a server’s tip-producing work includes waiting on tables, work that directly supports the server’s tip-producing work includes cleaning the tables to prepare for the next customers, and work which is not part of a server’s occupation includes food preparation and cleaning bathrooms. A bartender’s tip-producing work includes making and serving drinks and talking to customers, work that directly supports the work includes preparing fruit to garnish the prepared drinks, and work that is not part of a bartender’s occupation includes preparing food and cleaning the dining room. Finally, the proposed rule explains that a nail technician’s tip-producing work includes performing manicures and pedicures, work that directly supports the work of a nail technician includes cleaning pedicure baths between customers, and work that is not part of the nail technician’s occupation includes ordering supplies for the nail salon. While not an exhaustive list, the Department believes that these examples set clear parameters for how those three categories of work are defined and applied.

Proposed § 531.56(f)(1)(i) would permit an employer to take a tip credit for the employee’s performance of work that is *part of the tipped occupation*,

defined as work that produces tips. As explained above, the proposed regulation provides specific examples of tip-producing work for three specific occupations, which illustrate that tip-producing work in many instances is work which requires direct service to customers. In addition to the tasks listed in the proposed regulation, other examples of tip-producing work would include a parking attendant’s work parking and retrieving cars, and accepting payment for the same, a hotel housekeeper’s work cleaning hotel rooms, and bussers’ tip-producing work would include filling water glasses and clearing dishes from tables. However, not all tip-producing work involves direct customer service. A busser’s tip-producing work, for example, would also include work, such as putting new linens on tables that is done in support of other tipped employees, such as servers. The Department recognizes that tipped employees in different occupations may have different tip-producing work and requests comment on its definition of tip-producing work and these examples, and seeks input on other occupations and examples that the Department should consider.

Proposed § 531.56(f)(1)(ii) and (1)(iii) would address when and to what extent an employer can continue to take a tip credit for a tipped employee’s work that does not itself generate tips but that supports the tip-producing work of the tipped occupation because it assists a tipped employee to perform the work for which the employee receives tips. As proposed, § 531.56(f)(1)(ii) defines this supportive work as work that *directly supports* tip-producing work, and explains that this work can be considered to be part of the tipped occupation provided that it is not performed for a substantial amount of time.

The Department believes that defining this as work that “directly supports” the tip-producing work is more specific and therefore more helpful than referring to these tasks as duties that are related to the tipped occupation. The Department believes that the “related duties” terminology used in past tests may have inadvertently caused confusion because it could be interpreted to encompass duties that are only remotely related to the tipped occupation, particularly because the Department provided only a few examples of the type of work the Department intended to include in this term. In contrast, the proposed new rule’s limited tolerance for non-tipped work that “directly supports” tip-producing work, which in turn is defined as work that assists a tipped employee to perform the work for which

the employee receives tips, provides a more concrete and specific definition of the term.

The examples included in the proposed regulatory text are not the only tasks that the Department would consider to be directly supporting work under the new test. For example, work that directly supports the work of a server would also include folding napkins, preparing silverware, and garnishing plates before serving the food to customers. Sweeping under tables would be considered to be directly supporting work if it is performed in and limited to the dining room because keeping the serving area clean assists the performance of a server's tip-producing work. Likewise, work that directly supports the work of a bartender would also include wiping down the surface of the bar and tables in the bar area, cleaning bar glasses and implements used to make drinks behind the bar, arranging the bottles behind the bar, and briefly retrieving from a storeroom a particular beer, wine, or liquor, and supplies such as ice and napkins. Work that directly supports the work of a nail technician would also include cleaning manicure tools, cleaning the floor of the nail salon, and scheduling client appointments and taking customer payments. Work that directly supports the tip-producing work of a parking attendant would include moving cars in a parking lot or parking garage to facilitate the parking of patrons' cars. Work that directly supports the tip-producing work of a hotel housekeeper would include stocking the housekeeping cart. These examples illustrate the nexus between the tip-producing work and the supporting work that is required to conclude that the supporting work directly supports the tip-producing work within the meaning of the proposed regulation. The proposed test allows for some flexibility in determining the nexus between the tip-producing work and the directly supporting work. The Department seeks comment on these examples and seeks input on other occupations and examples that the Department should consider.

Proposed § 531.56(f)(1)(iii) would define *substantial amount of time* to include two categories of time. Under proposed § 531.56(f)(1)(iii), an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds 20 percent of the hours worked during the employee's workweek or (2) is performed for a continuous period of time exceeding 30

minutes. Under proposed § 531.56(f)(1)(iii)(A), if a tipped employee spends more than 20 percent of their workweek performing directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek. Under proposed § 531.56(f)(1)(iii)(B), if a tipped employee spends a continuous, or uninterrupted, period of time performing directly supporting work that exceeds 30 minutes, the employer cannot take a tip credit for that entire period of time that was spent on such directly supporting work. The Department believes that these two measurements of time reflect the manner in which tipped employees are most likely to conduct non-tipped, directly supporting work: On the one hand, tipped employees may do an incidental amount of non-tipped, directly supporting work that is interspersed with their tip-producing work throughout the workday, and on the other hand, tipped employees may be assigned non-tipped, directly supporting work for distinct blocks of time. The Department believes that measuring a "substantial amount of time" in this way provides a uniform and accurate measure of when a tipped employee is still engaged in a tipped occupation such that an employer can pay a reduced cash wage for the time spent on that work, but requests comment on this proposed test.

The first prong of the Department's proposed test provides a tolerance that permits an employer to continue taking a tip credit for some part of the work that its tipped employees perform which directly supports their tip-producing work. However, the Department is proposing in its test to limit the amount of this non-tipped work, in recognition that if a tipped employee engages in a substantial amount of such work, the employee is no longer employed in a tipped occupation. The Department has thus proposed, in part, to define "substantial amount of time" as meaning more than 20 percent of the hours worked in a workweek. A 20 percent limitation is consistent with various other FLSA provisions, interpretations, and enforcement positions setting a 20 percent tolerance for work that is incidental to but distinct from the type of work to which an exemption applies.<sup>43</sup> The Department believes this

<sup>43</sup> See, e.g., 29 U.S.C. 213(c)(6) (permitting 17-year-olds to drive under certain conditions, including that the driving be "occasional and incidental," and defining "occasional and incidental" to, *inter alia*, mean "no more than 20 percent of an employee's worktime in any workweek"); 29 CFR 786.100, 786.150, 786.1,

tolerance is also reasonable and consistent with the Department's previous practice under the 80/20 guidance.

As explained above, prior to 2018, federal courts deferred to the Department's 80/20 guidance, including both the Eighth and the Ninth Circuits. See *Applebee's*, 638 F.3d at 879–81; *Marsh*, 905 F.3d at 623; see also *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014) (describing underlying substantive legal issues by relying on Department's 80/20 guidance and *Applebee's*). District courts also deferred to and relied on the Department's interpretation of the dual jobs regulation.<sup>44</sup> Even after the Department rescinded the 80/20 guidance, most federal courts to consider the issue have declined to defer to the new interpretation. As explained above, many of those district courts independently determined that a 20 percent tolerance is a reasonable interpretation of the dual jobs regulation.<sup>45</sup> The Department thus believes that 20 percent of an employee's workweek is an appropriate tolerance for non-tipped work that is part of the tipped employee's occupation. The Department seeks comments, however, on whether a different portion of the employee's workweek would be appropriate or if another metric would be more appropriate.

In addition to the 20 percent limitation, the proposed regulation also defines "substantial amount of time" to

786.200 (nonexempt work for switchboard operators, rail or air carriers, and drivers in the taxicab business will be considered "substantial if it occupies more than 20 percent of the time worked by the employee during the workweek"); 29 CFR 552.6(b) (defining "companionship services" that are exempt from FLSA requirements to include "care" only if such "care . . . does not exceed 20 percent of the total hours worked per person and per workweek").

<sup>44</sup> See, e.g., *Alverson v. BL Rest. Operations LLC*, No. 16–849, 2017 WL 3493048, at \*5–6 (W.D. Tex. Aug. 8, 2017), *rep. & rec. adopted*, 2018 WL 1057045 (W.D. Tex. Feb. 22, 2018); *White v. NIF Corp.*, No. 15–322, 2017 WL 210243, at \*4 (S.D. Ala. Jan. 18, 2017); *Romero v. Top-Tier Colorado LLC*, 274 F. Supp. 3d 1200, 1206 (D. Colo. 2017); *Knox v. Jones Group*, 201 F. Supp. 3d 951, 960–61 (S.D. Ind. 2016); *Langlands v. JK & T Wings, Inc.*, No. 15–13551, 2016 WL 2733092, at \*3 (E.D. Mich. May 11, 2016); *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 733–34 (D.S.C. 2015); *Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572, 582–84 (S.D.N.Y. 2015); *Schaefer v. Walker Bros. Enters.*, No. 10–6366, 2014 WL 7375565, at \*3 (N.D. Ill. Dec. 17, 2014); *Holder v. MJDE Venture, LLC*, No. 08–2218, 2009 WL 4641757, at \*3–4 (N.D. Ga. Dec. 1, 2009).

<sup>45</sup> The courts reasoned that this limitation is consistent with the qualifiers "occasionally," "part of [the] time," found in § 531.56(e). See, e.g., *Belt*, 401 F. Supp. 3d at 536–37; *Rorie*, 485 F. Supp. 3d at 1042; *Berger*, 430 F. Supp. 3d at 412; *Roberson*, 2020 WL 7265860, at \*7–\*8.

include any continuous period of time that exceeds 30 minutes. This proposal addresses concerns with the 80/20 guidance, which the Department identified in the 2020 Tip final rule, that the guidance did not adequately address the scenario where an employee performs non-tipped, directly supporting work for an extended period of time, and thus essentially ceases to be employed in the tipped occupation for that entire block of time. *See* 85 FR 86769. The 2020 Tip final rule provided an example of a bellhop who performed tipped duties for 8 hours, and worked for an additional 2 hours “cleaning, organizing, and maintaining bag carts.” The Department noted that under the 80/20 guidance, the employer could potentially take a tip credit for the entire 2 hour block of time, even though the bellhop was “engaged in a tipped occupation (bellhop) for 8 hours and a non-tipped occupation (cleaner) for 2 hours.” *Id.* The proposed regulation addresses this concern by requiring employers to pay employees the full cash minimum wage whenever they perform non-tipped work, albeit work that directly supports tipped work, for a continuous block of time that exceeds 30 minutes. The Department’s proposal that an employer cannot take a tip credit for the entire block of time spent on non-tipped work when the work is performed for more than 30 minutes, rather than time that exceeds the 30 minute standard, is premised on the concept that the work is being performed for such a significant, continuous period of time that the tipped employee’s work is no longer being done in support of the tip-producing work, such that the employee is not engaged in a tipped occupation for that entire period.

Particularly because the FLSA’s tip credit provision permits employers to compensate their tipped employees as little as \$2.13 an hour in direct cash wages, it is important to ensure that this reduced direct wage is available to employers only when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute. The tip credit provision allows employers to pay a reduced cash wage based on the assumption that a worker will earn additional money from customer-provided tips—at least \$5.12 per hour in tips. When an employer assigns an employee to perform non-tipped duties continuously for a substantial period of time, such as more than 30 minutes, however, the employee’s non-tipped duties are not being performed in support of the tipped work, and the employee is no

longer earning tips during that time. Therefore, the employee is not engaged in a tipped occupation.

Under the Department’s proposed § 531.56(f)(1)(iii)(B), if a tipped employee performs non-tipped, directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for the entire period of time the non-tipped work is performed. Thus, an employer may take a tip credit for time a server performs directly supporting work such as cleaning the dining room at the end of the day and preparing the tables for the next day’s service, but only if that time does not exceed 30 minutes. An employee who performs non-tipped, directly supporting work for more than 30 minutes does so for a substantial amount of time. The Department believes that a threshold of 30 minutes, the majority of any given work hour, is an appropriate time marker for determining when an employee continuously performing non-tipped work is no longer performing incidental work but instead has ceased to be engaged in their tipped occupation for that entire period. The Department seeks comments, however, on whether a different period of time would better approximate this transition, and on how to best define a substantial amount of time for which the employer should no longer be permitted to pay a cash wage as low as \$2.13 an hour.

The proposed rule also recognizes the different situation where an employee performs incidental, non-tipped work for shorter periods of time. As described above, when an employee performs non-tipped work that directly supports the tip-producing work for 30 minutes or less, proposed § 531.56(f)(1)(iii)(A) provides a general tolerance that permits the employer to take a tip credit for that work before it exceeds 20 percent of the workweek. This tolerance is provided for ease of administration, and in recognition of the fact, as noted above, that most tipped occupations involve an incidental amount of non-tipped work that supports the tip-producing activities and is interspersed with those activities. Such work may also be less foreseeable than when an employer assigns an employee to perform non-tipped directly supporting work continuously for a period of more than 30 minutes, further justifying the tolerance.

The proposed regulation addresses concerns raised in the 2020 Tip final rule that the timeframe used to determine compliance under the Department’s previous 80/20 guidance was unclear. *See* 85 FR 86770. The 20 percent tolerance applies to increments

of directly supporting work spanning 30 continuous minutes or less, and is calculated on a workweek basis. Once an employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any additional time spent on directly supporting work in that workweek and must pay the full minimum wage for that time. If an employee spends more than 30 continuous minutes on work that directly supports the tip-producing work, the employer may not take a tip credit and must pay the full minimum wage for that entire continuous period of time. Any time paid at the full minimum wage would not count towards the 20 percent workweek tolerance. For example, if a server is required to perform an hour of directly supporting work at the end of each of her five 8-hour shifts, each of those hours spent performing directly supporting work must be paid at the full minimum wage and would not count towards the 20 percent workweek tolerance. If that same server also performs 20 minutes of directly supporting work three times each shift, for a total of 1 hour per day, the employer could take a tip credit for the rest of the server’s supporting work because the 5-hour total did not reach the 20 percent tolerance for a 40-hour workweek.

The Department believes that the requirement limiting employer’s ability to pay a reduced cash wage for non-tipped, directly supporting work to less than a substantial amount of time, as discussed above, will not be onerous for employers to implement. The preamble to the 2020 Tip final rule criticized the previous 80/20 guidance, discussing the perceived need for employers to “precisely” track employees’ time spent on non-tipped related duties in order to comply with a percentage-of-time limitation on those duties, and employer’s concerns that such tracking was difficult. *See* 85 FR 86769–70. Upon further review and consideration, however, the Department believes that the limitations on performing non-tipped work included in the proposed rule allow employers ample ability to assign to their tipped employees a non-substantial amount of non-tipped duties that directly support the tip-producing work, without needing to account for employees’ duties minute-by-minute. Twenty percent of an employee’s workweek is a significant amount of time—equal to a full 8 hour workday in a 5-day, 40-hour workweek. Particularly because the proposed guidance provides examples illustrating the type of work

that is part of the tipped occupation, including work that is tip-producing and work that directly supports the tip-producing work, employers should be able to proactively identify work that counts toward the tolerance and assign work to tipped employees accordingly, to avoid going over this tolerance. Similarly, a continuous, uninterrupted block of 30 minutes or more is a significant amount of time, and does not require the minute-by-minute micromanaging with which the 2020 Tip final rule expressed concern. In addition, as noted above, employers are likely to assign such work in a foreseeable manner. As a general matter, “since employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time.” *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 734 (D.S.C. 2015); see also *Marsh*, 905 F.3d at 631 (“[I]t is not impracticable for an employer to keep track of time spent on related tasks.”). Far from being an arbitrary burden, showing that a tipped employee does not perform a substantial amount of non-tipped work is how an employer can properly justify claiming a tip credit rather than directly paying the full minimum wage.

Finally, proposed § 531.56(f)(2) would clarify that an employer cannot take a tip credit for the time a tipped employee spends performing work that is not part of the tipped occupation, defined as any work that does not generate tips and does not directly support tip-producing work. In addition to the work identified in the examples, work that is not part of the tipped occupation of a hotel housekeeper would include cleaning non-residential parts of a hotel, such as a spa, gym, or the restaurant. Work that is not part of the tipped occupation of a busser would include, for example, cleaning the kitchen of the restaurant. Under the proposed rule, all time performing any work that is not part of the tipped occupation must be paid at the full minimum wage. The Department seeks comment on this part of its proposed test, including whether the list of examples appropriately identify work that is not part of the tipped occupation.

The Department requests comments on its proposed revisions to § 531.56(e) and all aspects of the new proposed § 531.56(f).

### C. Proposed § 10.28(b)

The Department also proposes to amend the provisions of the Executive Order 13658 regulations, which address

the hourly minimum wage paid by contractors to workers performing work on or in connection with covered federal contracts. See E.O. 13658, 79 FR 9851 (Feb. 12, 2014). The Executive Order also established a tip credit for workers covered by the Order who are tipped employees pursuant to section 3(f) of the FLSA. The Department proposes to amend § 10.28(b) consistent with its proposed revisions to § 531.56(e) and (f) and seeks comment on these proposed revisions.

### VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations require an agency to consider its need for any information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. This proposed rule does not contain a collection of information subject to Office of Management and Budget approval under the PRA.

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

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>46</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is economically

significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

#### A. Background

In 2018 and 2019, the Department issued new guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time an employee performs related, non-tipped duties—as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); FAB 2019–2 (Feb. 15, 2019); WHD FOH 30d00(f). This guidance thus removed the 20 percent limitation on related, non-tipped duties that existed under the Department’s prior 80/20 guidance. On December 30, 2020, the Department published the 2020 Tip final rule to largely incorporate this 2018–2019 guidance into its regulations. The Department uses the 2018–2019 guidance as a baseline for this analysis because this is what WHD has been enforcing since the 2018–2019 guidance was issued and is similar to the policy codified in the 2020 Tip final rule.

In this NPRM, the Department proposes to withdraw the dual jobs portion of the 2020 Tip final rule and to re-propose new regulatory language that it believes will provide more clarity and certainty for employers, and will better protect employees. Specifically, the Department is proposing to amend its regulations to clarify that an employer may not take a tip credit for its tipped employees unless the employees are performing work that is part of their tipped occupation. This includes work that produces tips, as well as work that directly supports the tip-producing

<sup>46</sup> See 58 FR 51735, 51741 (Oct. 4, 1993).

work, provided that the directly supporting work is not performed for a substantial amount of time. Under the Department's proposal, work that "directly supports" tip-producing work is work that assists a tipped employee to perform the work for which the employee receives tips. In the proposed regulatory text, the Department explains that an employee has performed work that directly supports tip-producing work for a substantial amount of time if the tipped employee's directly supporting work either (1) exceeds, in the aggregate, 20 percent of the hours worked during the employee's workweek or (2) is performed for a continuous period of time exceeding 30 minutes. In order to analyze this regulatory change, the Department has quantified costs, provided an analysis of transfers, and provided a qualitative discussion of benefits. These impacts depend on the interaction between the policy proposed in this NPRM and any underlying market failure—perhaps most notably in this case, the monopsony power created for employers if their workers receive a substantial portion of their compensation in the form of tips.<sup>47</sup>

#### B. Costs

The Department believes that this proposed rule would result in three types of costs to employers: Rule familiarization costs, adjustment costs, and management costs. Rule familiarization and adjustment costs would be one-time costs following the

promulgation of the final rule. Management costs would likely be ongoing costs associated with complying with the rule.

#### 1. Potentially Affected Entities

The Department has calculated the number of establishments that could be affected by this proposed rule using 2019 data from the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW). Because this rule relates to the situations in which an employer is able to take a tip credit under the FLSA, it is unlikely that employers in states without a tipped minimum wage or employers in states with a direct cash wage of over \$7.25 would be affected by this proposal, because they are already paying their staff the full FLSA minimum wage for all hours worked. Therefore, the Department has dropped the following states from the pool of affected establishments: Alaska, Arizona, California, Colorado, Connecticut (Drinking Places (Alcoholic Beverages) only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.<sup>48</sup>

Because the QCEW data only provides data on establishments, the Department has used the number of establishments for calculating all types of costs. The Department acknowledges that for some employers, the costs associated with this proposed rule could instead be incurred at a firm level, leading to an overestimate of costs.<sup>49</sup> Presumably, the headquarters of a firm could conduct the regulatory review for businesses

with multiple locations, but could also require businesses to familiarize themselves with the proposed rule at the establishment level. The Department welcomes comments on whether these costs would be incurred at a firm or establishment level.

The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule, along with a couple of other industries that have tipped workers, which is consistent with using the 2018–2019 guidance as the baseline. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels)), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking Places (Alcoholic Beverages)), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). See Table 1 for a list of the number of establishments in each of these industries. The Department understands that there may be entities in other industries with tipped workers who may review this rule, and welcomes data and information on other industries that should be included in this analysis.

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

Table 1. Number of Establishments in Affected Industries

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

Source: BLS Quarterly Census of Employment and Wages, 2019

<sup>47</sup> Jones, Maggie R. (2016), "Measuring the Effects of the Tipped Minimum Wage Using W-2 Data," CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016-03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>.

<sup>48</sup> Department of Labor, Wage and Hour Division, "Minimum Wages for Tipped Employees," Updated January 1, 2021. <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>.

<sup>49</sup> An establishment is a single physical location where one predominant activity occurs. A firm is

an establishment or a combination of establishments, and can operate in one industry or multiple industries. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.

## 2. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. The Department believes one hour per entity, on average, to be an appropriate review time for this proposed rule. This estimate does not include any time employers spend adjusting their business or pay practices; that is discussed in the adjustment cost section below. Many employers are familiar with a 20 percent tolerance, which is part of what is being proposed in this rule, since the Department enforced a 20 percent tolerance for 30 years prior to the 2018–2019 guidance, albeit in a different way. The Department believes that some employers in the industries listed above do not have any tipped employees, or do not take a tip credit, and would therefore not review the rule at all. This review time therefore represents an average of employers who would spend less than one hour or no time reviewing, and others who would spend more time. The Department welcomes comments on how much time employers would spend reviewing this proposed rule.

The Department's analysis assumes that the rule would be reviewed by Compensation, Benefits, and Job Analysis Specialists (Standard Occupational Classification (SOC) 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019.<sup>50</sup> The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.<sup>51</sup> The Department estimates that regulatory familiarization costs would be \$23,827,236 (470,894 establishments  $\times$  \$50.60  $\times$  1 hour). The Department estimates that all regulatory familiarization costs would occur in Year 1.

## 3. Adjustment Costs

The Department expects that employers may incur adjustment costs associated with this rule. They may

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

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

$\times$  \$50.60  $\times$  1 hour). The Department estimates that all adjustment costs would occur in Year 1.

## 4. Management Costs

The Department also believes that some employers may incur ongoing management costs, because in order to make sure that they can continue to take a tip credit for all hours of an employee's shift, they will have to ensure that tipped employees are not spending more than 20 percent of their time on directly supporting work per workweek, or more than 30 minutes continuously performing such duties. The Department does not believe that these costs will be substantial, because if employers are able to make the upfront adjustments to scheduling, there is less of a need for ongoing monitoring. For example, if employers stop assigning work to tipped employees that will no longer be considered part of the tipped occupation under this proposed rule, this will be a one-time change that does not necessitate ongoing monitoring. Additionally, employers may have also incurred similar management costs under the 2018–2019 guidance, because in order to take a tip credit for all hours, they would have had to ensure that tipped employees did not perform duties not related to their tipped occupation, and that employees' related, non-tipped work was contemporaneous with or for a reasonable time before or after the tipped work.

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

The Department's analysis assumes that the management tasks would be

<sup>50</sup> BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm). Data for 2020 are now available, but the Department believes that it is more appropriate to use 2019 data for the analysis, because wages could have been affected by structural changes associated with the COVID–19 pandemic. The Department has aligned the year of the cost data with the pre-pandemic data used in the transfer analysis discussed later.

<sup>51</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU102000000000D and CMU103000000000D.

performed by Food Service Managers (SOC 11–9051) or employees of similar status and comparable pay. The median hourly wage for these workers was \$26.60 per hour in 2019.<sup>52</sup> The Department also assumes that benefits are paid at a rate of 46 percent and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$43.36 (\$26.60 + \$12.24 + \$4.52). The Department estimates that management costs would be \$177,227,926 (470,894 establishments × \$43.36 × 8.68 hours). The Department estimates that these management costs would occur each year.

## 5. Cost Summary

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

## C. Transfers

### 1. Introduction

As previously discussed, the Department recognizes the concerns that it did not adequately assess the impact of the dual jobs provision of the 2020 Tip final rule. Therefore, for this proposed rule, the Department provides the following analysis of the transfers associated with the proposed changes to its dual jobs regulations, pursuant to which employers would not be able to take a tip credit for a substantial amount of directly supporting work, defined as 20 percent of a tipped employee's workweek or a continuous period of more than 30 minutes. The Department has performed two different transfer analyses for this proposed rule. The first analysis refines a methodological approach similar to the one described by the Economic Policy Institute (EPI) in response to the Department's NPRM for the 2020 Tip final rule, which proposed to codify the Department's 2018–2019 guidance, which replaced the 80/20

approach with a different related duties test. *See* 84 FR 53956.<sup>53</sup> This analysis helps demonstrate the range of potential transfers that may result from this proposed rule. The second analysis is a retrospective analysis that looks at changes to total hourly wages following the 2018–2019 guidance to help inform whether changes would occur in the other direction following this proposed rule.

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

### 2. Potential Transfer Analysis

Under the approach outlined in the 2020 Tip final rule, and as originally put forth in the 2018–2019 guidance, employers can take a tip credit for related, non-tipped duties so long as they are performed “contemporaneously with” or for “a reasonable time immediately before or after tipped duties.” Additionally, the 2018–2019 guidance uses the Occupational Information Network (O\*NET) to determine whether a tipped employee's non-tipped duties are related to the employee's tipped occupation.<sup>54</sup> As explained above, the Department is concerned that the terms “contemporaneously with” and “a reasonable time immediately before or after tipped duties” do not provide clear limits on the amount of time workers can spend on non-tipped tasks for which an employer is permitted to take a tip credit. Under the 2018–2019 guidance, transfers would have arisen if employers required tipped employees for whom they take a tip credit, such as servers and bartenders, to perform more related, non-tipped duties, such as cleaning and setting up tables, washing glasses, or preparing garnishes for plates or drinks, than they would have under the prior 80/20 guidance. Because employers would be taking a tip credit for these additional related, non-tipped

duties instead of paying the full minimum wage, tipped employees would earn less pay because they would be spending less time on tip-producing duties, such as serving customers.

However, to retain the tipped workers that they need, employers would have needed to pay these workers as much as their “outside option,” that is, the hourly wage that they could receive in their best alternative non-tipped job with a similar skill level requirement to their current position. For each tipped employee, the Department assumed that by assigning non-tipped work, an employer could have only lowered the tipped employee's total hourly pay rate including tips if the employee's current pay rate was greater than the predicted outside-option wage from a non-tipped job.<sup>55</sup> As a measure of the upper bound of the amount of tips that employers could have reallocated to pay for additional hours of work, the Department estimated the difference between a tipped worker's current hourly wage and the worker's outside-option wage.

The Department is specifically contemplating an example in which, prior to 2018, a restaurant employed multiple dishwashers and multiple bartenders. The dishwashers earned a direct cash wage of \$7.25 per hour and spent all of their time washing dishes and doing other kitchen duties. The bartenders earned a direct cash wage of \$2.13 per hour and spent all of their time tending bar. Following the removal of the 80/20 approach in the 2018–2019 guidance, the restaurant decided to employ fewer dishwashers, and instead hire one additional bartender and have the bartenders all take turns washing bar glasses throughout their shifts, adding up to more than 20 percent of their time. In this situation, the bartenders are each earning fewer tips because they are spending less time on tip-producing duties, such as preparing drinks, and more time on non-tip-producing duties, such as washing bar glasses. The employers' wage costs have also decreased, as they are paying more workers a direct cash wage of \$2.13 instead of \$7.25. This results in a transfer from employees to employers. This transfer would be reversed following the reinstatement of a time limit on directly supporting work in this proposed rule. The Department is requesting comments and data on how prevalent staffing changes like this were following the 2018–2019 guidance of

<sup>53</sup> Shierholz, H. and D. Cooper. 2019. “Workers will lose more than \$700 million annually under proposed DOL rule.” Available at <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

<sup>54</sup> As explained above, the 2020 Tip final rule—which is not yet in effect—provided that a non-tipped duty is merely presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O\*NET.

<sup>55</sup> This methodology of estimating an outside wage option was used in the Department's 2020 Tip Regulations under the Fair Labor Standards Act (FLSA) final rule to determine potential transfer of tips with the expansion of tip pooling.

<sup>52</sup> BLS Occupational Employment and Wage Statistics (OEWS), May 2019 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2019/may/oes\\_nat.htm](https://www.bls.gov/oes/2019/may/oes_nat.htm).

the 2020 Tip Final Rule. The Department also requests comments on whether employers would make staffing changes following this proposed rule.

#### a. Defining Tipped Workers

The Department used individual-level microdata from the 2018 Current Population Survey (CPS), a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Outgoing Rotation Group (CPS-ORG) and provide more detailed information about those surveyed.<sup>56</sup> The Department used 2018 CPS-ORG data to avoid any unintentional impacts from the issuance of the 2018–2019 guidance. Because this analysis first looks at transfers that could have occurred following the 2018–2019 guidance, and uses that estimate to inform what the transfers would be following this rule, all data tables in this analysis include estimates for the year 2018, with dollar amounts inflated to \$2019 using the GDP deflator and further refinements as discussed below.

The Department included workers in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic Beverages)) and 722511 (Full-Service Restaurants); referred to in this analysis as “restaurants and drinking places.” The two occupations are classified under BLS Standard Occupational Classification (SOC) codes SOC 35–3031 (Waiters and Waitresses) and SOC 35–3011 (Bartenders).<sup>57</sup> The Department

considered these two occupations because they constitute a large percentage of the workers in these occupations receive tips (see Table 2 for shares of workers in these occupations who may receive tips). The Department understands that there are other occupations in these industries beyond servers and bartenders with tipped workers, such as SOC 35–9011 (Dining Room and Cafeteria Attendants and Bartender Helpers) and SOC 35–9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop). Additionally, there may also be some tipped workers in other industries who may be affected such as nail technicians, parking attendants, and hotel housekeepers.<sup>58</sup> The Department welcomes comments on which occupations would be affected, and therefore should be included in the analysis.

Table 2 presents the total number of bartenders and wait staff in restaurants and drinking places. The number of workers is then limited to those potentially affected by the changes proposed in this NPRM. This excludes workers in states that do not allow a tip credit, workers in states that requires a direct cash wage of at least \$7.25, and workers in other states who are paid a direct cash wage of at least the full FLSA minimum wage of \$7.25 (*i.e.*, employees whose employers are not taking a tip credit under the FLSA).<sup>59</sup> As alluded to above, because this proposed rule relates to the situations in which an

Waitresses (Census Code 4110). The industries correspond to Restaurants and Other Food Services (Census Code 8680) and Drinking Places, Alcoholic Beverages (Census Code 8690).

<sup>58</sup> The Department considered the additional set of occupations: SOC 39–5090 (Miscellaneous Personal Appearance Workers), SOC 39–5012 (Hairdressers, hairstylists, and cosmetologists), SOC 39–5011 (Barbers), SOC 53–6021 (Parking Attendants), SOC 37–2012 (Maids and Housekeeping Cleaners), and SOC 31–9011 (Massage Therapists). Workers in these occupations reported usually earning overtime pay, tips, and commissions (OTTC) less often than in the tipped occupations that the Department included in its analysis (15.2 percent compared to 56.1 percent). Additionally, a considerably lower proportion of workers in this additional set of occupations reported earning a direct wage below the federal minimum wage per hour (1.2 percent compared to 27.8 percent).

<sup>59</sup> Workers considered not affected by the 20 percent limitation were those in the following states that either do not allow a tip credit or require a direct cash wage of at least \$7.25 as of 2019: Alaska, Arizona, California, Colorado, Connecticut (Bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

employer takes a tip credit, it is unlikely that employees of employers that cannot or otherwise do not take a tip credit would be affected by this proposal. Both of these populations were also excluded from the analysis of potential transfers. The Department also assumed that nonhourly workers are not tipped employees and excluded these workers from the potentially affected population.<sup>60</sup> Lastly, workers earning a direct wage below \$2.13 per hour were dropped from the analysis.<sup>61</sup> This results in 630,000 potentially affected workers in these industries and occupations.

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips. CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.<sup>62</sup> Therefore, the Department assumed bartenders and wait staff who responded affirmatively to this question receive tips. Table 2 presents the share of potentially affected bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2018: Approximately 86 percent of bartenders and 78 percent of wait staff.

<sup>60</sup> The Department made this assumption because tipped employees are generally paid hourly and because the CPS does not include information on tips received for nonhourly workers. Without knowing the prevalence of tipped income among nonhourly workers, the Department cannot accurately estimate potential transfers from these workers. However, the Department believes the transfer from nonhourly workers will be small because only 10 percent of wait staff and bartenders in restaurants and drinking places are nonhourly and the Department believes nonhourly workers have a lower probability of receiving tips.

<sup>61</sup> The Department was unable to determine whether these workers were earning a direct cash wage below \$2.13 because their employers were not complying with the minimum wage requirements of the FLSA, or whether the data was incorrect.

<sup>62</sup> According to BLS Current Population Survey data, in 2018, workers in service occupations worked an average of 35.2 hours per week. See <https://www.bls.gov/cps/aa2018/cpsaat23.htm>.

<sup>56</sup> See Current Population Survey, U.S. Census Bureau, <https://www.census.gov/programs-surveys/cps.html> (last visited April 28, 2021); The Department used the Center for Economic and Policy Research. 2020. CPS ORG Uniform Extracts, Version 2.5. Washington, DC, <http://cedprdata.org/cps-uniform-data-extracts/cps-outgoing-rotation-group/cps-org-data/> (last visited April 27, 2021).

<sup>57</sup> In the CPS, these occupations correspond to Bartenders (Census Code 4040) and Waiters and

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

Occupation	Total workers (millions)	Potentially affected workers (millions) <sup>a</sup>	Potentially affected workers who report earning OTTC	
			Workers (millions)	Percent
Total .....	2.28	0.63	0.50	79.4
Bartenders .....	0.37	0.09	0.07	85.5
Waiters/Waitresses .....	1.91	0.54	0.42	78.4

Source: CEPR, 2018 CPS—ORG.

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

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

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

Of the 500,000 bartenders and wait staff who receive OTTC, only 310,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As

shown in Table 3, 69 percent of bartenders' earnings (an average of \$339 per week) and 68 percent of wait staff's earnings (an average of \$251 per week) were from overtime pay, tips, and commissions in 2018. For workers who

reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported their OTTC amounts (69 or 68 percent) was applied to their weekly total income to estimate weekly tips.

TABLE 3—PORTION OF INCOME FROM OVERTIME PAY, TIPS, AND COMMISSIONS FOR BARTENDERS AND WAIT STAFF IN RESTAURANTS AND DRINKING PLACES

Occupation	Those who report the amount earned in OTTC			
	Workers	Average weekly earnings	Average weekly OTTC	Percent of earnings attributable to OTTC
Total .....	309,690	\$386.44	\$262.56	68
Bartenders .....	40,354	491.03	338.67	69
Waiters and waitresses .....	269,335	370.77	251.16	68

Source: CEPR, 2018 CPS—ORG, inflated to \$2019 using the GDP deflator.

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

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

b. Outside-Option Wage

The Department assumed that employers only reduce the hourly wage rate of tipped employees for whom they are taking a tip credit if the tipped employee's total hourly wage, including the tips the employee retains, are greater than the "outside-option wage" that the employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used a quartile regression analysis to predict the wage that these workers would earn in a non-tipped job. Hourly wage was regressed on age, age squared, age cubed, education, gender, race, ethnicity, citizenship, marital status, veteran status, metro area status, and state for a sample of non-tipped workers.<sup>63</sup> The Department restricted the regression sample to non-tipped workers earning at least the applicable state minimum wage (inclusive of OTTC), and those

who are employed. This analysis excludes workers in states where the law prohibits employers from taking a tip credit or that require a direct cash wage of at least \$7.25.<sup>64</sup>

In calculating the outside-option wage for tipped workers, the Department defined the comparison sample as non-tipped workers in a set of occupations that are likely to represent outside options. The Department determined the list of relevant occupations by exploring the similarity between the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the O\*NET system for occupations that share important similarities with wait staff and bartenders—the occupations had to require "customer and personal service" knowledge and "service orientation"

skills.<sup>65</sup> The list was further reduced by eliminating occupations that are not comparable to the wait staff and bartender occupations in terms of education and training, as wait staff and bartender occupations do not require formal education or training. See Appendix Table 1 for a list of these occupations.

The regression analysis calculates a distribution of outside-option wages for each worker. The Department used the same percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.<sup>66</sup> This method

<sup>63</sup> For workers who had missing values for one or more of these explanatory variables we imputed the missing value as the average value for tipped/non-tipped workers.

<sup>64</sup> These states are Alaska, Arizona, California, Connecticut (bartenders only), Hawaii, Minnesota, Montana, Nevada, New York, Oregon, and Washington.

<sup>65</sup> For a full list of all occupations on O\*NET, see <https://www.onetcenter.org/reports/Taxonomy2010.html>.

<sup>66</sup> Because of the uncertainty in the estimate of the percentile ranking of the worker's current wage, the Department used the midpoint percentile for workers in each decile. For example, workers whose current wage was estimated to be in the zero to tenth percentile range were assigned the predicted fifth percentile outside-option wage, those with wages estimated to be in the eleventh to twentieth percentile were assigned the predicted fifteenth percentile outside-option wage, etc.

assumes that a worker's position in the wage distribution for wait staff and bartenders reflects their position in the wage distribution for the outside-option occupations.

### c. Potential Transfer Calculation

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

- The positive differential between a worker's current earnings (wage plus tips) and their predicted outside-option wage,
- the positive differential between a worker's current earnings and the state minimum wage, and
- the total tips earned by the worker.

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 cannot earn less than their applicable state minimum wage in non-tipped occupations. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than their total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. The Department subtracted predicted overtime pay to better estimate total tips.<sup>67</sup> For workers who reported receiving OTTC, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for wait staff or bartenders (see Table 2).

To determine the aggregate annual potential total tip transfer, the Department multiplied the weighted sum of weekly tip transfers by 45.2 weeks—the average weeks worked in a year for wait staff and bartenders in the 2018 CPS Annual Social and Economic Supplement. The resulting annual estimate of the upper bound of potential transfers from tipped employees to employers is \$714 million). This estimate is an upper bound, because following the 2018–2019 guidance, an employer could have, at most, had a tipped worker do more related non-tipped work until their overall earnings reached their outside option wage. In order to further refine this estimate, and adjust down this upper bound, the Department requests data on how much related non-tipped work tipped employees were performing prior to the 2018–2019 guidance and how that changed with the removal of the 80/20 approach. The Department requests

<sup>67</sup> Predicted overtime pay is calculated as  $(1.5 \times \text{base wage}) \times \text{weekly hours worked over 40}$ .

information on whether employers increased the number of employees for which they took a tip credit, and decreased the number of employees for which they paid a direct cash wage of at least \$7.25. The Department also requests data about how the amount of time that employees spend on directly supporting work would change following the requirements proposed in this rule.

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

1. Lower the weekly earnings of these employees if their weekly hours worked remain the same; or
2. Require that these employees work more hours per week to earn the same amount per week.

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

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

The Department believes that these estimates are also an overestimate, because they assume that every employer that takes a tip credit and for whom it was economically beneficial would lower the hourly rate (including tips) of tipped employees to their outside-option wage. In reality, even when it is seemingly economically beneficial from this narrow perspective,

many employers may not have changed their non-tipped task requirements with the removal of the 20 percent limitation because it would have required changes to the current practice to which their employees were accustomed. There are reasons it is not appropriate to assume that all employers are able to extract all the earnings above the outside-option wage of their employees for whom they take a tip credit. For example, decreasing workers' hourly earnings might reduce morale, leading to lower levels of efficiency or customer service. The reduction in workers' earnings may also lead to higher turnover, which can be costly to a company. Part of this turnover may be due to workers' wages falling below their reservation wage and causing them to exit the labor force.<sup>68</sup> In support of this, researchers have found evidence of downward nominal wage stickiness, meaning that employees rarely experience nominal wage decreases with the same employer.<sup>69</sup> Although in this case the direct wage paid by the employer would not change, these tipped employees' total hourly pay including tips would decrease due to the employer requiring more work on non-tipped tasks leading to earning fewer tips per hour. While some empirical evidence, such as the Kahn paper cited above, indicates that employers are unlikely to make changes in work requirements that would lower employees' nominal hourly earnings, this evidence may not hold in low-wage industries such as food service and in times of structural changes to the economy, such as during the COVID-19 pandemic.<sup>70</sup> Additionally, even if employers may be constrained from having current employees take on more non-tipped work, they could institute these changes for any newly hired employees, so the reduction in average earnings would be over a longer-term time horizon.

The Department believes that another potential reason these transfer estimates

<sup>68</sup> A worker's reservation wage is the minimum wage that the worker requires to participate in the labor market. It roughly represents the worker's monetary value of an hour of leisure. If the worker's reservation wage is greater than their outside option wage, the worker may exit the labor market if tips are reduced.

<sup>69</sup> See for example Kahn, S. 1997. "Evidence of Nominal Wage Stickiness from Microdata." *The American Economic Review* 87(5): 993–1008. Hanes, C. 1993. "The Development of Nominal Wage Rigidity in the Late 19th Century." *The American Economic Review* 83(4): 732–756. Kawaguchi, D. and F. Ohtake. 2007. "Testing the Morale Theory of Nominal Wage Rigidity." *ILR Review* 61(1): 59–74. Kaur, S. 2019. "Nominal Wage Rigidity in Village Labor Markets." *American Economic Review* 109(10): 3585–3616.

<sup>70</sup> See Section VI.E. for a more detailed discussion of the effects of the COVID-19 pandemic.

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

However, the Department does not know to what extent this overestimate has occurred, because data is lacking on how many employers stopped taking a tip credit to expand their tip pools following the CAA amendments. Employers may not have acted on new incentives to shift away from their current tip credit arrangements. Additionally, some states and local areas may not allow employer-mandated tip pooling, so employers in these areas would not have made adjustments following the change in tip pooling provisions. Moreover, there is uncertainty about the future trajectory of state employment regulations; if state-level prohibitions on mandatory tip pooling were to become more widespread, the scope of the tip pooling provisions’ impacts could decrease and, in turn, the scope for this NPRM’s impacts could increase (thus potentially making the \$714 million estimate less of an overstatement farther in the future than in the near-term). Lastly, the CAA amendments were enacted in March 2018, so although the Department expects that it may have taken employers time to implement changes to their pay practices, any employers that stopped taking a tip credit in order to institute a nontraditional tip pool directly following the CAA amendments could have already been excluded from the transfer calculation. The Department does not know if employers would have changed their usage of the tip credit following the CAA amendments, or

wanted to make the change until the codification of the CAA in the 2020 Tip final rule. As noted above, the tip pooling provisions of the 2020 Tip final rule went into effect on April 30, 2021.

The Department also looked at the share of workers earning a direct wage of less than \$7.25 in 2018 and 2019, and found no statistically significant difference between those two years. Because of this, and for all of the reasons discussed above, the Department has not quantified the reduction in transfers associated with the fact that the CAA allowed employers to institute nontraditional tip pools that include back-of-the-house workers. However, it welcomes comments on the extent to which employers stopped taking a tip credit in order to expand their tip pools to include back-of-the-house workers.

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

The Department was unable to determine what proportion of the total tips estimated to have been potentially transferred from these workers were realistically transferred following the replacement of its prior 80/20 guidance with the 2018–2019 guidance. The Department assumes that the likely potential transfers were somewhere between a lower bound of zero and an upper bound of \$714million, depending on interactions between federal and state-level policies. The Department believes that the reasons the estimate is an overestimate outweigh the reasons the estimate is an underestimate, but requests comments and data to help inform this assumption. Therefore, the Department believes that this proposed rule would result in transfers from employers to employees, but at a fraction of the upper bound of transfers.

The Department does not have data to determine what percentage of the maximum possible transfers is likely to result from this proposed rule, and welcomes comments and data to help inform this analysis.

If the proposal results in transfers to tipped workers, it could also lead to increased earnings for underserved populations. Using data from the American Community Survey, the National Women’s Law Center found that about 70 percent of tipped workers are women and 26 percent of tipped

workers are women of color.<sup>71</sup> Tipped workers also have a poverty rate of over twice that of non-tipped workers.<sup>72</sup>

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

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

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

This lack of a significant decline in tips and total wages could imply that employers had not directed employees to do more non-tipped work following the guidance, and that there would also be little to no transfers associated with the requirement put forth in the proposed rule. However, it is also possible that employers had made no changes in response to the guidance, but would have shifted employees’ duties following the 2020 Tip final rule. As noted above, federal courts largely declined to defer to the Department’s 2018–2019 guidance, and this may have influenced employer’s decisions as well.<sup>73</sup> Additionally, it may be that the time period is too short to really observe

<sup>71</sup> National Women’s Law Center, “Women in Tipped Occupations, State by State,” May 2019. <https://nwlc.org/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf>.

<sup>72</sup> Sylvia A. Allegretto and David Cooper, “Twenty-three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage,” July 10, 2014. <https://files.epi.org/2014/EPI-CWED-BP379.pdf>.

<sup>73</sup> *See supra* note 3 (identifying cases in which courts declined to defer to the 2018–19 guidance).

a meaningful difference. The Department chose not to examine data from 2020, as average hourly wages during that year increased as low-wage workers in the leisure and hospitality industry were out of work due to the COVID-19 pandemic, making meaningful comparisons difficult. Furthermore, as noted elsewhere in this regulatory impact analysis, other tip-related policy changes occurred in 2018, thus creating challenges in estimating impacts attributable to each such policy. The Department welcomes comments and data on this analysis, specifically whether employers made changes in response to the 2018–2019 guidance, or whether they were planning to make changes until after the 2020 Tip final rule.

#### D. Benefits and Cost Savings

The Department believes that one benefit of this proposed rule is increased clarity for both employers and workers. In the 2020 Tip final rule, the Department said that it would not prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. However, the Department did not define “contemporaneously” or a “reasonable time immediately before or after.” If the 2020 Tip final rule’s revisions to the dual jobs regulations had gone into effect, the Department believes that the lack of clear definitions of these terms could have made it more difficult for employers to comply with the regulations and more difficult for WHD to enforce them. The reinstatement of the historically used 20 percent work week tolerance of work that does not produce tips but is part of the tipped occupation, together with the 30 continuous minute limit on directly supporting work, along with examples and explanations, will make it easier for employers to understand their obligations under the Fair Labor Standards Act, and will ensure that workers are paid the wages that they are owed.

Under this proposed rule, employers will also no longer need to refer to O\*NET to determine whether a tipped employee’s non-tipped duties are related to their tipped occupation. The duties listed in O\*NET could change over time, so an employer would have had to make sure to regularly review the site to ensure that they are in compliance. This proposed rule could result in cost savings related to employers’ time referencing O\*NET.

The Department welcomes comments on other cost savings associated with the clarity provided by this rule.

As noted previously in this regulatory impact analysis, the phenomenon of tipping can create monopsony power in the labor market. As a result, the relationship between minimum wages for tipped employees and employment of such workers has been estimated by some to be quadratic—with employment increasing over some range of minimum wage increases and decreasing over a further range.<sup>74</sup> Although this NPRM does not change the minimum direct cash wage that must be paid when an employer claims a tip credit, one way that an employer could comply with the requirements proposed in this rule is to pay tipped workers a direct cash wage of at least \$7.25 for all hours worked. An employer could discontinue taking a tip credit if they found it more beneficial not to limit the amount of directly supporting work performed by a tipped employee. The Department welcomes comments on the likelihood of this outcome and data that would help facilitate quantification of such changes.

The Department also welcomes comments and data on additional benefits of this proposed rule.

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

The Department notes that this analysis relies on data from 2018 and 2019, which is prior to the COVID-19 pandemic. Because many businesses were shut down during 2020 or had to change their business model, especially restaurants, the economic situation for tipped workers likely changed due to the pandemic. For example, a survey from One Fair Wage found that 83 percent of respondents reported that their tips had decreased since COVID-19, with 66 percent reporting that their tips decreased by at least 50 percent.<sup>75</sup> This reduction in tips received could result in a decrease in the amount of transfers calculated above.

The labor market has likely changed for tipped workers during the pandemic, and could continue to change following the recovery from the pandemic,

<sup>74</sup> Jones, Maggie R. (2016). “Measuring the Effects of the Tipped Minimum Wage Using W-2 Data,” CARRA Working Paper Series, U.S., Census Bureau, Working Paper 2016-03, <https://www.census.gov/content/dam/Census/library/working-papers/2016/adrm/carra-wp-2016-03.pdf>; Wessels, Walter John (1997). “Minimum Wages and Tipped Servers,” *Economic Inquiry* 35: 334–349, April 1997.

<sup>75</sup> One Fair Wage, “Service Workers’ Experience of Health & Harassment During COVID-19”, November 2020. [https://onefairwage.site/wp-content/uploads/2020/11/OFW\\_COVID\\_WorkerExp\\_Emb-1.pdf](https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf).

especially in the restaurant business. The full-service restaurant industry lost over 1 million jobs since the beginning of the pandemic,<sup>76</sup> and by the end of 2020, over 110,000 restaurants had closed permanently.<sup>77</sup> These industry changes could impact workers’ wages, as well as their ability and willingness to change jobs. There may also be other factors such as safety influencing workers’ choice of workplace, which could distort labor market assumptions and behavior. Workers that value the security and safety of their job could be less willing to leave for another job, even if their net earnings decreased, and this could have an impact on the outside-option analysis.

The Department welcomes data and information on how tipped workers were affected by the pandemic, and how the analysis discussed in this proposed rule would be adjusted to account for these changes.

#### VIII. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this proposed rule to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB).<sup>78</sup> The Department limited this analysis to the industries that were acknowledged to have tipped workers in the 2020 Tip final rule. These industries are classified under the North American Industry Classification System (NAICS) as 713210 (Casinos (except Casino Hotels), 721110 (Hotels and Motels), 721120 (Casino Hotels), 722410 (Drinking

<sup>76</sup> BLS Current Employment Statistics, <https://www.bls.gov/ces/>. Series ID CES7072251101.

<sup>77</sup> Carolina Gonzales, “Restaurant Closings Top 110,000 With Industry in ‘Free Fall,’” December 7, 2020. <https://www.bloomberg.com/news/articles/2020-12-07/over-110-000-restaurants-have-closed-with-sector-in-free-fall>.

<sup>78</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

Places (Alcoholic Beverages), 722511 (Full-Service Restaurants), 722513 (Limited Service Restaurants), 722515 (Snack and Nonalcoholic Beverage Bars), and 812113 (Nail Salons). As discussed in Section IV.B.1, there are 470,894 potentially affected establishments. The QCEW does not provide size class data for these detailed industries and states, but the Department calculates that for all

industries nationwide, 99.8 percent of establishments have fewer than 500 employees. If we assume that this proportion holds true for the affected states and industries in our analysis, then there are 469,952 potentially affected establishments with fewer than 500 employees.

The Year 1 per-entity cost for small business employers is \$477.56, which is the regulatory familiarization cost of

\$50.60, plus the adjustment cost of \$50.60, plus the management cost of \$376.36. For each subsequent year, costs consist only of the management cost. See Section IV.B for a description of how the Department calculated these costs. The Department has provided tables with data on the impact on small businesses, by size class, for each industry included in the analysis.

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Table 4.

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

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

Table 5

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

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

Table 6

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

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

Table 7

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

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

Table 8

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

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

Table 9

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

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

Table 10

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

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

Table 11

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

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

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

#### IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>79</sup> requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of

\$165 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least one year.<sup>80</sup> This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and

<sup>80</sup> Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

<sup>79</sup> See 2 U.S.C. 1501.

relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and Tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

#### A. Authorizing Legislation

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

#### 1. Assessment of Costs and Benefits

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

The Department determined that the proposed rule would result in Year 1 total costs for the private sector of \$224.9 million, for regulatory familiarization, adjustment costs, and management costs. The Department

determined that the proposed rule would result in management costs of \$177.2 million in subsequent years. Furthermore, the Department estimates that there may be substantial transfers experienced as UMRA-relevant expenditures by employers.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.<sup>81</sup> However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of \$53.6 billion to \$107.2 billion (using 2019 GDP).<sup>82</sup> A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be \$224.9 million. Given OMB's guidance,

the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

#### X. Executive Order 13132, Federalism

The Department has (1) reviewed this delay in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### XI. Executive Order 13175, Indian Tribal Governments

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

### APPENDIX TABLE 1—LIST OF OCCUPATIONS INCLUDED IN THE OUTSIDE-OPTION REGRESSION SAMPLE

Amusement and Recreation Attendants.  
 Bus Drivers, School or Special Client.  
 Bus Drivers, Transit and Intercity.  
 Cashiers.  
 Childcare Workers.  
 Concierges.  
 Door-To-Door Sales Workers, News and Street Vendors, and Related Workers.  
 Driver/Sales Workers.  
 Flight Attendants.  
 Funeral Attendants.  
 Hairdressers, Hairstylists, and Cosmetologists.  
 Home Health Aides.  
 Hotel, Motel, and Resort Desk Clerks.  
 Insurance Sales Agents.  
 Library Assistants, Clerical.  
 Maids and Housekeeping Cleaners.  
 Manicurists and Pedicurists.  
 Massage Therapists.  
 Nursing Assistants.  
 Occupational Therapy Aides.  
 Office Clerks, General.  
 Orderlies.  
 Parking Lot Attendants.  
 Parts Salespersons.  
 Personal Care Aides.  
 Pharmacy Aides.  
 Pharmacy Technicians.  
 Postal Service Clerks.  
 Real Estate Sales Agents.  
 Receptionists and Information Clerks.  
 Recreation Workers.  
 Residential Advisors.  
 Retail Salespersons.  
 Sales Agents, Financial Services.  
 Sales Representatives, Wholesale and Manufacturing, Except Technical and Scientific Products.  
 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive.  
 Social and Human Service Assistants.

<sup>81</sup> See 2 U.S.C. 1532(a)(4).

<sup>82</sup> According to the Bureau of Economic Analysis, 2019 GDP was \$21.43 trillion. [https://www.bea.gov/system/files/2020-02/gdp4q19\\_2nd\\_0.pdf](https://www.bea.gov/system/files/2020-02/gdp4q19_2nd_0.pdf).

## APPENDIX TABLE 1—LIST OF OCCUPATIONS INCLUDED IN THE OUTSIDE-OPTION REGRESSION SAMPLE—Continued

Statement Clerks.  
 Stock Clerks, Sales Floor.  
 Subway and Streetcar Operators.  
 Taxi Drivers and Chauffeurs.  
 Telemarketers.  
 Telephone Operators.  
 Tellers.  
 Tour Guides and Escorts.  
 Travel Agents.  
 Travel Guides.

**List of Subjects****29 CFR Part 10**

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

**29 CFR Part 531**

Wages.

For the reasons set forth above, the Department proposes to amend title 29, parts 10 and 531, of the Code of Federal Regulations as follows:

**PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS**

■ 1. The authority citation for part 10 continues to read as follows:

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

■ 2. Amend § 10.28 by revising paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

**§ 10.28 Tipped employees.**

\* \* \* \* \*

(b) \* \* \*

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

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

(i) *Work that is part of the tipped occupation.* Any work performed by the

tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation provided it is not performed for a substantial amount of time.

(A) *Tip-producing work.* Any work for which tipped employees receive tips is tip-producing work. A server's tip-producing work includes waiting tables; a bartender's tip-producing work includes making and serving drinks and talking to customers; a nail technician's tip-producing work includes performing manicures and pedicures.

(B) *Directly supports.* Work that directly supports tip-producing work is also part of the tipped occupation provided that it is not performed for a substantial amount of time. Work that directly supports the work for which employees receive tips is work that assists a tipped employee to perform the work for which the employee receives tips. Work performed by a server that directly supports the tip-producing work includes, for example, preparing items for tables so that the servers can more easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include slicing and pitting fruit for drinks so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail technician would include cleaning the pedicure baths between customers so that the nail technicians can begin customers' pedicures without waiting.

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

(1) For any workweek, the directly supporting work exceeds 20 percent of

the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or

(2) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any of that continuous period of time.

(ii) *Work that is not part of the tipped occupation.* Work that is not part of the tipped occupation is any work that does not generate tips and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time. For example, preparing food or cleaning the bathroom is not part of a server's occupation. Preparing food or cleaning the dining room is not part of a bartender's occupation. Ordering supplies for the nail salon is not part of a nail technician's occupation.

\* \* \* \* \*

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

■ 3. The authority citation for part 531 continues to read as follows:

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

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

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

\* \* \* \* \*

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

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

(1) *Work that is part of the tipped occupation.* Any work performed by the tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation provided it is not performed for a substantial amount of time.

(i) *Tip-producing work.* Any work for which tipped employees receive tips is tip-producing work. A server's tip-producing work includes waiting tables; a bartender's tip-producing work includes making and serving drinks and talking to customers; a nail technician's tip-producing work includes performing manicures and pedicures.

(ii) *Directly supports.* Work that directly supports tip-producing work is also part of the tipped occupation provided that it is not performed for a substantial amount of time. Work that directly supports the work for which employees receive tips is work that assists a tipped employee to perform the work for which the employee receives tips. Work performed by a server that directly supports the tip-producing work includes, for example, preparing items for tables so that the servers can more easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include slicing and pitting fruit for drinks so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail technician would include cleaning all the pedicure baths between customers so that the nail technicians can begin customers' pedicures without waiting.

(iii) *Substantial amount of time.* An employer can take a tip credit for the

time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:

(A) For any workweek, the directly supporting work exceeds 20 percent of the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or

(B) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any of that continuous period of time.

(2) *Work that is not part of the tipped occupation.* Work that is not part of the tipped occupation is any work that does not generate tips and does not directly support tip-producing work. If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time. For example, preparing food or cleaning the bathroom is not part of a server's occupation. Preparing food or cleaning the dining room is not part of a bartender's occupation. Ordering supplies for the nail salon is not part of a nail technician's occupation.

**Jessica Looman,**

*Principal Deputy Administrator, Wage and Hour Division.*

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**BILLING CODE 4510-27-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2021-0416]

RIN 1625-AA00

#### Safety Zone; Sabine River, Orange, TX

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a temporary safety zone for certain navigable waters of the Sabine River, extending the entire width of the

river, adjacent to the public boat ramp located in Orange, TX. The safety zone is necessary to protect persons and vessels from hazards associated with a high-speed boat race competition in Orange, TX. Entry of vessels or persons into this zone would be prohibited unless authorized by the Captain of the Port Marine Safety Unit Port Arthur or a designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before July 8, 2021.

**ADDRESSES:** You may submit comments identified by docket number USCG-2021-0416 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409-719-5086, email [Scott.K.Whalen@uscg.mil](mailto:Scott.K.Whalen@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### II. Background, Purpose, and Legal Basis

On April 29, 2021, the Coast Guard published a temporary safety zone to protect persons and vessels from the hazards associated with high speed boat races in Orange, TX (86 FR 22610). That event was cancelled due to weather. On May 19, 2021 the City of Orange, TX notified the Coast Guard that they rescheduled the races for September 18 and 19, 2021, in the same location, adjacent to the public boat ramp in Orange, TX. The Captain of the Port Port Arthur (COTP) has determined that potential hazards associated with high speed boat races would be a safety concern for spectator craft and vessels in the vicinity of these race events.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters of the Sabine River adjacent to the public boat ramp in Orange, TX before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under