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*Submitted via www.regulations.gov*

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

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

Dear Ms. DeBisschop:

The National Women's Law Center (the Center) writes in response to the Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM),[1] whereby the Department seeks to align its tip regulations with the new section 3(m)(2)(B) of the Fair Labor Standards Act (FLSA), enacted in the Consolidated Appropriations Act of 2018 (CAA),[2] and withdraw the prior rulemaking on the subject that the CAA amendments to the FLSA were intended to block.[3]

Since 1972, the Center has worked to remove barriers based on gender, to open opportunities for women and girls, and to help women and their families lead economically secure, healthy, and fulfilled lives. The Center advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of women with low incomes and their families, communities of color, and others who face historic and systemic barriers to equality and economic security. These communities are overwhelmingly represented in the tipped workforce, and the Center consistently advocates for policies that will improve and stabilize pay in tipped jobs.

The Center supports the legislative compromise reflected in the CAA amendments—which makes clear that tips belong to workers, not their employers—and appreciate the Department's efforts to implement the new law, although we believe that the Department should clarify the definition of managers and supervisors and certain other elements as detailed in our comments below.

We strongly oppose, however, the Department's additional proposals in this rulemaking—namely, to codify its abandonment of the "80/20 rule" regulating employers' use of the tip credit for non-tipped work, and to make it harder for the Department to impose civil money penalties for willful violations of a wide range of labor laws. These components of the proposed rule run counter to the avowed purpose of this rulemaking, the Fair Labor Standards Act, and the Department: to protect working people and their wages. As explained in the comments that follow, the Department should withdraw the proposed changes to the willfulness standard and the dual jobs regulation—and it should implement a standard no less protective than the 80/20 rule to ensure that employers do not regularly pay their employees less than the full minimum wage when they are performing work for which they will not earn tips.

[1] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53,956 (Oct. 8, 2019) [hereinafter "2019 Tip Rule"].
[2] Pub. L. No. 115-141, Div. S., Title XII, § 1201, 132 Stat. 348, 1148-49 (2018).
[3] Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017) [hereinafter "2017 Tip Rule"].

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

In March of 2018, tipped workers across the country won critical new protections in the FLSA with the addition of section 3(m)(2)(B), which states unequivocally that an "employer may not keep tips received by its employees for any purposes." In this amendment, Congress made clear that the Department's prior proposed rulemaking on the subject—which would have resulted in employers *legally* pocketing an estimated $5.8 billion of their employees' tips each year[4]—was contrary to congressional intent. The FLSA now bars employers from using tips to, for example, "make capital improvements to their establishments" or simply to increase profits, as would have been expressly allowed under the rule originally proposed by the Department in 2017.[5]

The FLSA now *does* authorize employers to establish tip pools between tipped restaurant workers in the "front of the house," such as bartenders and servers, and those who work in the "back of the house," such as line cooks and dishwashers.[6] Such a tip pool is only permissible, however, if two conditions are met: 1) the employer pays *all* employees at least the full minimum wage, before tips (rather than taking a "tip credit" that counts a portion of employee tips toward its minimum wage obligation), and 2) the employer, managers, and supervisors do not keep any portion of employees' tips.

In these limited circumstances, allowing employers to require tip sharing between front- and back-of-house employees has the potential to improve pay for both customarily tipped employees (who will be able to rely on at least $7.25 per hour before tips instead of the $2.13 per hour that federal law permits when employers take a tip credit) and cooks, dishwashers, and others who also contribute to the customer experience but are typically very low paid and do not traditionally receive tips. In the present rulemaking, the Department should make clear that Congress did not authorize employers to simply take a tip credit in another form by reducing the wages it pays back-of-house staff, then supplementing them with the earnings of tipped employees. The Department's suggestion in the proposed rule that such activity is permissible runs contrary to Congress's intent to ensure that tips inure to the benefit of employees rather than their employers,[7] and the Department must ensure that the final rule makes no such suggestion. The Department should also make clear in the final rule that employers cannot withhold from an employee's tips the credit card transaction fee associated with liquidating the employee's credit card tips—a cost the employer chooses to incur, and one that it must not, under the CAA amendments to the FLSA, use employee tips to subsidize.

The Department also must ensure that employers do not similarly subsidize the pay of managers and supervisors by allowing them to capture a portion of employee tips. Preventing employers, managers, and supervisors from participating in tip pools intended to benefit lower-paid employees is at the core of the legislative compromise in the CAA, and appropriately defining the terms "manager" and "supervisor" is thus a key component of the present rulemaking. We appreciate that the definition the Department has proposed is not an unduly narrow one that would clearly exclude only high-level management from tip pools, and we agree that the executive duties test at 29 C.F.R. § 541.100(a)(2)-(4) outlines core principles of managerial and/or supervisory responsibilities.

However, we are concerned that this duties test may in fact be overbroad, and could be interpreted to exclude individuals who should be permitted to participate in tip pools. An employer might incorrectly identify as a supervisor, for example, a more experienced line cook who "manages" the line and

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[4] *See* Heidi Shierholz et al., Econ. Policy Inst. (EPI), Employers Would Pocket $5.8 Billion of Workers' Tips Under Trump Administration's Proposed "Tip Stealing" Rule (Dec. 2017), https://www.epi.org/files/pdf/139138.pdf.

[5] *See* 2017 Tip Rule, 82 Fed. Reg. at 57408.

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

[7] *See* 2019 Tip Rule, 84 Fed. Reg. at 53957 and 53968 ("because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-house workers (as long as they do not reduce these employees' wages below the applicable minimum wage)").

"customarily and regularly directs the work" of two other cooks—but who spends most of their time cooking, and is paid only $28,000 a year. Such employees lack the bargaining power and authority that the statute intended to attribute to the managers and supervisors who should be barred from sharing tips.

As the Department has recognized in the overtime context, a compensation-based test can be a useful tool to help clarify the contours of a duties-based exemption, on the basis that employees paid less than a specified level are unlikely to be bona fide exempt employees.[8] Here, too, a compensation level test would help to ensure that individuals who are categorically excluded from tip pools are bona fide managers or supervisors. Therefore, in addition to the duties test borrowed from the overtime rules, we recommend that the Department incorporate a compensation level test into the definition of manager or supervisor for purposes of the rule implementing section 3(m)(2)(B). Given that tip pooling typically arises in the restaurant context, we propose that the Department tailor the pay threshold accordingly—specifically, by setting a threshold that corresponds to the median wage for "supervisors of food preparation and serving workers" (35-1010) based on the most recent National Occupational Employment and Wage Estimates from the U.S. Bureau of Labor Statistics, Occupational Employment Statistics (OES), which could be met on an annual or hourly basis. This level should be defined in regulation by reference to the OES source so that it is automatically adjusted each year; the current level, based on May 2018 data, is $33,890 annually or $16.30 per hour.[9]

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

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

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

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

As the Department recognizes, the FLSA at section 3(m) only allows employers to take a tip credit for a "tipped employee," defined at section 3(t) as an "employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"—a definition that requires further explanation to ensure that employers understand when an individual employee is employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage). Indeed, the "fair day's pay for a fair day's work"

[8] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (Sept. 27, 2019).

[9] U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2018 National Occupational Employment and Wage Estimates (March 2019), *available at* https://www.bls.gov/oes/special.requests/oesm18nat.zip (occupation code 35-1010).

promised by the FLSA "can only be guaranteed if employers' ability to take the tip credit is limited to when their employees are actually 'engaged in a tipped occupation.'"[10]

The "dual jobs" regulation at 29 C.F.R. § 531.56(e) thus distinguishes between an employee who holds both a non-tipped and a tipped occupation (e.g., "a maintenance man in a hotel also serves as a waiter") and a person in a tipped occupation who performs some related non-tipped tasks, such as a "waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." However, as one court recently explained, "[b]y not defining what, precisely, the temporal limits on related work for tipped employees are, the Dual Jobs regulation 'only produces more questions.'"[11] Accordingly, between 1988 and 2018, guidance from the Department clarified the dual jobs regulation with the "80/20 rule," which provided that necessary temporal limit: when an employee spends more than 20 percent of their time during a work week on activities that do not produce tips, the employee is no longer a tipped employee who "occasionally" performs non-tipped related work and is instead an employee who is engaged in two occupations, only one of which is a tipped occupation (and only one of which permits an employer to take the tip credit).[12]

Notwithstanding the 80/20 rule's consistent use and acceptance by employers, courts,[13] and the Department itself over a 30-year period, the Department now asserts that the 80/20 rule "was difficult for employers to administer and led to confusion."[14] The alternative proposed in this rule, however—which the Department recently issued in guidance[15] and seeks to formalize here—is sure to produce far greater confusion. As numerous courts have already recognized in refusing deference to the identical policy in guidance, replacing the longstanding 80/20 standard with vague "reasonable time" language removes any meaningful temporal limit on the time spent on non-tipped duties for which an employer may claim a tip credit.[16] Indeed, the proposed rule only supplements the vague temporal terms in the existing dual jobs regulation—"occasionally," "part of [the] time," and "takes a turn"—with a "reasonable amount of time" standard that is equally vague and overly broad. If 20 percent is not a "reasonable" limit, what is? The

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[10] *Belt v. P.F. Chang's China Bistro, Inc.,* No. 18-3831, 2019 WL 3829459, at *33 (E.D. Pa. Aug. 15, 2019).

[11] *Id.* at *20 (quoting *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 624 (9th Cir. 2018)).

[12] *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); *see also, e.g., Belt,* 2019 WL 3829459 at *25. As the Department is aware, between 1988 and 2018, its guidance suggested a departure from the 80/20 rule only once—in January 2009, when the Department wrote an opinion letter stating the same interpretation of the dual jobs regulation proposed in this rulemaking. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 16, 2009), *available at* https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_23_FLSA.pdf. This letter was never delivered, however, and the Department withdrew it one month later.

[13] *See, e.g., Marsh*, 905 F.3d at 629; *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 879 (8th Cir. 2011); *Harrison v. Rockne's Inc.*, 274 F. Supp. 3d 706, 712 (N.D. Ohio 2017); *Romero v. Top-Tier Colo. LLC*, 274 F. Supp. 3d 1200, 1207 (D. Colo. 2017*); McLamb v. High 5 Hosp.*, 197 F. Supp. 3d 656, 663 (D. Del. 2016); *Knox v. Jones Grp.*, 201 F. Supp. 3d 951, 961 (S.D. Ind. 2016); *Stokes v. Wings Inv., LLC*, 213 F. Supp. 3d 1097, 1102 (S.D. Ind. 2016); *Flood v. Carlson Rests. Inc.*, 94 F. Supp. 3d 572, 584 (S.D.N.Y. 2015); *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 735 (D.S.C. 2015); *Alverson v. BL Rest. Operations LLC*, No. 16 Civ. 849, 2017 WL 3493048, at *5 (W.D. Tex. Aug. 8, 2017); *Osman v. Grube, Inc.*, No. 16 Civ. 802, 2017 WL 2908864, at *5 (N.D. Ohio July 7, 2017); *Thomas v. Bayou Fox, Inc.*, No. 15 Civ. 623, 2017 WL 2374706, at *3 (M.D. Ala. May 31, 2017); *Eldridge v. OS Rest. Servs., LLC*, No. 17 Civ. 798, 2017 WL 2191084, at *3 (M.D. Fla. May 18, 2017); *Goodson v. OS Rest. Servs., LLC*, No. 17 Civ. 10, 2017 WL 1957079, at *6 (M.D. Fla. May 11, 2017); *Barnhart v. Chesapeake Bay Seafood House Assocs., L.L.C.*, No. 16 Civ. 1277, 2017 WL 1196580, at *6 (D. Md. Mar. 31, 2017); *White v. NIF Corp.*, No. 15 Civ. 322, 2017 WL 210243, at *4 (S.D. Ala. Jan. 18, 2017); *Bowe v. HHJJ, LLC*, No. 16 Civ. 1844, 2017 WL 56401, at *1-2 (M.D. Fla. Jan. 5, 2017); *Langlands v. JK & T Wings, Inc.*, No. 15 Civ. 13551, 2016 WL 2733092, at *3 (E.D. Mich. May 11, 2016); *Crate v. Q's Rest. Grp. LLC*, No. 13 Civ. 2549, 2014 WL 10556347, at *4 (M.D. Fla. May 2, 2014); *Holder v. MJDE Venture, LLC*, No. 08 Civ. 2218, 2009 WL 4641757, at *4 (N.D. Ga. Dec. 1, 2009).

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

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

[16] *See, e.g., Flores v. HMS Host Corp.,* No. 8:18-CV-03312-PX, 2019 WL 5454647, at *12-13 (D. Md. Oct. 23, 2019); *Belt,* 2019 WL 3829459 at *25; *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545, 553 (W.D. Va. 2019); *Esry v. P.F. Chang's China Bistro, Inc.*, 373 F. Supp. 3d 1205, 1210 (E.D. Ark. 2019) (noting abolishing the 80/20 rule is an "about face" for the Department); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019) ("Aside from expressing the DOL's desire to clarify the FOH sections addressing the tip credit, the DOL does not offer reasoning or evidence of any thorough consideration for reversing course."); *Callaway v. DenOne LLC,* No. 18 Civ. 1981, 2019 WL 1090346, at *7 (N.D. Ohio Mar. 8, 2019).

lack of a bright line answer to that question will sow confusion for employers and employees alike and could be abused even by well-intentioned employers.

In addition to the lack of any clear temporal limitation on non-tipped work, the proposed rule's reference to tasks listed in O*Net to define duties "related" to tip-producing occupations invites abuse. For example, O*Net tasks for waiters and waitresses include "cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and *cleaning bathrooms*"[17]—when from 1988 until 2018, the Department's Field Operations Handbook specified as an example that "maintenance work (e.g., *cleaning bathrooms* and washing windows) [is] not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs."[18]

A 20 percent limit on related but non-tipped duties for which an employer may take a tip credit provides concrete guidance to both employers and employees that is "tremendously useful in evaluating whether employees are in fact employed in a tipped 'occupation.'"[19] The Department employed this standard in the dual jobs context for three decades, and also uses "a 20 percent threshold to delineate the line between substantial and nonsubstantial work in various contexts within the FLSA."[20] The Department has offered no explanation other than confusion for its repeal—an explanation that is groundless given the greater confusion the more vague rule will surely engender.

Abandoning decades of consistent agency policy without a rational explanation is arguably arbitrary and capricious in its own right.[21] Doing so with no attempt to quantify the human impact, however, makes this action far worse.

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

Women—disproportionately women of color—represent more than two-thirds of tipped workers nationwide.[22] In 38 states, at least 7 in 10 tipped workers are women.[23] Median hourly earnings for people working in common tipped jobs like restaurant server and bartender are less than $11, including tips,[24] and poverty rates for tipped workers are more than twice as high as rates for working people overall—with tipped workers who are women at a particular disadvantage and women of color disadvantaged yet

[17] *See* O*Net Online, Summary Report for: 35-3031.00 – Waiters and Waitresses, Tasks, https://www.onetonline.org/link/summary/35-3031.00#Tasks (last visited Nov. 20, 2019) (emphasis added).

[18] U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988) (emphasis added).

[19] *Irvine,*106 F. Supp. 3d at 735.

[20] *Fast,* 638 F.3d at 881.

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

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

[23] *See* NWLC, WOMEN IN TIPPED OCCUPATIONS, STATE BY STATE (May 2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf.

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

further.[25] Reducing the pay that working people can take home to their families will undoubtedly harm this already low-paid workforce, especially the women and people of color who disproportionately hold these roles.

Yet this is precisely what the proposed rule would do. As the Department concedes, tipped employees could "lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage."[26] A server who formerly could spend no more than 1.2 hours of a six-hour shift, on average, doing non-tipped work like rolling silverware, cleaning tables, or sweeping floors can now be required to spend two hours—or four hours, or whatever the manager deems "reasonable"—doing such side work, foregoing tipped income while still being paid just $2.13 an hour.[27] This scenario has already played out in workplaces across the country in which unscrupulous employers ignored their obligations under the 80/20 rule.[28] With the regulatory barriers to abuse of the tip credit—and tipped employees—all but removed, millions of working people will undoubtedly be required to do more work for less pay.

Back-of-house employees will also lose out under the Department's amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on "related" tasks like cleaning and food prep that have traditionally been performed by back-of-house staff, that will drive down wages for—or even eliminate—back-of house positions in restaurants.[29] The proposal will have damaging impacts beyond the restaurant industry, too, since it applies equally to all tipped employees; for example, parking attendants could be required to spend substantial time sweeping the garage, taking out trash, and performing administrative tasks instead of attending to customers and earning tips.[30]

By incentivizing employers' use of the tip credit, and introducing further ambiguity into when use of the tip credit is in fact permissible, the proposed rule will also make people who depend on tips to make a living even more vulnerable to wage theft.[31] And it will permit employers to pay subminimum wages to a much wider range of people working in service jobs—i.e., anyone who earns at least $30 a month in tips, a threshold that hasn't been updated in decades and is easily met even at coffee shops, fast casual restaurants, and other counter service establishments where tips are typically small and sporadic. For example, at a coffee and gelato shop in Washington, D.C., employees recently saw their pay drop by nearly $3 an hour, to rates below the District's minimum wage—leaving some workers earning the same wage they were paid several years prior, and newly dependent on tips that are unlikely to make up the difference.[32]

Despite the Department's concessions regarding the possibility of reduced income for a range of tipped (and non-tipped) employees as a result of its amendments to the dual jobs rule, it fails to provide sufficient economic analysis to quantify the costs of its proposal to working people, or to provide an analysis of regulatory alternatives that may be less harmful. In so doing, the Department violates its

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[25] *See generally* Morgan Harwood, Jasmine Tucker & Julie Vogtman, NWLC, ONE FAIR WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (May 2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/05/Tipped-Worker-New-2019-v2.pdf.

[26] 2019 Tip Rule, 84 Fed. Reg. at 53,972.

[27] Even if an employer ensures that an employee's total compensation (including tips) amounts to the minimum wage, the employer is not excused from its obligation under the FLSA to pay at least the minimum wage, without a tip credit, for any time the employee spends in a non-tipped occupation—an obligation the Department's proposal will encourage employers to evade. *See, e.g., Spencer v. Macado's, Inc.*, No. 6:18-CV-00005, at *16 (W.D. Va. Aug. 1, 2018) ("the workweek rule…does not allow an employer to take tips from a tip-producing job and transfer them to a non-tip-producing job worked by the same employee").

[28] The fact patterns in the cases considering the validity of the 80/20 rule are instructive. *See generally supra* n.13 & n.16.

[29] The Department acknowledges this possibility as well; *see* 2019 Tip Rule, 84 Fed. Reg. at 53,972.

[30] *See* O*Net Online, Summary Report for: 53-6021.00 – Parking Lot Attendants, Tasks, https://www.onetonline.org/link/summary/53-6021.00#Tasks (last visited Nov. 20, 2019).

[31] For example, in a compliance sweep of nearly 9,000 full-service restaurants between 2010 and 2012, the Department's Wage and Hour Division found 1,170 tip credit violations that resulted in nearly $5.5 million in back wages. Sylvia A. Allegretto, *Should New York State Eliminate its Subminimum Wage?* 11 (2018), http://irle.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf.

[32] *See* Rachel Kurzius, *Dolcezza Lowered Its Baristas' Wages. Here's Why, and What It Says About D.C.'s Economy,* DCIST (Oct. 23, 2018), https://dcist.com/story/18/10/23/dolcezza-barista-wages-dc-economy/.

responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible[33]—and abandons its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law. The Economic Policy Institute, which conducted the type of analysis that the Department claims it cannot, estimates that tipped workers will lose more than $700 million dollars in tips each year if the Department's rule goes into effect.[34]

The Department's failure to include a quantitative analysis of the costs and benefits of the proposed rule in its NPRM runs counter to standard practice and multiple rulemaking authorities. This failure alone could render the Department's actions arbitrary and capricious, in light of its duties to both consider and publicize the likely effect of the proposed rule on working people.[35] It is all the more galling given that the FLSA amendments at issue in this rulemaking were included in the CAA to prevent the Department from implementing the 2017 proposal that would have allowed employers to pocket employee tips—the cost of which the Department similarly claimed it could not calculate, but which reporting later revealed was in fact calculated but concealed.[36] The Department must work to correct, rather than replicate, that pattern here.

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

DOL should abandon this ill-conceived proposal, both in this rule and in the guidance documents where it is currently in effect. As the court in *Belt v. P.F. Chang's* observed in rejecting that guidance, "a twenty percent limit on untipped related work . . . avoids the 'possibility that employers could misuse [the tip credit provision] to withhold wages from dual job employees . . . who are titled 'servers' or 'bartenders,' but who function in actuality as bussers, janitors, and chefs at least part of the time' . . . ."[37] The history of the 80/20 rule has demonstrated that such a limit is both necessary and practicable.

To provide the clarity in the dual jobs regulation that the Department claims to desire, the Department can and should incorporate the 80/20 rule into section 531.56(e), or adopt a stronger standard that further restricts the amount of non-tipped work for which an employer can pay employees anything less than the full minimum wage. If it will not, it must—at minimum—amend section 516.28 to require employers to track hours that a tipped employee works each workday in both tip-generating tasks and non-tip-generating "related" duties and the payment made by the employer for all such hours, and to provide this record to the employee so that all parties have a record of whether the time in which an employee is paid a cash wage below the full minimum wage for the performance of non-tipped tasks may be considered "reasonable." Indeed, "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 before reducing their wages by 71%."[38]

For the reasons detailed above, to remove any meaningful restriction—without a reasoned explanation, an economic analysis of the likely impact on working people, or even a requirement that employers keep

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

[34] Heidi Shierholz & David Cooper, *Workers Will Lose More Than $700 Million Annually Under Proposed DOL Rule*, WORKING ECON. BLOG (Nov. 30, 2019), https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/.

[35] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

[36] Ben Penn, *Labor Department Ditches Data on Worker Tips Retained by Business*, BLOOMBERG BNA (Feb. 1, 2018), https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses.

[37] *Belt,* 2019 WL 3829459 at *33 (quoting *Marsh*, 905 F.3d at 633).

[38] *Irvine,* 106 F. Supp. 3d at 734.

the records necessary to quantify and justify the amount of time they used the tip credit while their employees performed non-tipped work—is arbitrary and capricious.

## III. The Department should not import a willfulness standard for civil money penalties for section 3(m)(2)(B) violations, nor use this rulemaking to make it harder to hold employers accountable for willful violations of other labor laws.

In conjunction with the CAA amendments to the FLSA adding section 3(m)(2)(b), Congress amended FLSA section 16(e)(2) to impose civil penalties for section 3(m)(2)(b) violations at the discretion of the Secretary. The plain language of the statute is clear:

> Any person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).[39]

In the same section, Congress established that *only* repeated and willful violations of sections 206 and 207 (minimum wage and overtime, respectively) are subject to civil penalties:

> Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.[40]

Nowhere in section 16(e)(2) did Congress indicate that an employer can only be subject to civil penalties for section 3(m)(2)(B) when willfulness is established. That Congress used the words "repeatedly or willfully" for minimum wage and overtime violations, but omitted such words with respect to section 3(m)(2)(B), demonstrates Congress's clear intent that civil penalties for the latter section do not require a repeated or willful violation. The Department's proposal to import the repeated and willfulness requirement to section 3(m)(2)(B) is contrary to the plain language of the statute and must be removed from the final rule.

Moreover, in assigning civil penalties to violations of the new FLSA section 3(m)(2)(B)—without referencing willfulness—Congress surely did not presume that the Department would use the need to implement new worker protections in the FLSA as a pretext to *weaken* worker protections, far beyond the context of tipped occupations. Yet that is what the Department has done here, by proposing to redefine willfulness to characterize an employer's decision to ignore advice from the Department as a mere factor to be considered rather than what it is: clear evidence that an employer knew it was violating labor laws and chose to proceed with the violation—evidence that should therefore be sufficient to deem an employer's conduct "knowing," as provided in existing FLSA regulations governing minimum wage, overtime, and child labor law violations. The existing regulations similarly make clear that an employer's conduct is "in reckless disregard of the requirements of the Act" if the employer failed to make adequate inquiry into whether its conduct was compliant. These longstanding, bright line rules promote consistency in application and certainty for employers.

It is unreasonable for the Department to require willfulness as a precondition for civil money penalties when Congress intended no such requirement, and it is beyond the pale to undermine the willfulness test applicable to minimum wage, overtime, and child labor standards that are not at issue in this rulemaking.

* * *

The Department should do what Congress intended it to do in this regulation: implement the new provisions of the Fair Labor Standards Act in a way that ensures working people who are paid tips—and, in appropriate cases, their colleagues—receive the economic benefit of those tips. The Department

[39] 29 U.S.C. § 216 (e)(2).

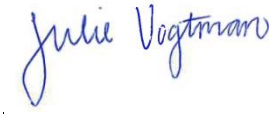
[40] *Id*.

should strengthen the component of its rule implementing section 3(m)(2)(B)—and it should entirely abandon the other components of the proposal, which will run counter to Congress's intention to improve economic security for working people and serve only to enable employer abuses, contrary to the mission of the Department. Should the Department continue to pursue weakening amendments to the dual jobs regulation, it must, at minimum, provide all stakeholders—especially the low-wage workers who will undoubtedly be harmed—with an opportunity to review the Department's good-faith economic analysis of the impact of this proposal, including the assumptions underlying it, and adequate time to fully respond to such analysis.

Thank you for the opportunity to submit comments on this NPRM. Please do not hesitate to contact Julie Vogtman, Director of Job Quality and Senior Counsel (jvogtman@nwlc.org/202.588.5180) if you have questions or require additional information regarding these comments.

Sincerely,

Emily Martin
Vice President for Education & Workplace Justice



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