December 9, 2019

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

Amy DeBisschop, Acting Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Proposed Rule Regarding Tip Regulations Under the Fair Labor Standards Act, 84 Fed. Reg. 53,956 (Oct. 8, 2019), RIN 1235-AA21

Dear Acting Director DeBisschop:

On behalf of the Restaurant Law Center (the "Law Center") and the National Restaurant Association (the "Association"), we appreciate the opportunity to submit our comments on the notice of proposed rulemaking (the "Proposed Rule") issued by the Wage and Hour Division ("WHD") and published in the Federal Register on October 8, 2019, to amend the tip regulations under the Fair Labor Standards Act (the "FLSA"). We generally support the approach taken in the Proposed Rule, and we have some suggestions that we believe will make the tip regulations more practical and workable in the restaurant industry, as well as being more consistent with the text and purpose of the FLSA.

The Law Center is a 501(c)(6) legal entity affiliated with the Association and launched in 2015 with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. The Law Center's goal is to protect and advance the restaurant industry and to ensure that the voice of

America's restaurants is heard by giving them a stronger voice, particularly in the courtroom. The Law Center pursues cases of interest to the restaurant industry. In fact, for over a decade, the Law Center and/or the Association has led the litigation seeking proper enforcement of the FLSA with regard to its tips' provisions.[1]

Founded in 1919, the Association is the largest trade association representing the restaurant and foodservice industry (the "Industry") in the world. The Industry is comprised of over one million restaurants and other foodservice outlets employing almost 15.3 million people—approximately 10 percent of the U.S. workforce. Restaurants are job creators and the nation's second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. Thus, it is especially important that the FLSA's tip regulations provide clear guidance that informs small business owners, as well as their employees, what the law allows and requires.

Our comments focus on two main issues presented by the Proposed Rule.

Dual Jobs

WHD's proposed changes to 29 C.F.R. § 531.56(e) are a significant step in the right direction, insofar as they expressly reject any cap on the amount of time a tipped employee may spend on tasks that do not directly generate tips.[2] The Proposed Rule, however, still leaves room for further alignment with the FLSA.

---

[1] *See, e.g., Restaurant Law Center v. U.S. Dept. of Labor*, No. 18-cv-567 (W.D. Tex. July 6, 2018); *National Restaurant Association, et al., Petitioners v. Dept. of Labor, et al*. SCOTUS No. 16-920 (Appeal mooted by change in the law and, thus, *certiorari* petition denied on January 24, 2017); and, *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (February 23, 2010).

[2] For a time, WHD's subregulatory guidance took the position that when a tipped employee spends more than 20% of his or her working time on tasks that do not produce tips, the employer must pay full minimum wage, rather than a tipped wage, for the time spent on those tasks. Some who oppose the Proposed Rule argue, as the Economic Policy Institute does, that expressly rejecting a cap on so-called non-tipped duties for tipped employees will cost workers money. *See, e.g.*, Economic Policy Institute, Working Economics Blog, *Workers will lose more than $700 million dollars annually under proposed DOL rule*, https://www.epi.org/blog/workers-will-lose-more-

Under the FLSA, employers may pay a "tipped employee"—i.e., "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"—a cash wage of $2.13 per hour (or more) so long as the employer satisfies certain statutory criteria, including that the employee's tips plus the cash wage equal the minimum wage. *See* 29 U.S.C. §§ 203(m), 203(t). Congress has noted occupations in which workers qualify for this so-called tip credit: "waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

The "dual jobs" regulation—in both its current form and subject to the proposed modifications—seeks to address the scenario in which an employee may work for an employer in two distinct, non-overlapping capacities, one of which is tipped and one of which is not. Congress has already spoken to how the law should treat a worker's status as a tipped employee in that situation: "[W]here the employee performs a variety of different jobs, the employee's status as one who 'customarily and regularly receives tips' will be determined on the basis of the employee's activities over the entire workweek." S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

According to Congress, therefore, the availability of the tip credit in situations where the employee has both a tipped job and an untipped job depends on which job was predominant in any

than-700-million-dollars-annually-under-proposed-dol-rule/ (Nov. 30, 2019). Such criticism of the Proposed Rule rests on a flawed premise—i.e., that current law reflects such a quantitative cap. To the contrary, WHD expressly abandoned any such limitation in November 2018 when it (1) issued Opinion Letter FLSA2018-27 and (2) agreed not to assert such a limitation in pending and future investigations in response to litigation filed against the Department of Labor in federal court in Texas. *See* Notice of Voluntary Dismissal, Docket Entry 21, *Restaurant Law Center v. Department of Labor*, No. 1:18-cv-00567 (W.D. Tex. Nov. 30, 2018). Then in February 2019, WHD issued Field Assistance Bulletin No. 2019-2 reiterating its rejection of any quantitative limit on non-tipped duties and revised the Field Operations Handbook to eliminate any reference to such a limitation. As a matter of federal law, there has been no quantitative limit on non-tipped activity for more than a year. The Proposed Rule simply confirms this result and clarifies that there is no basis in the statute or the regulations for any such limit. Thus, EPI's baseline is simply incorrect, as this aspect of the Proposed Rule does not change the law or take away any employee's rights. As discussed in our comments, the Proposed Rule will help workers, not hurt them.

given workweek. To the extent that the dual jobs regulation goes beyond what Congress has indicated, the rule is simply unnecessary.

In addition, the Proposed Rule in some ways perpetuates the erroneous distinction WHD's subregulatory guidance developed from the late 1970s through the late 1980s between so-called "tipped" and "non-tipped" duties. The current version of the dual jobs regulation was not designed to split clearly tipped occupations, like server or bartender, into hours or minutes of work subject to the tip credit versus hours or minutes not subject to the tip credit. The path WHD followed to end up focused on this distinction is instructive.

Apart from the dual jobs regulation, the first discussion by WHD of tipped employees engaging in supposedly non-tipped work appears to be in a 1979 opinion letter addressing waitresses who "report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar." U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA-895 (Aug. 8, 1975). With little analysis, WHD concluded that "since it is our opinion that salad preparation activities are essentially the activities performed by chefs, no tip credit may be taken for the time spent in preparing vegetables for the salad bar." *Id.* at 1.

In 1980, WHD was asked to opine whether the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese, salt and pepper shakers), and vacuumed the dining room carpet. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Mar. 28, 1980), 1980 DOLWH LEXIS 1. WHD stated that the employee would be considered a tipped employee for this period and the tip credit would apply because the employee was not engaged in a dual occupation.

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

In 1985, WHD issued an opinion letter addressing whether a server who, during a five-hour shift, performed 1.5 to 2 hours of preparatory work prior to the restaurant opening could be paid the tip credit rate for the time spent performing preparatory activities, which amounted to "30%-40%" of the employee's workday. WHD concluded that because only one employee was assigned to the opening duties, the employee was responsible for preparing the entire restaurant, not just her area, and because the amount of time was 30% to 40% of the entire shift, the tip credit could not be applied. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Dec. 20, 1985), 1985 DOLWH LEXIS 9.

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

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

See U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook § 30d00(e) (Dec. 9, 1988). These new made-up categories in the Field Operations Handbook unleashed a wave of class and collective action litigation focusing on, among other things, whether certain tasks are tip-producing, related or incidental to tip-producing tasks, or unrelated to tip-producing tasks.

None of that litigation, which imposed untold millions of dollars in costs and burdens on the Industry, should have happened, because WHD should never have gone down the rabbit hole of applying the *dual jobs* framework to a *single job* in the Industry. Tasks such as getting the restaurant ready for customers, restocking various items during meal service, cleaning, and closing down the restaurant at the end of the day—known in the industry as "side work"—have long been an integral part of the tipped occupations commonly found in restaurants.

The Proposed Rule acknowledges that these activities are a normal part of these jobs. The FLSA simply provides no basis for carving up a tipped restaurant job into tipped and non-tipped segments, especially given the clearly expressed will of Congress that these restaurant occupations qualify as "tipped occupations" under the law. *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

The Proposed Rule still retains significant vestiges of WHD's flawed analytical approach to tipped employment. The proposed text of 29 C.F.R. § 531.56(e)(2), for example, declares that the tip credit is available "for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties." The proposed text of § 531.56(e)(3), in turn, declares that "a non-tipped duty is related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network[.]" These provisions are unnecessary and inconsistent with the FLSA.

The FLSA does not confer upon WHD the authority to dictate the appropriate mix of tasks within a tipped occupation. So long as an employer assigns a tipped employee to perform the core functions of an occupation during a shift (e.g., assigning a server to wait tables, or a bartender to prepare drinks for customers), that employee does not cease to be engaged in the tipped occupation by virtue of performing side work during a shift along with the core functions of the occupation. Nor does a tipped employee cease to be engaged in the tipped occupation merely because the employer assigns side work during times when the restaurant is slow.

The public policy underlying the FLSA's tip credit provision is to protect employees' minimum wage rights while at the same time accommodating the extensive history of tipping in the restaurant industry, among other industries. It is not the purpose of the FLSA's tip credit provision to give tipped employees a windfall or to put tipped employees in a better position than other employees in the economy who are not subject to the tip credit.

The public policy underlying the FLSA's minimum wage and tip credit provisions is fully satisfied and vindicated so long as in any given workweek a tipped employee receives sufficient tips, combined with the cash wage, to cover the minimum wage multiplied by the total number of hours worked.

So long as an employee customarily and regularly receives enough tips to satisfy the law's threshold, the employee is engaged in a tipped occupation, and allowing a tip credit for all of that employee's working time places that employee on an equal footing with every other employee *not* engaged in a tipped occupation. An employee who receives five dollars an hour in wages from an employer and an average of five dollars an hour in tips over the course of a week is in the very same position as a non-tipped employee who receives ten dollars an hour in wages. Either way, the situation satisfies the policies underlying the minimum wage.

But even if WHD is determined to retain this focus on distinguishing so-called "tipped" duties from "non-tipped" duties—neither of which concept appears in the FLSA, which focuses on the "occupation"—the language of the Proposed Rule virtually ensures further litigation regarding what it means for "non-tipped duties" to be performed "contemporaneously" with "tipped duties," or what constitutes a "reasonable time immediately before or after" the tipped work. Is performing opening duties for 30 minutes before the restaurant opens its doors to customers permissible? What about 45 minutes, or 60, or 90? Same issue with closing duties: how long after a restaurant closes its doors to new customers for the day, or after a server or bartender takes care of his or her last customer, may a tipped employee engage in closing side work before the employer forfeits the tip credit?

We submit that it would be much better to specify in the Final Rule that so long as the side work occurs during the same shift or workday in which the employee engages in the main duties of a tipped occupation, the tip credit is available for the entire shift or workday, so long as the other statutory criteria are met.

We also respectfully suggest that the Final Rule should clarify that tasks appearing in O*NET in connection with a tipped occupation is *sufficient* to demonstrate that it is part of the occupation, but that it is not a *necessary* condition for a task to be deemed related to the occupation.

At its core, the tip credit is about the tips, not the duties, of an occupation. The tip credit exists to protect employees' minimum wage rights under the FLSA. The mix of duties an employee performs at work has nothing to do with whether the employee received sufficient money, between direct wages and tips, to meet or to exceed minimum wage.

It does not appear that WHD, or any other federal agency for that matter, has undertaken a study of how much time tipped employees in the Industry spend on various tasks, or when during

the workday they perform those tasks in relation to other types of tasks. WHD should take this opportunity to step back from trying to micromanage restaurant work at the level of task assignment and, instead, return its focus to what WHD is designed to do: ensuring that employees receive the wages the FLSA guarantees.

Tip Pooling

The Association supports the proposed changes regarding tip pooling, as they closely track the new statutory language. We would, however, suggest that WHD clarify what is already implicit in the statute and the proposed regulations: that the limitations on tip pooling apply *only* in instances where a tip pool involves at least one tipped employee. There may be circumstances where non-tipped employees, including supervisors or managers, may themselves receive tips directly from customers, or may even have tip pools just among the non-tipped employees.

The regulations should make clear, perhaps in 29 C.F.R. § 531.54(d), that the law does not prohibit supervisors or managers from pooling or retaining tips in those circumstances, where no tipped employee shares tips with a supervisor or manager.

In addition, given the policies underlying the new statutory language in Section 3(m)(2)(A) of the FLSA, we submit that the Final Rule should clarify that the statutory prohibition on managers or supervisors participating in a tip pool or sharing arrangement extends only to those individuals *receiving* money from the pool or share, but not to individuals who only *contribute* money into the pool or share.

In some restaurants, it is common for a manager or supervisor in the dining area to have responsibility for serving tables. The restaurant may have a tip sharing arrangement whereby the servers "tip out" a portion of their tips to other employees, such as bartenders, bussers, food runners, or hosts who in various ways help the server to take care of the customers. In that

situation, allowing the manager-server to contribute into the tip share, just as the other servers do, in order to facilitate payments to the other tipped employees, in no way undermines the policies behind Section 3(m)(2)(A), as *tipped* employees are not sharing their tips with managers or supervisors. Instead, tipped and non-tipped employees are sharing their tips with tipped employees, a permissible result under the FLSA. Language in the Final Rule, perhaps in 29 C.F.R. § 531.54(b), approving of that type of arrangement would be beneficial to the tipped employees who will thereby stand to receive additional tip-outs from the managers or supervisors contributing into the tip share.

Conclusion

On behalf of the Restaurant Law Center and the National Restaurant Association, we thank you for this opportunity to submit our comments.

Sincerely,

Angelo I. Amador
Executive Director (RLC)
SVP & Regulatory Counsel (Association)
2055 L Street, NW
Seventh Floor
Washington, DC 20036
P: 202-331-5913
aamador@restaurant.org

Shannon L. Meade
Deputy Director (RLC)
VP of Policy (Association)
2055 L Street, NW
Seventh Floor
Washington, DC 20036
P: 202-331-5994
smeade@restaurant.org

*We would like to thank outside counsel for his assistance in drafting these comments and in the litigation that led to some of these changes:

EPSTEIN BECKER GREEN

Paul DeCamp
Member of the Firm
PDeCamp@ebglaw.com
Washington, DC
Tel: 202-861-1819