December 10, 2019

ATTORNEY GENERAL RAOUL DEFENDS RIGHTS OF TIPPED WORKERS

Chicago — Attorney General Kwame Raoul, Massachusetts Attorney General Maura Healey, and Pennsylvania Attorney General Josh Shapiro today led a coalition of 19 attorneys general in submitting a comment letter to the U.S. Department of Labor (DOL) opposing its proposed rescission of protections for workers who earn tips.

Under the Fair Labor Standards Act, employers are required to pay their employees the federal minimum wage. Illinois employers can meet this requirement by paying employees the full federal minimum wage – currently $7.25 per hour. They also have the option of paying a lower cash wage, no less than $2.83 per hour, and taking a credit for the difference with the tips that employees earn. This is known as the tip credit.

For decades, tipped workers have been protected by what is known as the 80/20 Rule. The rule ensures that any worker being paid under $2.83 per hour – due to their employer utilizing the tip credit – spends at least 80 percent of their work time doing tipped work.

The DOL's proposal eliminates the 80/20 Rule. This means that employers would be able to assign workers to virtually unlimited amounts of non-tipped work – such as cleaning, cooking and other "back of the house" tasks – while paying workers a lower wage and still taking a tip credit.

"The Department of Labor's attempt to eliminate the 80/20 rule would harm thousands of workers throughout Illinois who are already struggling with minimum wage incomes," Raoul said. "Without the 80/20 rule, workers' already low wages will be unfairly reduced and workers will be more susceptible to wage theft. I urge the Department of Labor to protect low-wage earners and reconsider this proposal."

In the letter, Raoul and the coalition explain that the proposed rule would further erode the already low wages tipped workers are paid. The attorneys general also argue that the proposal is contrary to the purpose of the Fair Labor Standards Act – to protect workers – and that the DOL did not abide by the requirements of the Administrative Procedure Act when it failed to examine the proposal's impact on wages and increased reliance on social safety net programs.

The letter builds on Attorney General Raoul's efforts to fight unlawful employment practices. Earlier in December, Raoul led a coalition of attorneys general in opposing a DOL proposal to allow employers to expand its fluctuating workweek rule, the only rule under which workers' hourly and overtime rates of pay actually decrease as the hours they work per week increase.

Raoul has also testified before the Congressional House Appropriations Labor, Health and Human Services, and Education Subcommittee about the wage theft crisis and the importance of the federal government partnering with states to combat wage theft. Raoul and a coalition of attorneys general secured a settlement this spring with four fast-food chains to stop using no-poach agreements, restrictive agreements that prevent employees from leaving one fast food franchise in pursuit of a better paying job at another franchise in the same chain.

Starting Jan. 1, 2020 a Worker Protection Unit within the Attorney General's office will have the authority to enforce existing laws that protect workers' rights and lawful businesses in Illinois. Raoul initiated legislation establishing the unit after becoming Attorney General.

Joining Raoul, Healey, and Shapiro in submitting the comment letter are the attorneys general of California, Delaware, the District of Columbia, Hawaii, Iowa, Maine, Maryland, Michigan, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

STATE OF ILLINOIS
KWAME RAOUL
ATTORNEY GENERAL

COMMONWEALTH OF MASSACHUSETTS
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COMMONWEALTH OF PENNSYLVANIA
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December 9, 2019

Via Electronic Filing (https://www.federalregister.gov/)

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Amy DeBisschop
Acting Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking (RIN: 1235-AA21)
Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Secretary Scalia and Acting Director DeBisschop:

This comment is submitted by the Attorneys General of the States of Pennsylvania, Illinois, Massachusetts, California, Delaware, Hawai'i, Iowa, Maine, Maryland, Michigan, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, in opposition to part of the United States Department of Labor's ("DOL" or the "Department") proposed rulemaking to amend the Department's tip regulations. *See* Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53,956 (Oct. 8, 2019) RIN

1235-AA21. The proposed rule hurts working people who rely on tips to support themselves and their families and it is not consistent with the purpose of the FLSA.

Specifically, this comment opposes the Department's rescission of its long-standing interpretation of its "Dual Jobs" regulation, which required that traditionally tipped service workers must receive full minimum wages when they perform related non-service work more than twenty percent of the time, otherwise known as the Department's "80/20 Rule." As explained below, the existing Rule places reasonable limitations on tip-crediting when workers are engaged in non-tip generating tasks. Its rescission would likely violate the Administrative Procedure Act as it is contrary to the congressional intent underlying the FLSA's tip-credit provision and the Department's rationale for this drastic reversal of its interpretation is devoid of adequate justification. Moreover, the Proposed Rule would reduce earnings for service employees and create confusion for honest employers seeking to comply with their legal obligations.

I. Introduction

As Attorneys General in our respective States, we enforce laws that protect the public interest, including, in many cases, those that set fair labor standards. Therefore, many of us share responsibility for protecting employees from workplace abuses and fostering a level playing field for those businesses that abide by these laws. Nevertheless, wage theft–the failure to pay workers the full wages to which they are legally entitled–remains a persistent economic problem across the United States.[1] And unquestionably, traditionally tipped restaurant workers are among those who are particularly susceptible to exploitative wage payment practices.[2]

Because the reduced service rate[3] for tipped workers is so low, tips play a crucial role in helping employees achieve a *living wage.*[4] Yet, those tips are stretched thin when employers take tip credits for significant amounts of time that servers spend on non-tip generating duties. Prior to November 2018, an employer could not require tipped employees to spend more than twenty percent of their time on non-tipped duties without paying them the full minimum wage rate under

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[1] *See* Cooper and Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute (May 10, 2017), https://www.epi.org/files/pdf/125116.pdf.

[2] *See, e.g.*, Gould and Cooper, *Seven facts about tipped workers and the tipped minimum wage*, Economic Policy Institute (May 31, 2018), https://www.epi.org/blog/seven-facts-about-tipped-workers-and-the-tipped-minimum-wage/

[3] The reduced service rate is far below the minimum wage rate: $2.13 under the Fair Labor Standards Act, $2.83 in Pennsylvania, $4.35 in Massachusetts, and $4.95 in Illinois. 29 C.F.R. § 531.50; 43 P.S. 333.103-04; Mass. Gen. Laws Ann. ch.151 § 7; 820 Il. Comp. Stat. Ann. 105/4.

[4] Dr. Amy Glasmeier, a professor of Economic Geography and Regional Planning at Massachusetts Institute of Technology (MIT), first created a Living Wage Calculator in 2004 as a market-based approach to factor a family's regional costs for food, childcare, health insurance, housing, transportation, and other basic needs. *See* Glasmeier and MIT, Living Wage Calculator, available at: https://livingwage.mit.edu/pages/about. For example, currently, the living wage for a single adult with one child is between $23.65-$29.66 per hour in Illinois, Pennsylvania, and Massachusetts. *See* https://livingwage.mit.edu/states/17; https://livingwage.mit.edu/states/42; https://livingwage.mit.edu/states/25.

DOL's 80/20 Rule–a rule that some of our states have looked to for guidance in interpreting similar state minimum wage laws.[5] However, under the Proposed Rule, employers could schedule servers to start work well before the restaurant opens and to stay long after closing to prepare food, clean, or perform any number of other non-tipped duties, without any limit on how much non-tipped work may be compensated at the lower service rate. By eliminating the clear parameters used to distinguish when tip-crediting is not permitted, the Proposed Rule not only impacts workers, but creates uncertainty for employers while offering ample opportunities for increased wage theft.

A. Overview of the Development of the Department's 80/20 Rule

Since its enactment in 1938, the Fair Labor Standards Act (FLSA) has required employers to pay an hourly minimum wage. 29 U.S.C. § 206(a)(1)(C). Certain service industries were excluded until Congress amended the FLSA in 1966 to cover service sector employees.[6] As a compromise, the FLSA permits an employer to take a tip-credit from the full minimum wage so long as a tipped employee receives gratuities that are sufficient to make up the difference between the reduced service rate the employer pays and the federal minimum hourly wage rate in effect.[7]

In interpreting the FLSA's tip-credit provision, the Department has long recognized that situations arise when workers are employed in two distinct occupations for the same employer: one that is a traditionally tipped occupation and another that is not. In those situations, since 1966, the Department has interpreted the FLSA to permit tip-crediting only for the employee's time spent working as a tipped employee through its "Dual Jobs" regulation, 29 C.F.R. § 531.56(e). Since the 1980s, the Department has explained, under the Dual Jobs regulation, when restaurant servers spend part of their time performing untipped related duties only "occasionally" or "part of [the] time," a tip credit may be taken for the time spent on those duties.[8] But, conversely, no tip credit may be taken when a server spends "substantial" portions of the workday performing "preparatory activities"–such as setting tables, cleaning and filling salt shakers, or checking supplies of napkins

[5] Because state minimum wage and overtime laws are substantially similar to the FLSA, courts (and state enforcement agencies) often look to analogous provisions in the FLSA and its interpretative regulations for guidance in interpreting state law claims. *See, e.g.*, *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 536 & n.1 (E.D. Pa. Aug. 15, 2019) (applying 80/20 Rule to Pennsylvania minimum wage law); *Roy v. JK & T Wings, Inc.*, 245 F. Supp. 3d 303, 308 (D. Mass. 2017) (applying 80/20 Rule to Massachusetts minimum wage law); *Driver v. AppleIllinois, LLC*, 890 F. Supp. 2d 1008, 1011-12 (N.D. Ill. 2012) (applying 80/20 Rule to Illinois minimum wage law).

[6] Pub. L. 89-601, § 101, 80 Stat. 830 (1966). *See* William G. Whittaker, CRS Report for Congress, *The Tip Credit Provisions of the Fair Labor Standards Act* (March 24, 2006), 2-3, https://www.everycrsreport.com/files/20060324_RL33348_ad85f13a3a41cd5fafd56b16338e820ac7136692.pdf.

[7] The FLSA defines a "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).

[8] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter WH-502 (Mar. 28, 1980), 1980 WL 141336.

and straws.[9] Since 1988, DOL's Field Operations Handbook ("FOH") has specified that no tip-credit may be taken when employees spend more than twenty percent of the time performing "related," but untipped, duties–known as the "80/20 Rule"–and such employees must receive full minimum wage for all hours spent performing such untipped related work.[10] Over the last thirty years DOL predominantly followed this 80/20 Rule.[11] Indeed, as recounted in *Belt v. P.F. Chang's China Bistro*, "including as recently as July, 2016—the DOL adopted the 80/20 Rule in amicus briefs to the [United States Courts of Appeals for the] Eighth, Ninth, and Tenth Circuit[s]."[12]

B. DOL Reversed Course on Its Interpretation of the Dual Jobs Regulation

Abruptly departing from decades of precedent, on November 8, 2018, the Department issued an Opinion Letter announcing its intention to supersede the 80/20 Rule.[13] Citing two 2007 district court decisions as examples, DOL asserted that the Rule has "created some confusion and inconsistent application," such that clarification may be required.[14] To reconcile this perceived problem, DOL stated that it "do[es] not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met."[15] On February 15, 2019, the Department revised its FOH[16] and also issued a Field Assistance Bulletin ("FAB").[17] The Bulletin restated the DOL's contention that the 80/20 Rule "created

[9] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA-854 (Dec. 20, 1985), 1985 WL 1259240.
[10] FOH § 30d00(f)(1)-(4) (rev. Dec. 15, 2016).
[11] *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545, 549-50 & n.1 (W.D. Va. July 8, 2019).
[12] *Belt*, *supra* note 5 at 522-23 (citing Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (Nos. 15-1579, 15-15794, 15-16561, 15-16659, 16-15003, 16-15004, 16-15005, 16-15118, 16-16033), 2016 WL 3900819; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant, *Romero v. Top-Tier Colo., LLC*, 849 F.3d 1281 (10th Cir. 2017) (No. 16-1057), 2016 WL 3922687; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725/26), 2010 WL 3761133). These cases are discussed in greater detail *infra*.
[13] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-27 (Nov. 8, 2018), 2018 WL 5921455.
[14] *Id.* at *2-3, *comparing Fast v. Applebee's Int'l, Inc*., 502 F. Supp. 2d 996 (W.D. Mo. 2007) (described by DOL as prohibiting tip-crediting for "duties related to the tip producing occupation if they exceed 20 percent of the employee's working time") *with Pellon v. Bus. Representation Int'l, Inc*., 528 F. Supp. 2d 1306 (S.D. Fla. 2007) (characterized by DOL as a rejection of *Fast*, in part, by holding that the 20 percent limitation is inapplicable to related duties), *aff'd*, 291 Fed. App'x 310 (11th Cir. 2008). However, despite the Department's characterization of *Pellon* as a rejection of the 80/20 Rule, that case "actually decided that determining the validity of the interpretation was 'unnecessary' given the facts of the case." *Belt*, 2019 WL 3829459, at *15 (citing *Pellon*, 528 F. Supp. 2d at 1314); see discussion *infra*.
[15] Opinion Letter FLSA2018-27, 2018 WL 5921455 at *3.
[16] FOH, § 30d00(f)(1)-(4) (Feb. 15, 2019).
[17] *See* U.S. Dep't of Labor, Wage & Hour Div., FAB No. 2019-2 (Feb. 15, 2019).

confusion" and its new interpretation of § 531.56(e).

Thereafter, the Department issued the instant NPRM, proposing to amend 29 C.F.R. § 531.56(e) "to reflect the guidance on related duties in the recent opinion letter, FAB, and FOH revisions."[18] As the text of the NPRM makes plain, the Department lacks information to support such a dramatic change in its regulations. In fact, the Department admits that it does not know what the economic impact will be and has sought information during the comment period to ascertain its effects.[19] And, as explained in more detail below, the current long-standing 80/20 Rule meets the objectives of ensuring clarity for the regulated community and the protection of employees while the Proposed Rule is not supported by the legal arguments advanced by the Department.

II. If Finalized, the Proposed Rule Would Likely Violate the Administrative Procedure Act.

Under the Administrative Procedure Act (APA), it is well settled that agency actions that are arbitrary and capricious are to be held unlawful and set aside.[20] An agency regulation is arbitrary and capricious if an agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[21]

When promulgating a new regulation, agencies are required to present findings to support their regulatory choices, and those findings must be supported by substantial evidence.[22] Agencies must show that there are good reasons for new policies, and they must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[23] An agency rule must also be rejected if the agency fails to reflect upon contrary evidence to the rule or treats contrary evidence in a conclusory fashion.[24]

The Proposed Rule is arbitrary and capricious for three reasons. First, the Proposed Rule's proffered explanation "that the policy was difficult for employers to implement and led to confusion," as well as its reliance on the decision in *Pellon v. Business Representation International, Inc*., do not provide sufficient justification for the promulgation of the rule. Second, the Proposed Rule entirely fails to consider an important aspect of the issue, namely the potentially

[18] 84 Fed. Reg. at 53,963
[19] *Id.* at 53,967.
[20] 5 U.S.C. § 706(2)(A).
[21] *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[22] *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167-68 (1962).
[23] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotations omitted).
[24] *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008).

devastating impact of the Proposed Rule on workers. Third, the Department fails to consider the confusion the implementation of the Proposed Rule will create among employers.

A. Judicial decisions cited in the NPRM do not provide justification for rulemaking.

In the Proposed Rule, the Department cites one judicial decision which considered and declined to apply the 80/20 rule based on the particular facts presented. In that case, the trial court found that the 80/20 rule was impractical to apply to the duties of the plaintiff skycaps.[25] Finding the plaintiffs more like servers who are expected to perform general preparation or maintenance, the trial court concluded they did not perform dual jobs—all of their work was skycap work.[26] The trial court also determined that the plaintiff skycaps performed tasks which are "directed toward receiving tips or incidental to receiving tips" and could not provide evidence that "general preparation work or maintenance" constituted more than twenty percent of their time.[27] In fact, several of the plaintiffs "admitted that dividing their workday among the various tasks they perform is impractical or impossible."[28] Although employees that can demonstrate "easily separable . . . time" when they are performing exclusively non-tipped work are entitled to the full minimum wage for that time period, the court held that skycaps performed integrated tasks, and had not provided evidence to demonstrate what, if any, portion of their time was spent on non-tipped work.[29] While the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the trial court, it did not abrogate the rule, nor characterize it as impractical or "infeasible"; rather, it issued a one-page per curiam decision affirming the trial court's determination that the skycaps failed to demonstrate that they spent substantial time doing non-tipped work. As discussed below, the other federal appellate courts that have considered the 80/20 rule have applied it without issue in appropriate cases.

In a more recent decision, the Eleventh Circuit upheld a trial court's straightforward application of the 80/20 rule in another per curiam opinion. In *Ide v. Neighborhood Restaurant Partners, LLC*, the trial court denied the plaintiff's motion for conditional certification of a collective action, applying the 80/20 rule and finding that there was not "sufficient evidence to establish that all of Defendants' tip credit employees spent more than 20 percent of their work time performing non-tip related duties."[30] In affirming the trial court, the appellate court held that there was insufficient evidence that the plaintiff "performed duties unrelated to her tipped occupation for which she was not properly compensated . . . ."[31] While the trial court found that the 80/20 rule was not violated, it applied the rule to the facts in that case without questioning its propriety.

[25] *Pellon v. Bus. Representation Int'l, Inc*., 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. App'x 310 (11th Cir. Sept. 3, 2008) (per curiam).
[26] *Id.* at 1313.
[27] *Id.* at 1312-14.
[28] *Id.* at 1314.
[29] *Id.* at 1313-14.
[30] 32 F. Supp. 3d 1285, 1293-95 (N.D. Ga. 2014), *aff'd*, 667 Fed. App'x 746 (11th Cir. July 1, 2016).
[31] *Ide*, 667 Fed. App'x at 747.

The *Pellon* court's questioning of the rule's application in certain contexts represents a minority opinion on the matter. The Courts of Appeals for the Eighth, Ninth, and Tenth Circuits have all approved of the 80/20 rule.[32] The Seventh Circuit also applied the 80/20 rule without issue, holding that servers that spent a negligible amount of time on non-tip-producing tasks were not dual job employees.[33] By contrast, federal courts across circuits have found the 2018 Opinion Letter and revised FOH cited in the NPRM unworthy of deference.[34]

It is simply untrue that the 80/20 rule has engendered confusion among courts. Courts regularly apply it without substantial difficulty, and the vast majority have reached a consensus that it is, in fact, a valid interpretation of the dual jobs regulation. Accordingly, the Department's primary rationale for the Proposed Rule does not support its upending the 80/20 rule.

B. DOL failed to analyze the potentially devastating impact of the Proposed Rule on workers.

The NPRM states that the Proposed Rule would relieve employers of an oppressive administrative burden without providing any evidence that such a burden exists and may result in

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[32] *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011) ("DOL's interpretation . . . which concludes that employees who spend 'substantial time' (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of the regulation."); *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (applying *Auer* deference to the DOL Guidance which establishes the 20 percent benchmark and finding that the rule is not "unworkable" or "impracticable"); *Romero v. Top-Tier Colorado LLC*, 849 F.3d 1281 (10th Cir. 2017) (reversing and remanding to the trial court to consider the plaintiff's claim that "she spent more than 20 percent of her workweek performing 'related but nontipped work.'").

[33] *Schaefer v. Walker Bros. Enters., Inc.*, 829 F.3d 551, 554-55 (7th Cir. 2016); *see also Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014) ("A tipped employee is entitled just to the sub-minimum, tip credit wage rate unless he is doing either unrelated non-tipped work or related non-tipped work in excess of 20 percent of his work-day.").

[34] *See Flores v. HMS Host Corp.*, No. 8:18-CV-03312-PX, 2019 WL 5454647, at *7 (D. Md. Oct. 23, 2019) ("[T]his Court joins its sister courts in declining to accord the DOL Letter any persuasive value."); *Belt, supra* note 5 at 531 (declining to award *Auer* deference to the DOL's "unreasonable" Opinion Letter and Handbook); *Spencer, supra* note 11 at 553 ("[T]he Court declines to give [DOL's Opinion Letter and Handbook] either [*Auer*] or [*Skidmore*] deference."); *Esry v. P.F. Chang's China Bistro, Inc*., 373 F. Supp. 3d 1205, 1210 (E.D. Ark. 2019) ("The Court therefore will not defer under *Auer* to the Department's guidance contained in the Handbook."); *Cope v. Let's Eat Out, Inc*., 354 F. Supp. 3d 976, 986-87 (W.D. Mo. 2019) (declining to apply *Auer* or *Skidmore* deference to the Opinion Letter). *See also Callaway v. DenOne LLC*, No. 1:18-CV-1981, 2019 WL 1090346, at *7 (N.D. Ohio Mar. 8, 2019) (expressing "hesitan[ce] to defer to the agency in this case."). *But see Shaffer v. Perry's Restaurants, Ltd*., No. SA-16-CV-01193-FB, 2019 WL 2117639, at *5 (W.D. Tex. Apr. 3, 2019), *report and recommendation adopted*, No. CV SA-16-CA-1193-FB, 2019 WL 2098116 (W.D. Tex. Apr. 24, 2019) (awarding summary judgment to employer based on a retroactive application of DOL's new guidance).

cost savings to consumers. It fails, however, to consider and appreciate the impact that the Proposed Rule will have on workers and social safety net programs.

In order to justify the regulatory choices they make, agencies must examine all relevant considerations and articulate satisfactory explanations that rationally connect the facts found and choices made.[35] An agency's explanation for its rulemaking will not survive judicial scrutiny where there is no direct evidence in support of its findings."[36] DOL suggests that the Proposed Rule will ease administrative burdens on employers,[37] stating that employers "may" currently track how tipped employees spend their time in order to ensure compliance with the 80/20 rule, an endeavor it describes as "difficult and costly."[38] However, it offers no actual evidence that employers are "constantly monitoring their [employees'] time"[39] in such a manner that the Proposed Rule would ease any administrative burden in a meaningful way, or that such monitoring is difficult or costly under the current rule.

Agencies must avoid "factors which Congress has not intended [them] to consider" as foundations for rulemaking,[40] and DOL veers far outside of its regulatory lane in considering potential consumer savings.[41] But those "labor cost savings" that could theoretically be passed onto consumers touted as a potential benefit of the Proposed Rule belie a troubling fact: it would deal a serious blow to workers' earnings. DOL's failure to consider that facet alone would render the Proposed Rule arbitrary and capricious.[42]

Although the NPRM makes a cursory acknowledgement that "employment of workers currently performing [non-tipped duties], such as dishwashers and cooks, may fall,"[43] it does not actually attempt to quantify how many of these non-tipped workers would lose their jobs due to the Proposed Rule. Instead, it posits that their work would be done by tipped workers working longer hours,[44] but still fails to analyze the effect the Proposed Rule would have on those workers' earnings.

Tipped workers simply cannot afford to spend large amounts of time on non-tip-generating work. A 2008 survey found that thirty percent of tipped workers in Chicago and New York City

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[35] *F.E.R.C. v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016).
[36] *See State Farm*, *supra* note 21 at 52-54.
[37] NPRM, 84 Fed. Reg. 53,956, 53,972.
[38] *Id.*
[39] *Id.*
[40] *State Farm*, *supra* note 21 at 43.
[41] It is worth noting that here as well, the Department also failed to offer any evidence that the Proposed Rule would result in savings to consumers.
[42] *See Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) ("[A]n agency may not entirely fail to consider an important aspect of the problem." (internal quotation omitted)).
[43] NPRM, *supra* note 18.
[44] *Id.*

were not paid the lower service rate,[45] leaving them entirely dependent on tips for income. Evidence from DOL enforcement activity echoes the survey's findings. As the Department appreciates, "[t]ip credit and overtime violations are, unfortunately, common in the restaurant industry[,]"[46] which employs roughly sixty percent of all tipped workers.[47] In its 2010-12 compliance sweep of nearly 9,000 full-service restaurants, DOL found that 83.8% of the restaurants it investigated violated wage and hour laws.[48] That included 1,170 tip credit violations, which cost workers $5.5 million in lost income.[49] These data reveal the true stakes of removing the limit on the amount of time tipped employees may spend on non-tip-producing activities; for many workers, minimum wage shortfalls resulting from the loss of time on tip-producing activities will not be shorn up by their employers.

Even the Department's conservative hypothetical demonstrates how significant the financial loss to workers would be. If the hypothetical server making $12 per hour in tips makes $2 less per hour in tips under the Proposed Rule[50] and works 35 hours per week,[51] she will lose $70 per week, or *fourteen percent of her income*.[52] That translates to a loss of $3,164 annually,[53] bringing her income down from $22,353.66[54] to $19,189.66.[55]

The reality is likely to be much worse. A recent analysis found that income losses resulting from the Proposed Rule would be astronomical, costing workers more than $700 million dollars annually.[56] These losses would be devastating for workers and their families. Contrary to popular perception, the vast majority of tipped workers are not teenagers; 87.4% are aged 20 years or older,

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[45] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 3 National Employment Law Project (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.
[46] News Release, U.S. Dep't of Labor, Pennsylvania Restaurants to Pay $1 Million in Back Wages, Damages, and Penalties following U.S. Department of Labor Investigation (Feb. 15, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190215-3.
[47] 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* 7 Economic Policy Institute (Jul. 10, 2014), https://www.epi.org/files/2014/EPI-CWED-BP379.pdf.
[48] *Id.* at 18.
[49] *Id.*
[50] NPRM, *supra* note 18.
[51] DOL states that the average server works 35 hours per week. NPRM, *supra* note 18, at 53,969 n. 18.
[52] (2*35) / ((2.13*35) + (12*35)) = 0.14.
[53] $70 * 45.2 = $3,164. This assumes she works 45.2 weeks per year, which DOL states is average. NPRM, *supra* note 18, at 53,970.

[54] 45.2 * (($2.13*35) + ($12*35)) = $22,353.66.
[55] 45.2 * (($2.13*35) + ($10*35)) = $19.189.66.
[56] Heidi Shierholz and David Cooper, *Workers will lose more than $700 million dollars annually under the proposed DOL rule*, Economic Policy Institute, November 30, 2019, https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/

and 25.6% are parents.[57] With poverty rates nearly twice that of non-tipped workers,[58] roughly 46% of tipped workers and their families rely on public benefits[59]—a number that is sure to rise if the Proposed Rule is finalized. In many states, the loss of income described in DOL's hypothetical would render a single mother with one child eligible for Supplemental Assistance Nutrition Program ("SNAP") benefits.[60] In Pennsylvania, she would make just a fraction of many states' eligibility threshold for a child care subsidy.[61] The reduction in earnings would also render many more households eligible for medical and home heating assistance benefits.[62] Yet, the Department

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[57] Allegretto and Cooper, *supra* note 47 at 9-10.
[58] *Id.* at 3.
[59] *Id.*
[60] In Pennsylvania, for example, a two-person household is eligible for SNAP if the household's gross monthly income is $1,832 or less. *See* Pa. Dep't of Human Servs., *SNAP Income Limits*, https://www.dhs.pa.gov/Services/Assistance/Pages/SNAP-Income-Limits.aspx. She would have already been eligible in Illinois and Massachusetts, whose thresholds are $2,326 and $2,818, respectively. Il. Dep't of Human Servs., *Supplemental Nutrition Assistance Program*, https://www.dhs.state.il.us/page.aspx?item=30357; Mass. Dep't of Transitional Assistance, *Gross Monthly Categorical Eligibility Income Standards*, https://www.mass.gov/doc/gross-monthly-categorical-eligibility-income-standards-as-referenced-at-106-cmr-364976/download.
[61] *See* Pa. Dep't of Human Servs., *Child Care Works Subsidized Child Care Program*, https://www.dhs.pa.gov/Services/Children/Pages/Child-Care-Works-Program.aspx ($33,820 annual income); Il. Dep't of Human Servs., *CCAP Income Guidelines*, http://www.dhs.state.il.us/page.aspx?item=98601 ($2,538 monthly income); Mass. Executive Office of Educ., *Early education and care financial assistance for families*, https://www.mass.gov/guides/early-education-and-care-financial-assistance-for-families#-eligibility-requirements- and https://www.mass.gov/files/documents/2019/10/01//smi-income-eligbility-fy2020.pdf ($40,713 annual income for parents of children without disabilities).
[62] In Pennsylvania, adults aged nineteen to sixty-four with incomes at or below 133% of the Federal Income Poverty Guidelines (approx. $22,500) are eligible for Medical Assistance benefits. *See* Pa. Dep't of Human Servs., *Medical Assistance General Eligibility Requirements*, https://www.dhs.pa.gov/Services/Assistance/Pages/MA-General-Eligibility.aspx. A two-person household with an annual income of $25,365 or less is eligible for Pennsylvania's Low-Income Home Energy Assistance Program. *See* Pa. Dep't of Human Servs., *LIHEAP Brochure*, https://www.dhs.pa.gov/Services/Assistance/Documents/Heating%20Assistance_LIHEAP/p_035672.pdf. *See also* 2019 U.S. Federal Poverty Guidelines, https://aspe.hhs.gov/2019-poverty-guidelines ($16,910 for two person household). In Illinois, a family of two is eligible for Medicaid if their annual income is $23,336 or less, and is eligible for heating assistance if their annual income is $25,365 or less. *See* Benefits.gov, *Illinois Medicaid*, https://www.benefits.gov/benefit/1628 and Illinois Dep't of Commerce, *Utility Bill Assistance – How To Apply*, https://www2.illinois.gov/dceo/CommunityServices/UtilityBillAssistance/Pages/HowtoApply.aspx. In Massachusetts, a single mother with an annual income of $19,189.66 is eligible for MassHealth and $796 in home energy assistance benefits. *See* MassHealth, *2019 MassHealth Income Standards and Federal Poverty Guidelines*, https://www.mass.gov/doc/2019-masshealth-income-standards-and-federal-poverty-guidelines/download and Mass. Dep't of Housing & Community Development, *Fiscal Year 2020 Low-Income Home Energy Assistance Program*

did not even acknowledge that the Proposed Rule could result in increased reliance on social safety net programs based on the example it provides, let alone attempt to quantify the impact.

Further, the Proposed Rule would leave workers even more vulnerable to other forms of workplace abuse. Restaurant servers, who are predominantly female, frequently face the dilemma of choosing to confront customers about sexual harassment and abuse and risk losing their tips–or remaining silent.[63] "Working for tips means that each shift comes with questions that do not apply to millions of other workers around the country: How much money will I make, and how much will I tolerate to make it?"[64] Those tips are stretched thin when employers take tip credits for significant amounts of time that servers spend on non-tip generating duties, such as food prep, setting tables, and cleaning–before, after, and during their regular shifts, increasing the risk that servers who choose to confront workplace abuse will lose their financial security.

The Department cannot ignore these crucial facts in the rulemaking process. DOL's failure to conduct a substantial investigation into the true cost of the Proposed Rule renders any decision to finalize it arbitrary and capricious.

C. DOL failed to consider the confusion the Proposed Rule could cause among employers.

In addition to properly examining relevant facts, it is vital to "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account" when promulgating new regulations.[65] At the same time that the Proposed Rule would leave workers even more vulnerable to wage theft by dishonest employers, it would make it exceedingly difficult for honest employers to distinguish between tipped workers and dual job employees. If an employee is instructed to come in and wash dishes for four hours before her shift as a bartender, would an employer be required to treat her as a dual employee—a dishwasher and then a bartender—or could the employer treat her as a tipped employee for all hours? Could a restaurant owner call his cooks servers[66] and pay them the tipped minimum wage for their entire shift, so long as they perform some table service? The Proposed Rule provides no clear guidelines that would answer these questions, potentially subjecting employers who guess incorrectly to substantial liability. By erasing the 80/20 rule's clear line between dual job employees and tipped workers, DOL would wreak havoc on both employers and workers.

(LIHEAP) Income Eligibility and Benefit Levels, https://www.mass.gov/doc/fy-2020-liheap-income-eligibility-and-benefit-level-chart/download.

[63] *See* Einhorn and Abrams, *The Tipping Equation*, New York Times, March 12, 2018, https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html.

[64] *Id*.

[65] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotations omitted).

[66] The Occupational Information Network ("O*Net") lists "cook foods" in the detailed work activity section for waiters and waitresses, https://www.onetonline.org/link/details/35-3031.00.

III. The Proposed Rule Is Contrary to the Legislative Intent of the FLSA.

The Proposed Rule is contrary to the legislative intent of the FLSA. Agencies are not permitted to adopt administrative constructions which are contrary to clear congressional intent.[67] If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[68] Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[69] If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, it should not be disturbed unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.[70] As explained above, the signatory states believe the Proposed Rule is arbitrary and capricious. However, not only is the Proposed Rule arbitrary and capricious, but it is contrary to legislative intent.

The reason Congress permitted the tip credit to remain in place when it undertook the 1974 amendments was because it was "impressed by the extent to which customer tips contributed to the earnings of some hotel and restaurant employees."[71] In establishments where 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.[72] It was also clear in 1974 that Congress intended for employers to keep track of employees' time spent on tipped and non-tipped duties.[73]

The Proposed Rule's "contemporaneous with or within reasonable time immediately before or after" standard is not a permissible construction of the FLSA because it is contrary to the legislative intent of the Act. The FLSA "was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work."[74] A "fair day's pay for a fair day's work" 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."[75]

In contrast, courts have repeatedly recognized over the past thirty years that the 80/20 rule is reasonable and consistent with the FLSA's purpose. In *Belt*, the district court engaged in an in-depth review of the Department's dual jobs regulation as well as the Department's past and current interpretations of that regulation.[76] After determining that the Department's current interpretation of the dual jobs regulation was unreasonable and not entitled to deference, the district court then

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[67] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984).
[68] *Id.* at 843.
[69] *Id.* at 844.
[70] *Id.* at 845.
[71] Legislative History of the Fair Labor Standards Act Vol. 1, 682.
[72] *Id.* at 683.
[73] *See* Legislative History of the Fair Labor Standards Act Vol. 2, p. 2411 (citing 29 C.F.R. § 516.28(a)(1)-(5).
[74] *Belt, supra* note 5 at 538 (*citing A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).
[75] *Id.*
[76] *See generally id.*

went on to find that the dual jobs regulation itself places a 20% limit on untipped related work.[77] Furthermore, it stated, "A twenty percent limit on untipped related work also 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."[78] The 80/20 rule is consistent with legislative intent because it protects workers and ensures they are guaranteed a fair day's pay for a fair day's work.

The 80/20 rule ensures that workers who are paid the lower service rate are performing duties that will enable them to earn more tipped income by spending at least 80% of their time serving customers directly. Indeed, courts often examine the amount of time workers spend interfacing with customers as part of determining whether they are tipped workers at all. For instance, in *Montano v. Montrose Restaurant Association, Inc.*, the United States Court of Appeals for the Fifth Circuit held that "in determining whether an employee customarily and regularly receives tips, a court or a factfinder must consider the extent of an employee's customer interaction."[79] By creating the "contemporaneous with or within reasonable time immediately before or after" standard, employers will have an incentive to assign tipped employees more non-tipped work-related duties. By spending less time interacting with customers, service workers will have less tip-earning potential which will inevitably result in workers receiving less than a fair day's pay in contravention to legislative intent.

IV. Conclusion

The proposed elimination of the 80/20 Rule is inconsistent with the minimum wage protections afforded by the FLSA, and the Department's rationale lacks adequate justification for this complete reversal of the DOL's long-standing interpretation that struck a balance between the rights of workers and flexibility for the regulated community, as Congress intended in enacting the tip-credit provision.

For all the reasons stated above, we oppose rescission of the 80/20 Rule, and we strongly urge the Department to withdraw this proposed change.

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[77] *Id.* at 535-38.

[78] *Id.* at 538 (citing *Marsh*, 905 F.3d at 621-23, 633). Other courts have found the 80/20 rule to be a reasonable interpretation of the Department's dual jobs regulation. *See Fast*, 638 F.3d at 879-881 (finding that "the 20 percent threshold . . . is a reasonable interpretation of the terms "part of [the] time" and "occasionally" in the Dual Jobs regulation); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976, 986-87 (W.D. Mo. 2019) (agreeing with Eighth Circuit's finding in *Fast*); *Esry*, 373 F. Supp. 3d at 1211 (following the Eighth Circuit's finding in *Fast*).

[79] 800 F.3d 186, 193 (5th Cir. 2015). *See also Myers v. Copper Cellar Corp.*, 192 F.3d 546, 550-51 (6th Cir. 1999) (finding that salad preparers were not tipped employees and could not participate in a valid tip pool because they "abstained from any direct intercourse with diners."); *Kilgore v. Outback Steakhouse of Fla.*, 160 F.3d 294 (6th Cir. 1998) (finding that restaurant hosts were tipped employees because they had more than a de minimis interaction with customers).

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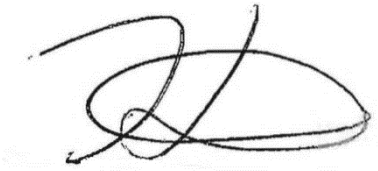

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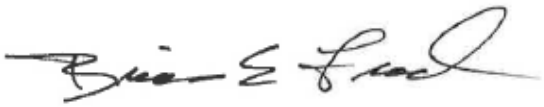

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