



**U.S. Department of Labor
Wage and Hour Division**



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MEMORANDUM FOR Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Andrew B. Rogers
Administrator

SUBJECT: **Withdrawal of Opinion Letters FLSA-895 (Aug. 8, 1979),
WH-502 (Mar. 28, 1980), FLSA-854 (Dec. 20, 1985), and
80/20 Guidance on Related Duties**

This Field Assistance Bulletin (FAB) withdraws Wage and Hour Division (WHD or Division) Opinion Letters FLSA-895 (Aug. 8, 1979); [WH-502](#) (Mar. 28, 1980); and FLSA-854, 1985 WL 1259240 (Dec. 20, 1985). These letters address whether an employee is a “tipped employee” under section 3(t) of the Fair Labor Standards Act (FLSA or Act) and the Division’s “dual jobs” regulation, subsection 531.56(e). In addition, WHD confirms the version of section 30d06(e) of the Field Operations Handbook (FOH) that included the 80/20 guidance on related duties, withdrawn on January 14, 2025 ([see WHD FOH Revision 785](#)), no longer reflects the Division’s policy or interpretation of the Act. These withdrawn opinion letters and the FOH provision that implemented them should no longer be relied upon as WHD enforcement guidance.

BACKGROUND

A. The Fair Labor Standards Act

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked and overtime of at least one and one-half times the employee’s regular rate of pay for all hours worked over 40 in a workweek. 29 U.S.C. §§ 206(a), 207(a). However, special provisions apply to employees who receive tips. *Id.* § 203(m)(2), (t).

Since 1966, section 3(m) of the FLSA has permitted employers that meet certain requirements to satisfy a portion of their minimum wage obligation to a “tipped employee” by taking a partial credit, commonly known as a “tip credit,” toward the minimum wage obligation for tipped employees, based on the amount of tips that the tipped employee receives. *See* Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 101(a), 80 Stat. 830 (1966); *see also* 29 U.S.C. § 203(m)(2)(A). An employer that elects to take a tip credit cannot satisfy the entirety of the minimum wage requirement with tips because the employer must pay the tipped employee a direct cash wage of at least \$2.13 per hour. Under current law, the employer may claim a tip credit of up

to \$5.12 per hour towards its minimum wage obligation for a tipped employee, provided—among other criteria—that the employee *actually receives* sufficient tips to earn not less than the FLSA minimum wage. 29 U.S.C. § 203(m)(2)(A).

Section 3(t) of the Act 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). In 1966, Congress originally fixed the monthly-to-exceed figure at \$20, *see* Pub. L. 89-601, § 101(b), 80 Stat. 830, increasing it to \$30 in the 1977 amendments, *see* Pub. L. 95-151, § 3(a), 91 Stat. 1245, 1249 (1977). Congress has not since amended the threshold monetary level of section 3(t).

The Department promulgated the original regulations for tipped employees in 1967, the year after Congress enacted the 1966 amendments. *See* [32 Fed. Reg. 13575](#) (Sep. 28, 1967).

B. The “Dual Jobs” Regulation

Although the FLSA does not define the term “occupation” or the phrase “engaged in an occupation,” the so-called “dual jobs” regulation, [29 C.F.R. § 531.56\(e\)](#), has long provided direction regarding when an employee is engaged in an occupation in which the employee customarily and regularly receives tips (*i.e.*, a tipped occupation) or an occupation in which the employee does not customarily and regularly receive tips (*i.e.*, a non-tipped occupation).

1. 1967 Regulation

Subsection 531.56(e) recognizes the logical and practical reality that an individual may be employed by the same employer in two or more distinct occupations, one or more of which may be a tipped occupation under the Act, while one or more other occupations may not qualify as a tipped occupation. Specifically, the employee may be engaged in an occupation in which workers customarily and regularly receive more than \$30 a month in tips and a non-tipped occupation—namely, one in which employees either do not customarily and regularly receive any tips or receive less than the statutory threshold.

The Division illustrates this concept with an individual employed by a hotel as both a waiter and a maintenance worker. 29 C.F.R. § 531.56(e). In this regulatory scenario, the employee is a “tipped employee” under the Act only while he or she is engaged in the tipped occupation. As such, the employer may take a tip credit against its minimum wage obligation only for the hours the tipped employee spends engaged in the tipped occupation. For the hours worked by the employee in a non-tipped occupation, the employer may not take the tip credit and must pay the employee at least the full minimum wage for hours worked in the non-tipped occupation.

The regulation further recognizes that an employee employed in a tipped occupation may perform duties “related” to that occupation, even if such duties are not by themselves “directed toward producing tips.” *Id.* The regulation provides several examples of tipped employees performing so-called “related” non-tipped (or non-tip-producing) duties, including a “waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses,” and a “counterman who also prepares his own short orders or who, as part of a group of counterwomen, takes a turn as a short order cook for the group.” *Id.* The regulation provides that a tipped employee remains engaged in a tipped occupation when performing duties

that are part of that occupation, even if those duties are “not by themselves . . . directed toward producing tips.” *Id.* Put another way, each duty of a tipped occupation “need not” by itself be “directed toward producing tips.” *Id.*

2. 2021 Regulation and Antecedent Subregulatory Guidance

In 2021, the Department issued a final rule (2021 Dual Jobs Rule) that revised the dual jobs regulation by setting specific limits on the amount of time that tipped employees could spend performing “work that is not tip-producing, but directly supports tip-producing work.” [86 Fed. Reg. 60158](#) (codified at 29 C.F.R. § 531.56(f)(4)). The 2021 Dual Jobs Rule provided that tipped employees must receive the full minimum wage from their employer whenever non-tipped, directly supporting work exceeds 20 percent of their workweek or 30 continuous minutes. *Id.* It also provided examples of tasks that fall into the following three categories: (1) tip-producing work; (2) work that directly supports tip-producing work; and (3) work that is not part of a tipped occupation. [86 Fed. Reg. 60157–58](#) (codified at 29 C.F.R. § 531.56(f)(2)–(3) and (5)).

The preamble to the 2021 Dual Jobs Rule noted that over the past several decades, WHD has issued guidance interpreting the dual jobs regulation as it applies to employees who perform both tipped and non-tipped duties. *See* [86 Fed. Reg. 60116](#). The Department first addressed this issue through a series of Opinion Letters, three of which are relevant here:

- Opinion Letter FLSA-895 (Aug. 8, 1979) (“1979 Opinion Letter”) addressed a question regarding whether an employer may claim a tip credit for time spent by a waitress preparing vegetables for the salad bar.
- Opinion Letter WH-502 (Mar. 28, 1980) (“1980 Opinion Letter”) addressed a question regarding whether an employer may claim a tip credit for time spent by waiters and waitresses cleaning and stocking the waitress station, cleaning and resetting the tables (including filling salt and pepper shakers), and vacuuming the dining room carpet.
- WHD Opinion Letter FLSA-854 (Dec. 20, 1985) (“1985 Opinion Letter”) addressed a question regarding whether an employer may claim a tip credit for time spent preparing vegetables for the salad bar and a variety of other preparatory or maintenance-type tasks, including cleaning and setting tables and restocking the server station.

Building upon statements in the 1980 Opinion Letter, the 1985 letter explained that a “tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the [servers’] regular duties and are assigned generally to the [server] staff.” But if “specific employees are routinely assigned to maintenance-type work or . . . tipped employees spend a substantial amount of time in performing general preparation work or maintenance, we would not approve a tip credit for hours spent in such activities.” *Id.* Under the circumstances described by the employer seeking that opinion letter—specifically, “one waiter or waitress is assigned to perform . . . preparatory activities,” including setting tables and ensuring that restaurant supplies are stocked, and those activities “consume a substantial portion of a waiter or waitress’ workday,” in that case, “30% to 40% of the employee’s workday”—a tip credit was not permissible as to the time the employee spent performing those activities. *Id.*

In 1988, WHD revised its FOH to add subsection 30d00(e), which consolidated, distilled, and further refined the policies established in the 1979, 1980, and 1985 Opinion Letters. *See* WHD FOH Revision 563; *see also* [86 Fed. Reg. 60116](#) (describing the 1988 FOH revision). According to the 1988 FOH, subsection 531.56(e) “permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities),” provided those duties are “incidental” and “generally assigned” to tipped employees. *Id.* at 30d00(e) (1988).

To illustrate the types of related, non-tip producing duties for which employers could take a tip credit, the FOH listed “a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses,” the same examples included in subsection 531.56(e). *Id.* But “where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.” The FOH defined a “substantial” amount of time spent performing general preparation or maintenance work as being “in excess of 20 percent,” creating a limited tolerance for this work. *Id.* This guidance recognized that if a tipped employee performs too much related, non-tipped work, the employee is no longer engaged in a tipped occupation, and the employer may not take a tip credit for such time. This became known as the “80/20” guidance or rule.

In 2021, the Department’s Dual Jobs Rule restored and largely codified the 80/20 guidance. *See* 86 Fed. Reg. 60158. In 2023, the Department updated the FOH to reflect the 2021 Dual Jobs Rule and reorganized and moved it to subsection 30d06(e). *See* WHD FOH Rev. 779.

C. Fifth Circuit Decision

In 2024, the Fifth Circuit decided *Restaurant Law Center v. U.S. Department of Labor*, 120 F.4th 163 (5th Cir. 2024). The Court of Appeals rejected the Department’s 2021 Dual Jobs Rule. The Fifth Circuit concluded that the 2021 Dual Jobs Rule was inconsistent with the Act, specifically by defining whether an employee is “engaged in” an occupation that customarily and regularly receives tips based on how long an employee performs “specific tasks,” and whether such tasks are “each individually tip-producing.” *Restaurant Law Ctr.*, 120 F.4th at 172–173. The Fifth Circuit found that a tipped employee is “undoubtedly engaged in his occupation” when he is performing a core duty of that occupation, regardless of whether he is tipped for that duty, but explained that the additional line drawing under the 2021 Dual Jobs Rule “discounts many core duties of an occupation when those duties do not themselves produce tips.” *Id.* at 176.

The Fifth Circuit vacated the revised regulatory text (then 29 C.F.R. §§ 531.56(e)–(f)) as promulgated in the 2021 Dual Jobs Rule. This had the effect of reinstating the Department’s original dual jobs regulation as promulgated in 1967. The Fifth Circuit explained that the 1967 dual jobs regulation “focuses on whether the employee performs tasks unrelated to his or her tipped occupation, not the amount of time spent on untipped tasks[.]” *Restaurant Law Ctr.*, 120 F.4th at 174 (internal quotations omitted).

Following the Fifth Circuit’s decision, the Department issued a final rule to remove the regulatory text codified under the 2021 Dual Jobs Rule and to reinstate the dual jobs regulation at 29 C.F.R.

§ 531.56(e) as it existed prior to the effective date of the 2021 Dual Jobs Rule. *See* [89 Fed. Reg. 101884](#). Consequently, the 1967 dual jobs regulation set forth in subsection 531.56(e) remains in effect today.

Moreover, on January 14, 2025, considering the Fifth Circuit’s decision, the Department withdrew the reissued and revised 80/20 guidance from the FOH. *See* [WHD FOH Rev. 785](#). FOH 30d06 now tracks the language of the 1967 rule without interpreting it.

The Department’s 1979, 1980, and 1985 opinion letters continued to remain available to the public.

DISCUSSION

Subsection 3(t) of the Act 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), and current subsection 531.56(e) explains that a tipped occupation can include the performance of duties related to a tipped occupation, regardless of whether such duties are tip producing. *See* 29 C.F.R. § 531.56. Both the statute and regulation permit employers to take a tip credit based on whether an employee is engaged in a tipped “occupation,” not whether the employee is performing certain kinds of duties or tasks *within* the tipped occupation. In particular, the dual jobs regulation does not require that each and every, or a certain number of, duties comprising a tipped occupation somehow or someway be “directed towards producing tips.”

Nevertheless, the Department’s 1985 opinion letter directs the analysis on the employee’s individual tasks—specifically, whether such tasks are tip producing and whether the employee’s related, non-tipped tasks comprise a “substantial portion of [the employee’s] workday”—instead of whether the employee is engaged in a tipped occupation. *See* WHD Op. Ltr. FLSA-854. In addition, the letter treats time amounting to 30 to 40 percent of an employee’s workday as consuming a substantial portion of that workday.

This is inconsistent with the *Restaurant Law Center* decision, which WHD finds persuasive, and which noted that “[t]he FLSA does not ask whether duties composing [a] given occupation are themselves each *individually* tip producing.” *Restaurant Law Center*, 120 F.4th at 173 (emphasis in original). *Restaurant Law Center* also held that “percentage-based” approaches focused on “the *amount of time* spent on untipped tasks,” rather than whether “the employee performs tasks *unrelated* to his or her tipped occupation,” are inconsistent with the statute. *Id.* at 174 (internal quotations omitted).

The Division cited to the 1979 and 1980 opinion letters in the 1985 letter, and has previously described these letters as culminating in the 1988 FOH guidance that became known as the 80/20 rule, *see* [86 Fed. Reg. 60116](#). In that context, the Division is concerned that these letters may be misread as focusing on whether individual duties are tip producing, or limiting an employee from performing duties within a tipped occupation, in light of the 80/20 rule that followed. As noted above, the 80/20 guidance was removed from the FOH in January 2025 in light of the *Restaurant Law Center* decision invalidating the 2021 Dual Jobs Rule. Accordingly, for the reasons described above, the 1979, 1980, and 1985 opinion letters no longer reflect Division policy and, in some respects, do not accurately state the law. All are hereby withdrawn. This FAB confirms that any

guidance that contemplates specific time limits on duties performed within a tipped occupation no longer reflects WHD policy.

As noted in the Department's most recent regulatory agenda, the Department is developing a notice of proposed rulemaking to amend various regulatory provisions in Subpart D of Part 531, related to tipped employees under the Act. Once published, the Department will welcome comments on any proposed rule impacting tipped employees.