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

Re: Regulatory Information Number (RIN) 1235-AA21

Dear Ms. DeBisschop:

The Missouri Restaurant Association appreciates the opportunity to provide comments on the Department's Notice of Proposed Rulemaking (NPRM) relating to "Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal" regarding Regulatory Information Number (RIN) 1235-AA21.

The Missouri Restaurant Association ("Association") and its predecessor organizations have, for over a century, served as a resource to the foodservice and hospitality industry across the State of Missouri by promoting, educating, empowering, and representing the Missouri restaurant community. Its members are diverse and include traditional restaurants, caterers, hospitals, schools, institutions, clubs, cafeterias, hotels with restaurants, bars, and nightclubs. Because many of our members have employees for whom the "tip credit" is taken, the rules and regulations addressing this topic under the Fair Labor Standards Act is of the utmost concern to the Association.

The Association welcomes clarity on the issue of when an employer may lawfully take a "tip credit" under the FLSA. Unfortunately, the changes proposed by the Department will only create more obscurity, confusion, and uncertainty; and therefore increase, not reduce, the amount of litigation surrounding FLSA compliance on this issue. The proposed changes will substantially increase the administrative burden on employers attempting to police a vague and unworkable standard and provide no additional benefits to employees. Indeed, the Association fears that the only beneficiaries of the adoption of the regulations proposed will be plaintiffs' attorneys who will undoubtedly inundate restaurants seeking class representatives for even more lawsuits which frequently target small business owners, entrepreneurs, and immigrants seeking to make a better life for themselves, their communities, and the individuals they employ. As the Department knows, employees often receive only a nominal amount from such lawsuits.

The Association and its members are committed to complying with the FLSA's requirements as it relates to appropriate application of the tip-credit. For this reason, the Association urges the Department to

carefully consider the comments submitted below – as well as those of other affected trade organizations nationwide – because the proposed changes to the Department's tip-credit regulations as currently written do not account for the realities confronting both employers and employees in industries where the tip-credit it commonly taken.

I. Economic Realities

As a threshold matter, while the proposed regulations purport to "protect" employees, the existing statute and regulations on taking a tip credit ***already*** guarantee the federal minimum wage to all employees; including those for whom the tip credit is taken. Under the FLSA, an employer that elects to take the tip credit must pay the tipped employee a direct cash wage of at least $2.13 per hour, but can take a credit against its wage obligation for the difference – up to $5.12 per hour – from the employee's tips. 29 U.S.C. § 203(m)(2); 29 CFR § 531.59. If the employee's tips are not sufficient to bring the employee's wages up to at least minimum wage, the employer must make up the difference. *Id*. Thus, regardless of whether an employer takes a tip credit or not, employees are ***already*** guaranteed at least the federal minimum wage of $7.25 per hour. (In Missouri and many other states, they are guaranteed an even higher hourly wage of at least half of the state-mandated minimum wage – currently $10.30 per hour)

As discussed below, the practical affect of the proposed changes will dissuade employers from claiming a tip credit for many employees. Many employers whose business models have – for generations – been built around being able to claim such credit will schedule fewer tip-credit-eligible employees. Therefore, the employees who the Department claims to "protect" will more likely be harmed by fewer hours or lack of a job altogether.

Employers will face increased costs if the regulations are adopted in their current form. Many of Missouri's restaurants and other establishments claiming the tip credit are small businesses. Their profit margins are frequently small; and increased labor costs can often mean the difference between remaining open and closing its doors. The recent COVID-19 pandemic and the steady inflation in food costs have already put enormous economic pressure on these businesses. If the tip credit becomes more difficult or more dangerous to claim, the increased labor costs will cause many existing establishments to close; and many more never to open. One alternative is to pass these costs along to customers. Yet, when the costs of a meal go up, experience shows that customers eat-out less frequently; resulting in less revenue for the business and less tips for employees.

II. The Need for Rulemaking

The purported need for "clarity" surrounding the taking of a tip credit is a problem of the Department's own creation. The Department's current regulation states that employees in tipped occupations can perform duties related to their tipped occupation that are not "themselves . . . directed toward producing tips," such as, for example, a server "who spends part of her time" performing non-tipped duties like "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." 29 CFR § 531.56. Although the Department's regulations did not define "part of her time" or "occasionally", the wording of such regulations balanced the practical realities of the restaurant and hospitality industry with a guarantee that employees for whom the tip credit was taken would be engaged primarily in tip-credit-generating work. Because of the hectic nature of restaurants, they often require tipped employees to perform some work which does not directly generate tips like keeping tables clean both during and after meals, doing minor food and beverage preparation, etc. Yet, the current wording of the regulations also precludes an employer from taking a

tip credit when an employee spends "most of their time" on such duties, or where such duties are the "primary" job of the employee.[1]

In 1988, the Department introduced the so-called "80/20 Rule" through its Field Operations Handbook (FOH). The 80/20 Rule stated that an employee was no longer a "tipped employee" if they spent more than 20% of their time in a workweek performing tip supporting, but non-tip-generating work. This "rule" moved away from the flexible language of the Department's own regulations in favor of an arbitrary formula which has proven exceptionally difficult, if not impossible, to administer in practice. Consider the Department's own regulatory example of the server. How was her employer to know what percentage of time the server spent cleaning tables, toasting bread, making coffee, or washing dishes during a shift? In the often chaotic setting of a restaurant, the server may do one or more of these tasks between seating customers and waiting on tables. Short of obsessively watching and recording the minutes (or seconds) the server was engaged in such non-tip-generating work, the employer had no way of knowing whether the server cleared the 20% threshold that transformed them into a non-tipped employee. It was reliance on the Department's own subregulatory guidance which has spurred the relatively recent trend in FLSA litigation. *See e.g. Fast v. Applebee's Intern. Inc.*, 638 F.3d 872 (8th Cir. 2011)

Recognizing that the Department's own "80/20 Rule" was the source – not the solution – to the issues surrounding the tip credit, in 2019 the Department attempted to provide clarity along the lines of its own existing regulations. The 2019 proposal, which was finalized and issued in December 2020, would have allowed employers to take the tip-credit if the employee performed related, nontipped duties as long as they were performed contemporaneously with, or for a reasonable time immediately before or after the tip-generating duties. The regulation directed employers to look to the Occupational Information Network (knows as "O*NET") to determine whether a tipped employees non-tipped duties related to the tipped occupation. While the Association does not necessarily advocate for retention of all of the changes made by the prior administrations final rule on the tip-credit, for the reasons discussed below, it does urge the Department to eschew the 80/20 rule (or any other mathematical formula) for determining tip credit eligibility for side work, and retention of references to O*NET to determine whether a tipped employee's non-tipped duties relate to tipped occupations.

III. The 80/20 Rule should not be promulgated as a regulation.

a. The 80/20 Rule in its current subregulatory form is functionally impossible to administer.

As noted above, the 80/20 Rule is, now and as proposed, not feasible to administer. The Department's conception that employers can easily ascertain what percentage of time in a particular day or workweek was spent on tip supporting but non-tip-generating work ("side work") is simply false and ignores the reality of operating a restaurant or hospitality venue. Unless an employer constantly monitors a tipped employee's[2] activities, the employer simply has no way to guarantee compliance with this arbitrary standard.

Moreover, the litigation which has resulted from application of the 80/20 Rule shows that not even ***employees*** know whether they have been spending more than twenty percent of their time on side work. The

[1] We note that such flexible language is already used in classifying bona fide administrative, executive, and professional employees exempt from the FLSA's minimum wage and overtime requirements. *See* 29 CFR § 541.700 (requiring that the performance of exempt work to be the "primary duty" of such employees)

[2] Note that even if an employer could monitor one employee's activities, it would be impossible to monitor *multiple* employees to make sure the threshold is not crossed.

depositions, interrogatory answers, and other testimony of even representative employees demonstrates they often provide nothing more than generic estimates of how much time they have spent on particular kinds of work (influenced, no doubt, by attorneys who guarantee that number exceeds 20%). Whether in a Wage and Hour Division Audit or in civil litigation, there is no meaningful way for employers to "prove the negative" and demonstrate that a tipped employees' side work in any week did not exceed 20%. Carving the 80/20 Rule into stone will not provide "clarity"; it will guaranty more litigation on this very subject.

b. The limit of no more than 30 minutes of side work is a new and exceptionally burdensome limitation that ignores the practical realities of the industry being regulated.

Under the proposed regulation, an employer can also lose the ability to take a tip credit for any employee who performs any non-tip generating work for more than 30 minutes for a continuous period of time. This is a significant change. Previously, an employer could take a tip credit if all time spent in tip supportive work during a workweek was less than 20% of their total hours.

The Department's comments provide no justification whatsoever for this proposed additional burden. It is common in the restaurant industry for servers to assist in "opening" the store before customers arrive; which often involves 30 minutes or more of non-tip-generating work. Restaurants and other hospitality establishments frequently have both "busy" and "slow" times. It is common industry practice to have tipped employees help clean tables, fill ice machines, roll silverware, and perform any number of other "non-tip-generating" work during such periods. This is entirely consistent and lawful even under the current 80/20 Rule which has existed for over 30 years; so long as this time does not exceed 20% of the time spent in a workweek. Under the proposed regulation, any period of 30 minutes or more of "side work" will result in the loss of the ability to claim the tip credit. The practical impact of this will be that employers will be ***forced*** to police and ***prohibit*** tipped employees from doing any potential side work for more than 30 minutes at a time. This is a ridiculous, bureaucratic imposition.

This imposition is compounded by the Department's circular definition of what type of work qualifies for the tip credit. Under the new proposed rule, work within a tipped occupation includes (a) work that "produces tips" or (b) work that "directly supports" tip-producing work, provided it is "not performed for a substantial amount of time."[3] Tip-producing work is defined circularly as "any work for which tipped employees receive tips." So what is an employer to do during slow periods of time when there are no customers to wait on? Clearly, no side work can be permitted for more than 30 minutes. But would requiring the employee to sit or stand idle allow the employer to still claim the tip credit? Such idleness is plainly not "tip producing" nor does it "directly support" tip-producing work? At the very least, the Department should clarify that inactivity should not count toward this 30 minute period; nor should it count toward the 20% threshold. If the Department does not so clarify, it will undoubtedly be the subject of litigation.

If the Department remains silent on this issue – or worse, takes the position that inactivity counts towards either the 30-minute limit or the 20% non-tip-generating total – then employers will be in an impossible position. An employer's only option would be to "send home" tipped employees during slow periods. But if such employees were instructed to remain close to the restaurant or venue, refrain from time-consuming activities (like going to a movie, going shopping, etc.) and be able to return on short notice if business picked back up, there is little doubt that the Department and plaintiff's attorneys would claim such employees were "engaged to wait" rather than "waiting to be engaged"; and therefore such time would be working time. In

[3] We note that this circular definition creates the same failure to "define its key terms" as the 2020 tip credit regulation it claims to clarify.

essence, the Department would be making it impossible for an employer to take a tip credit if there were ever slow periods in a workday. This is plainly not an appropriate use of administrative rulemaking.

IV. The Department should continue to permit reference to O*NET to identify "related" duties.

Even more concerning is the Department's proposed abandonment of O*NET as a source of information on "related" duties. Given its mission to assist in educating members on compliance with the FLSA's tip credit requirements, the Association finds this proposed change particularly troubling; especially when the Department provides no alternative source for what will qualify as a "related" duty.

As the Department is well aware, O*NET was developed under the sponsorship of the ***Department's own Employment and Training Administration***. For decades, the Department's own FOH directed the Department's investigators to consult O*NET in determining whether a particular activity was "related" to tip generating work. It contains hundreds of occupational definitions to assist employers in making this determination.

The Department's claim in the NPRM that "O*NET ***may*** not accurately capture the non-tipped duties that are part of tipped occupations" because the activities described were "obtained in part by asking employees which duties their employers are requiring them to perform" is no reason to abandon its use entirely. The 2020 Tip Credit rule stated that an activity listed on O*NET was ***presumed*** to be related to tip producing work; but it was **not conclusive**. Thus, there is no justification for abandoning it entirely. The Department's NPRM gives only one or two examples of instances where O*NET activities were found contrary to the Department's determination about which duties are "related" to tip producing work.

In place of the hundreds of detailed definitions on O*NET, the Department's regulation offers employers a grand total of three examples:

> Work performed by a server that directly supports the tip-producing work includes, for example, ***preparing items for tables*** so that the servers can more easily access them when serving customers or cleaning the tables to prepare for the next customers. Work that directly supports the work of a bartender would include ***slicing and pitting fruit for drinks*** so that the garnishes are more readily available to bartenders as they mix and prepare drinks for customers. Work that directly supports the work of a nail technician would include ***cleaning the pedicure baths between customers*** so that the nail technicians can begin customers' pedicures without waiting.

(emphasis added)[4] The Department cannot seriously claim (as it does) that it "believes that these examples will assist employers and employees in understanding the parameters of those terms and will help ensure consistent application of the test" but, in the exact same document, argue that O*NET's much more detailed and comprehensive lists cause "uncertainty [that] could potentially harm both employers and employees[.]"

[4] Even the examples provided are profoundly unhelpful and internally contradictory. For servers, what "items" can a server "prepare" for tables? If nail technicians can clean pedicure baths between customers to avoid customer waits, why cannot servers clean tables, dishes, and glasses to avoid customers having to wait for those items. For bartenders, is "slicing and pitting fruits for drinks" the only permissible side work? Does the conspicuous omission of these more obvious and common tasks for tipped employees imply the Department believes they do not directly support tip-producing work? These are not idle questions; they will be litigated.

The proposed rule leaves restaurant and bar owners entirely at a loss as to which tasks are tip-producing, which merely support tip-producing work, and which are completely outside the tipped occupation. Ultimately, the proposed regulation leaves it up to individual Wage and Hour Division investigators and judges to decide for themselves what activities they believe produce tips and what activities do not. That subjectivity, in turn, will ***guarantee litigation*** over these questions; which is precisely what the Department claims it wants to avoid with its proposed changes. O*NET's objective task lists are infinitely preferable to the handful of unhelpful examples provided in the Department's proposed rules.

V. The Management Costs set forth in the NPRM require additional consideration.

The Department estimates that "employers would spend, on average, 10 minutes per week" to verify that not a single employee for whom the tip credit is taken works more than 20 percent of their time on disallowed activities, or more than 30 minutes continuously performing such tasks. The Department provides no explanation for how it calculated this estimate and it is demonstrably inaccurate.

First, assuming an employer has developed and implemented an extensive policy prohibiting employees from spending more than 20 percent (or 30 minutes at a time) performing non-tip-credit-eligible tasks (and somehow accurately divined what those tasks are): does the Department actually believe that an employer can monitor compliance with such a policy in 10 minutes in a workweek? Would a Wage and Hour Division Investigator accept that an employer was adequately ensuring compliance if such Investigator was told the employer spent about 10 minutes each week doing so? Even handling one instance of one employee exceeding these time-limits would undoubtedly require at least 10 minutes to investigate, evaluate, and rectify. Given the strictures of the Department's proposed regulation, it is far more accurate to estimate between ***1-2 hours per day*** would be required to adequately monitor employee tasks, video or surveillance footage, discussing with managers and employees' activities, etc. to ensure compliance. This estimate of Management Costs deserves substantially more attention and study so that the public – and especially affected employers – can know what the true cost of the proposed regulations will be.

Second, the Department has conspicuously omitted any estimate of the average cost of increased litigation which will certainly result if the proposed rules are adopted. As detailed above, numerous uncertainties are created by the proposed rules which numerous employers will have to litigate as part of an FLSA action; whether brought by the Secretary of Labor or – more commonly – by private plaintiff's attorneys.

VI. The proposed changes will not benefit those it claims to "protect."

For the reasons explained above, tipped employees will derive little, if any, benefit from the proposed changes; and the changes proposed will guarantee additional significant burdens on employers. The main beneficiaries of the uncertainty created by the proposed regulations will be plaintiff's attorneys who will leverage that uncertainty to solicit settlements from employers to avoid costly litigation. Anecdotally, the Association is aware that at legal bar association events, it is common for plaintiff's attorneys to frequent bars and restaurants just to solicit potential new clients on just these kinds of tip credit issues. In other words, attorneys will benefit from the Department's proposed changes; no one else.

The Association is committed to working with the Department to devise common sense changes to the tip credit regulations which will benefit all interested parties. We would be happy to respond to any follow-up questions you may have or provide additional information.

Sincerely yours,

Robert Bonney, CEO

Missouri Restaurant Association

This submission was done with the specialized and the experienced assistance of McMahon Berger, Labor and Employment Counsel for the Missouri Restaurant Association