# ASSESSING THE NEED FOR TIP CREDIT LEGISLATION: CURRENT APPROACHES AND THE CASE FOR REFORM IN UNREGULATED STATES

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> "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." [1]
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> – President Franklin D. Roosevelt

## INTRODUCTION

In recent years, the United States of America saw the emergence of "tip culture," a phenomenon that led to the implementation of "payment processing platforms" in establishments spanning across a variety of industries.[2] Seemingly overnight, a practice that was once unique to the restaurant industry invaded other areas of commerce, "prompting customers to tip on to-go coffees, takeout orders[,] and other transactions previously free from tipping culture."[3] Although the majority of Americans are now accustomed to and frequently partake in tip culture, few truly understand the concept.[4] Instead, consumers tend to focus solely on whether they are obligated to tip in certain situations, and if so, how much.[5]

There is some uncertainty as to how tipping became the standard practice in the United States,[6] but the general consensus is that it originated sometime after the conclusion of the Civil War.[7] Many social historians believe that the practice was spread by well-traveled Americans returning from Europe who sought to

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[1] President Franklin D. Roosevelt, Inaugural Address (Jan. 20, 1937) (transcript available at the Franklin D. Roosevelt Presidential Library and Museum).

[2] Bree Hall, Note, *The Tipping Point: Network Effects of Tipping Quick-Service Restaurant Cashiers*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y, ONLINE SUPP. 569, 570 (2024).

[3] Elizabeth Gravier, *Everyone's Talking About the New Tipping Culture — Here's What Money Experts Say*, CNBC SELECT (Feb. 24, 2025), https://www.cnbc.com/select/new-tipping-culture-money-experts-weigh-in/ [https://perma.cc/33GF-2GTE].

[4] *See generally* Drew DeSilver & Jordan Lippert, *Tipping Culture in America: Public Sees a Changed Landscape*, PEW RSCH. CTR. (Nov. 9, 2023), https://www.pewresearch.org/2023/11/09/tipping-culture-in-america-public-sees-a-changed-landscape/ [https://perma.cc/99UJ-CVYF].

[5] *Id.*

[6] Hall, *supra* note 2, at 571 (citing Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 216 (2020)).

[7] Alec D. Beller, Comment, *The Tip of the Iceberg - The Past, Present, and Future of Tipping Regulations in the United States*, 50 S.U. L. REV. 199, 205 (2023).

display "their familiarity with European customs."[8] Nevertheless, the practice was well-received by businesses such as the Pullman Company, a railroad car manufacturer employing a large number of Black workers in the early 1900s.[9] These employers supported the practice of tipping not because it helped employees, but because it lowered their own wage payment obligations.[10] Nevertheless, it was by this time that tipping had solidified itself as a mainstay in American culture.[11]

Despite society's initial acceptance of tipping, "[t]he first half of the twentieth century witnessed growing discomfort with the practice, extending even to the organization of an 'Anti-Tipping Society of America,'"[12] consisting of approximately 100,000 members.[13] This is partially because many Americans believed that the practice demeaned those who received tips, creating somewhat of a "servants' class."[14] Additionally, tipping was deemed "offensively un-American, because it was contrary to the spirit of American life of working for wages rather than fawning for favors."[15] Finally, and perhaps most importantly, the widespread adoption of tipping was thought to have shifted much of the employer's wage obligations to consumers, who were unlikely to "violate the social convention."[16] Accordingly, seven states—Arkansas, Georgia, Iowa, Mississippi, South Carolina,

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[8] Hall, *supra* note 2, at 571 (citing Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 216 (2020)).

[9] Beller, *supra* note 7, at 206 (citing Ian Ayres, Fredrick E. Vars & Nasser Zakariya, Essay, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1622 (2005)).

[10] *Id.*

[11] Samuel Estreicher & Jonathan Remy Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation*, 59 B.C. L. REV. 1, 3 (2018) (citing KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES 7 (1998)).

[12] *Id.* (citing KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES 28-29 (1998)).

[13] Beller, *supra* note 7, at 207 (citing Rae L. Needleman, *Tipping as a Factor in Wages*, 45 MONTHLY LAB. REV. 1303, 1311 (1937)).

[14] Hall, *supra* note 2, at 571 (quoting Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 217 (2020)).

[15] *Id.* (quoting Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 217 (2020)).

[16] Beller, *supra* note 7, at 207 (citing WILLIAM R. SCOTT, THE ITCHING PALM 23 (1916)).

Tennessee, and Washington—outlawed the practice altogether.[17] Although the anti-tipping movement endured for some time, these laws were eventually repealed and the practice of tipping was restored to its former prominence.[18]

The importance of tipping in today's society cannot be overstated, as it impacts a significant percentage of the American workforce.[19] In 2023, nearly 800,000 Americans were employed in a service occupation earning below the federal minimum wage.[20] Although employers must pay these individuals in accordance with federal, state, and local laws or regulations, their incomes are "supplemented in large part by customer tips."[21] Unfortunately, due to the nature of customer tipping, most of these employees are unable to estimate their take-home pay with any significant accuracy.[22]

Despite the fact that these employees are generally protected by an abundance of legislation, recent judicial developments have called the effectiveness of these protections into question.[23] This uncertainty, perhaps best illustrated by ***Restaurant Law Center v. United States Department of Labor***, a recent vacatur order handed down by the United States Court of Appeals for the Fifth Circuit,[24]

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[17] *Id.* at 208 (citing JOHN E. SCHEIN, EDWIN F. JABLONSKLI & BARBARA R. WOHLFAHRT, THE ART OF TIPPING: CUSTOMS AND CONTROVERSIES 21 (1984)).

[18] *See* Estreicher & Nash, *supra* note 11, at 3 ("The anti-tipping movement eventually lost momentum, and tipping became fairly entrenched in American life and culture, at least in restaurants and hotels in big cities, and the gaming industry.") (citing KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES 59 (1998)).

[19] Ashley Weis, Comment, *Tip Jars in Need of Change: The Case for Reforming Employee Tip Regulations in the Fair Labor Standards Act*, 50 U. TOL. L. REV. 575, 575 (2019).

[20] *Characteristics of Minimum Wage Workers, 2023*, U.S. BUREAU OF LAB. STATS. tbl. 4, (May 2024), https://www.bls.gov/opub/reports/minimum-wage/2023/home.htm [https://perma.cc/UG2N-C3F9].

[21] Weis, *supra* note 19, at 575.

[22] *See* Hall, *supra* note 2, at 591 ("[T]here is no guaranteed tip amount, which makes estimating employee take-home pay challenging.").

[23] *See generally* Rebecca Rainey, *Legal Battles Cloud Tipped Wage Limits After Fifth Cir. Ruling*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 30, 2024, at 04:15 CT), https://www.bloomberglaw.com/bloomberglawnews/ [https://perma.cc/DS78-Y6F5].

[24] *See generally* 115 F.4th 396 (5th Cir. 2024) (vacating 29 C.F.R. § 531.56(f), a federal regulation governing how employers may utilize "tip credits" under the FLSA).

leaves many employers and their tipped employees wondering where and how they fit into the equation.[25]

This Comment will focus on the current tip credit issue facing tipped employees in the United States.[26] Section I of this Comment will provide the background of the Fair Labor Standards Act of 1938 and its subsequent amendments, which implemented far-reaching labor protections for American workers in occupations spanning across a wide variety of industries. Section II of this Comment will outline the problem this Comment seeks to remedy, which is how states with a current deficiency in labor laws leave their tipped employees vulnerable to opportunistic employers who may take advantage of the current uncertainty surrounding the relationship between state and federal tip credit laws. Section III of this Comment will survey how other states combat these concerns and categorize them accordingly. Section IV of this Comment will determine which approach, if any, would serve tipped employees best. Finally, Section V will briefly address the future of this issue as it stands in the wake of the 2024 election cycle.

## I. BACKGROUND

In 1938, Congress enacted the Fair Labor Standards Act of 1938 ("FLSA"),[27] which established national labor protections pertaining to minimum wage,[28] maximum hours,[29] overtime pay,[30] and child labor.[31] The overarching goal behind the FLSA was to protect workers from "the evil of 'overwork' as well as 'underpay.'"[32] Although the FLSA set forth the predominant framework governing the employer-employee relationship, it also

[25] *See generally* Rainey, *supra* note 23.

[26] Because "the practice [of tipping] is the most prominent in restaurants and bars," this Comment will primarily refer to individuals employed in those establishments. Hall, *supra* note 2, at 573 (citing Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 215 (2020)).

[27] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

[28] *Id.* § 206.

[29] *Id.* § 207.

[30] *Id.*

[31] *Id.* § 212.

[32] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (quoting 81 CONG. REC. 4983 (1937)).

permitted states and localities to enact their own more protective labor laws, with which employers must also comply.[33]

Initially, the FLSA did not explicitly address the practice of tipping or tipped employees.[34] For that reason, it was not uncommon (from the late-1930s to the mid-1960s) for employers to utilize service tips to pay their employees' wages.[35] In those situations, the employees would often agree to deliver a portion of their tips to their employer, who would then use those tips to satisfy their minimum wage obligations.[36] Notably, in *Williams v. Jacksonville Terminal Co.*, the Supreme Court of the United States sanctioned this practice, which gradually spread throughout the country over the next two decades.[37]

When Congress amended the FLSA in 1966, it formally addressed tips,[38] in part by establishing the "tip credit" system.[39] Under the current system, employers are entitled to pay a reduced hourly wage to "tipped employees," defined as those who are "engaged in an occupation in which [they] *customarily and regularly* receive[] more than $30 a month in tips."[40] Importantly, however, the newly-established system also allowed "employer[s]

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[33] *See* 29 U.S.C. § 218(a); 29 C.F.R. § 531.26 (2025).

[34] Susan N. Eisenberg & Jennifer T. Williams, *Evolution of Wage Issues in the Restaurant Industry*, 30 A.B.A. J. LAB. & EMP. L. 389, 390 (2015).

[35] *Id.*

[36] *Id.*

[37] 315 U.S. 386, 397 (1942) ("Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity.").

[38] *Compare* 29 C.F.R. § 531.52(a) (2025) ("A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer."), *with* 29 C.F.R. § 531.55(a) (2025) ("A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received . . . .").

[39] Eisenberg & Williams, *supra* note 34, at 390.

[40] 29 U.S.C. § 203(t) (emphasis added). Under the FLSA, the phrase "customarily and regularly" is defined as "a frequency which must be greater than occasional, but which may be less than constant." 29 C.F.R. § 531.57 (2025). Employees who normally fall within this definition but fail to earn more than $30 in tips in a particular month because of "sickness, vacation, seasonal fluctuations or the like" are still classified as tipped employees. *Id.*

to credit a limited number of tips earned by a tipped employee against [their own] minimum wage obligations[.]"[41]

Before employers may claim a tip credit, they must inform tipped employees, preferably in writing: (1) of the direct (or cash) wage the employee is to be paid, which must be at least $2.13 per hour; (2) of the additional amount the employer may claim as a tip credit, which may not exceed $5.12 per hour; (3) that the claimed tip credit cannot exceed the value of the tips the employee actually receives; (4) that all tips are to be retained by the employee, at least in the absence of a valid tip pooling arrangement; and (5) that the employer may not, for any purpose, keep tips received by the employee.[42]

Above all else, employers must ensure that their tipped employees' tips, received in the scope of their tipped occupation, account for the difference between their combined direct (or cash) wages and tips and the federal minimum wage.[43] Failure to strictly adhere to these requirements, including those listed above, may prevent an employer from claiming a tip credit altogether.[44] Several Circuits have held that this proposition controls, even in situations where a tipped employee consistently earns more than the minimum wage.[45]

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[41] Weis, *supra* note 19, at 578 (citing Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,845 (Apr. 5, 2011) (to be codified at 29 C.F.R. pt. 4)).

[42] 29 U.S.C. §§ 203(m)(2)(A)-(B), 206(a)(1).

[43] *Id.* § 203(m)(2)(A).

[44] Richard v. Marriott Corp., 549 F.2d 303, 305 (4th Cir. 1977) ("[I]f the employer does not follow the command of the statute, he gets no credit."). To ensure compliance with these requirements, the United States Department of Labor permits employers to provide notice orally or in writing. *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA),* U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa [https://perma.cc/WZ5B-UN9L] (last visited Oct. 26, 2024). Conveniently, the Department of Labor's Wage and Hour Division ("WHD") has approved an informative poster, which satisfies the notice requirement. *See Fair Labor Standards Act (FLSA) Minimum Wage Poster*, U.S. DEP'T OF LAB. (Apr. 2023), https://www.dol.gov/agencies/whd/posters/flsa [https://perma.cc/GA7S-TZZ7].

[45] *See generally* Martin v. Tango's Rest., Inc., 969 F.2d 1319 (1st Cir. 1992) (holding that the provisions of section 3(m) apply even when employees receive and retain enough wages to satisfy the federal minimum wage requirements); *Richard*, 549 F.2d at 303 (same); Doty v. Elias, 733 F.2d 720 (10th Cir. 1984) (same).

In 1974, Congress amended the FLSA once again.[46] In doing so, Congress provided the Department of Labor ("DOL") with broader authority to "prescribe necessary rules, regulations, and orders" to enforce the FLSA and its many provisions.[47] At the same time, it clarified that "employers [could not] use employees' tips to satisfy more than [fifty percent] of the minimum wage requirement" and that "tipped employees must be allowed to retain [one hundred percent] of their tips."[48] Finally, Congress also recognized the concept of "tip pooling," which is statutorily defined as the "pooling of tips among employees who customarily and regularly receive tips."[49]

As previously mentioned, the FLSA provides that employers who choose to claim a tip credit must reimburse their tipped employees whose direct wages and tips, when combined, fall short of the federal minimum wage.[50] In 1996, Congress amended the FLSA yet again, this time to "shift the tipped employer's obligation to a fixed dollar amount rather than a percentage of the minimum wage."[51] Thus, the FLSA now "allows more than 70.6%, or $5.12, of the current $7.25 federal hourly minimum wage to come in the form of tips."[52] It follows that the FLSA requires employers to pay the remaining $2.13 per hour.[53] Of course, this is assuming that the tipped employees' combined direct wages and tips are, in fact, exceeding the current federal minimum wage.[54] Should the federal minimum wage increase in the future, the permissible tip credit will follow suit.[55]

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[46] *See* Weis, *supra* note 19, at 578.

[47] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55 (1974).

[48] Eisenberg & Williams, *supra* note 34, at 391.

[49] *Id.* at 391 (citing 29 U.S.C. § 203(m)). Although the concepts of tip pooling and tip credits are closely related, this will Comment focus primarily on the latter.

[50] Hall, *supra* note 2, at 575 (citing Eisenberg & Williams, *supra* note 34, at 391).

[51] *Id.* (citing DAVID H. BRADLEY, CONG. RSCH. SERV., R43445, THE TIP CREDIT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA): IN BRIEF 2 (2015)).

[52] Estreicher & Nash, *supra* note 11, at 8-9 (citing Eisenberg & Williams, *supra* note 34, at 391-92).

[53] Hall, *supra* note 2, at 575.

[54] Eisenberg & Williams, *supra* note 34, at 391-92.

[55] DAVID H. BRADLEY, CONG. RSCH. SERV., R43445, THE TIP CREDIT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA): IN BRIEF 2 (2015).

## II. THE PROBLEM

Although the tip credit is facially comprehensible, the recent uncertainty surrounding the concept is evident. For that reason, Section II(A) will lay out the DOL's wildly inconsistent guidance regarding tip credits. Next, Section II(B) will examine a recent court decision that has left practitioners and scholars questioning the current effectiveness of federal labor laws. Finally, Section II(C) will explain how the decision may inadvertently subject tipped employees, especially those residing in states that lack more extensive labor protections, to undesirable employment practices.

### *A. Inconsistent DOL Tip Credit Guidance*

The tip credit has been subject to the DOL's interpretation for nearly sixty years.[56] In 1967, soon after Congress amended the FLSA to include the tip credit, the DOL issued its initial "dual-jobs" regulation.[57] This regulation addressed situations where an employee regularly engages in two or more occupations—with one being a tipped occupation, and the other, a non-tipped occupation—for the same employer.[58] For example, "where a maintenance man in a hotel also serves as a waiter," that employee "is a tipped employee only with respect to his employment as a waiter."[59] This situation is distinguishable from that of a "a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee[,] and occasionally washing dishes or glasses."[60] In that case, the waitress is considered a tipped employee at all times, despite performing non-tipped activities.[61]

Throughout the years that followed, the DOL published numerous opinion letters further restricting the availability of the tip credit.[62] In 1988, the DOL first published its 80/20 guidelines

[56] Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 399 (5th Cir. 2024).
[57] *Id.*
[58] *Id.*
[59] 29 C.F.R. § 531.56(e) (1967).
[60] *Id.*
[61] *See id.* ("Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.").
[62] *Rest. L. Ctr.*, 115 F.4th at 400.

in its Field Operations Handbook.[63] Pursuant to these guidelines, an employer could not claim a tip credit if a tipped employee in a dual job spent more than twenty percent of their total hours worked on non-tipped activities.[64] In the event that this occurred, the employer was required to pay the tipped employee the full minimum wage.[65] Although the DOL's Field Operation Handbook was "not used as a device for establishing interpretative policy," the 80/20 guidelines eventually became the official position of the DOL.[66]

Until 2009, the DOL's 80/20 guidance remained in effect, with little interruption.[67] However, it was at that point that the DOL's interpretation "began to oscillate with every change in presidential administration."[68] Before President George W. Bush left office in January 2009, the DOL released an opinion letter briefly rescinding the 80/20 guidance.[69] Shortly thereafter, newly-inaugurated President Barack Obama withdrew the letter, reinstating the 80/20 guidance for the foreseeable future.[70]

In late 2018, President Donald J. Trump's DOL reissued the Bush Administration's 2009 opinion letter.[71] Thus, the DOL's new guidance once again provided that "the Department would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as

[63] Hall, *supra* note 2, at 577; *see also* Kevin D. Johnson, *DOL Clears the Table: No More '80/20 Rule' for Tipped Employees*, FED. LAW., July-Aug. 2019, at 10, 10 ("The Field Operations Handbook is 'an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.'").

[64] Weis, *supra* note 19, at 578-79.

[65] Hall, *supra* note 2, at 577-78.

[66] Johnson, *supra* note 63, at 10 (citing Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 12-13, Fast v. Applebee's Int'l Inc., 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725, 10-1726)).

[67] *Rest. L. Ctr.*, 115 F.4th at 400.

[68] *Id.*

[69] *Id.*

[70] Because President Obama was reelected for a second term, the DOL's 80/20 guidance remained in effect for many years to come. *See id.*

[71] *Id.*

those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties."[72]

In 2020, the DOL issued a final rule that sought to amend 29 C.F.R. § 531.56(e) to better reflect the 2018 guidance.[73] Unsurprisingly, Attorneys General from nearly ten states, as well as the District of Columbia, challenged the final rule's implementation in the United States District Court for the Eastern District of Pennsylvania.[74] Had the rule gone into effect, it would have eliminated concerns surrounding the phrase "related duties" and placed more emphasis on whether an employee had actually performed "unrelated duties" in a second occupation.[75]

Shortly after taking office, President Joe Biden's DOL delayed the 2020 Final Rule "to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule."[76] On October 28, 2021, the DOL implemented a new final rule, to take effect in December 2021.[77] This final rule, however, essentially codified the 80/20 guidance.[78] Additionally, it provided that employers were unable to claim a tip credit when their tipped employees spent more than thirty minutes at any given time performing "untipped work."[79] In

[72] Hall, *supra* note 2, at 578 (citing Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60114-15 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531)).

[73] *Id.*

[74] *Id.* (citing Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60118 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531)).

[75] Johnson, *supra* note 63, at 11.

[76] Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60119 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531)).

[77] Hall, *supra* note 2, at 578. *See generally* Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531)).

[78] Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 400 (5th Cir. 2024) (referring to 29 C.F.R. § 531.56(f) (2024)).

[79] *Id.* at 400-01. This guidance was exceedingly difficult to apply because, "[a]t minute 31, a server who has been 'setting and bussing tables' [was] no longer engaged in her tipped occupation even though the *duty itself* ha[d] not changed." *Id.* at 406. It follows that this guidance "lead[] to strange scenarios where a single employee performing the exact same duty might or might not qualify for the tip credit depending on context." *Id.* at 409.

doing so, the DOL did away with the aforementioned "waitress counterexample," which had been incorporated into the regulations since the tip credit's inception in 1967.[80] This guidance, better known as the Biden Administration's 80/20/30 guidance, went into effect and remained uninterrupted for nearly three years.[81]

### *B.* Restaurant Law Center v. United States Department of Labor

In December 2021, the Restaurant Law Center and the Texas Restaurant Association ("the Associations") filed a joint lawsuit in the United States District Court for the Western District of Texas, seeking a permanent injunction that, if granted, would prevent enforcement of the 2021 Final Rule.[82] Shortly thereafter, "[t]he Associations moved for a preliminary injunction, which the district court denied."[83] On appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded, holding that "the Associations had sufficiently shown irreparable harm."[84]

On remand, the Western District of Texas reconsidered the merits of the Associations' claims and evaluated the motions filed by both parties.[85] Eventually, the district court entered final judgment formally denying the Associations' preliminary injunction and granting the DOL's motion for summary judgment.[86] In doing so, the court concluded that the 2021 Final Rule was a "permissible interpretation of an ambiguous statutory term—'engaged in an occupation,'" thus entitling it to *Chevron* deference.[87] The Associations appealed once again.[88]

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[80] *Compare* 29 C.F.R. § 531.56(e) (2021), *with* 29 C.F.R. § 531.56(e) (1967).

[81] Rainey, *supra* note 23.

[82] *Rest. L. Ctr.*, 115 F.4th at 401.

[83] *Id.*

[84] *Id. See generally* Rest. L. Ctr. v. U.S. Dep't of Lab., 66 F.4th 593 (5th Cir. 2023) (reversing and remanding with instructions for the district court to consider the other prongs of the preliminary injunction analysis).

[85] *Rest. L. Ctr.*, 115 F.4th at 401.

[86] *Id.*

[87] *Id.* (referring to Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[88] *Id.*

In August 2024, the Fifth Circuit handed down an order reversing the district court's decision yet again.[89] However, the order also vacated 29 C.F.R. § 531.56(f), which included the 80/20/30 guidance.[90] In issuing its vacatur, the Fifth Circuit held that the regulation was both "inconsistent with the FLSA's text" and was "arbitrary and capricious" under the Administrative Procedure Act ("APA").[91] Of course, the decision was largely made possible by the Supreme Court's recent decision to overturn *Chevron* in June 2024.[92]

Although it is unclear whether the vacatur order is contained to the Fifth Circuit or not, legal correspondents believe that it, like most other vacatur orders, is generally considered to have nationwide effect.[93] At the time of this writing, it is also unclear as to whether other portions of the DOL's guidance, implemented several decades before the 2021 Final Rule, remain in effect notwithstanding the nationwide injunction.[94] Should it be established that the vacatur order has nationwide effect and that the DOL's previous guidance is no longer controlling, the effects may be extensive.

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[89] *See generally id.* (vacating 29 C.F.R. § 531.56(f), a regulation governing how employers may utilize "tip credits" under the FLSA).

[90] *Id.* at 409.

[91] *Id.* at 407-08. Under the APA, "[a]n agency rule is arbitrary and capricious if:"

> [T]he 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.

*Id.* at 408 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[92] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled."). Although the Fifth Circuit conceded that the district court was correct in its application of the *Chevron* framework at the time of its decision, it argued that the Supreme Court's opinion in *Loper Bright* not only permitted, but required it "to depart from the district court's analysis at the very start." *Rest. L. Ctr.*, 115 F.4th at 404.

[93] *See* Rainey, *supra* note 23 ("The ruling . . . vacated the regulation and enjoined the agency from enforcing it nationwide . . . .").

[94] *Compare id.* ("[W]hether the decades-old guidance that informed the bulk of the proposal is still intact is an open question . . . ."), *with Rest. L. Ctr.*, 115 F.4th at 407 ("We are not persuaded that the 80/20 standard, however longstanding, can defeat the FLSA's plain text.").

### *C. Potential Ramifications*

The Fifth Circuit's vacatur raised many questions that have yet to be answered. Even so, none are more pressing than the following: If the 80/20/30 guidance is no longer in effect, what does that mean for the longstanding 80/20 guidance? Depending on the answer to that question, another arises: If the vacatur extends to the 80/20 guidance, as some practitioners believe, what does that mean for employers and their tipped employees?[95]

In the absence of answers to these questions, the speculation surrounding this uncertainty, at least outside of the Fifth Circuit, will almost certainly continue to grow.[96] For the time being, however, the immediate effects of *Restaurant Law Center* will vary widely for employers and tipped employees alike, depending on the state in which they live.[97] Once again, this is because the FLSA expressly permits states and localities to enact their own wage and hour laws,[98] and some have done just that.[99]

The vast majority of state legislatures have addressed tip credits in some way, either by statute or by regulation.[100] However, these states vary widely in their approaches.[101] Because employers must adhere to these alternatives, regardless of what they provide, tipped employees within those states may not feel the effects of the Fifth Circuit's decision whatsoever.[102] Instead, they could still seek some sort of legal recourse by way of state or local law, should it be established that they had been subjected to unfair employment practices.

The same cannot be said for tipped employees residing in states that have yet to enact their own tip credit laws.[103] Those

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[95] *See* Rainey, *supra* note 23.

[96] *Id.*

[97] *See id.* ("[E]mployers shouldn't toss out their stopwatches just yet because many state laws have their own 80/20 requirements or restrictions on the tip credit.").

[98] *See* 29 U.S.C. § 218(a); 29 C.F.R. § 531.26 (2025).

[99] *See infra* Section III.

[100] *See* BRADLEY, *supra* note 55, at 6-7.

[101] *Id.*

[102] *See* Rainey, *supra* note 23. For example, in states where the 80/20 guidance is codified, employers must adhere to that standard, regardless of the Fifth Circuit's decision providing otherwise. Thus, it is likely that tipped employees in those states will not see any significant changes to their day-to-day activities.

[103] BRADLEY, *supra* note 55, at 7. ("Five states—Alabama, Louisiana, Mississippi, South Carolina, and Tennessee—do not have state minimum wages. In these states,

states tend to rely entirely on the FLSA, for better or worse.[104] As a direct result of *Restaurant Law Center*, these employees are now vulnerable to the very same unfair employment practices the 2021 Final Rule sought to prevent.[105] Unfortunately, it is likely that they would have no legal recourse.[106] To ensure that these tipped employees are adequately protected moving forward, it is necessary for those states without their own tip credit laws or regulations to take action, just as so many others have in the past.

## III. THE APPROACHES

States take different approaches when it comes to enacting their own tip credit and minimum wage laws, at least as they relate to FLSA-covered employees.[107] Consequently, it is somewhat difficult for service industry employers to ensure that

employees covered by the FLSA would also be subject to the tip credit provisions of the federal minimum wage . . . ."). Interestingly enough, Georgia does not have a state minimum wage statute that applies to tipped employees; thus, they are also subject to the FLSA's tip credit provisions. *Id.* at 9 n.c.

[104] *See id.* at 7-10.

[105] *See, e.g.*, Rainey, *supra* note 23 ("[S]upporters of the rule say that the decision will drive more employers to classify workers as tip-earning, because there's no longer limits on idle time or side work."). For real-life examples of these violations, see Quinn Wilson, *P.F. Chang's Gets First Nod For Servers' Tipped Wage Settlement*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 16, 2024, at 16:55 CT), https://www.bloomberglaw.com/bloomberglawnews/ [https://perma.cc/SX45-ZUZJ] (discussing a recent settlement arising out of allegations that P.F. Chang's China Bistro Inc. claimed a tip credit despite requiring its tipped employees to perform non-tipped work for 25% to 50% of their work week); Alicia Tang, *Waffle House Underpaid Servers, Union Says in Federal Complaint*, BLOOMBERG L.: DAILY LAB. REP. (Sep. 19, 2024, at 08:29 CT), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/X7CG1GL4000000 [https://perma.cc/D2S4-BZWM] (discussing a recent union complaint alleging that Waffle House, Inc. employees were required to perform non-tipped work for two to three hours (or 28% to 42%) of their workday). These cases are illustrative of some of the issues that may arise as a result of the Fifth Circuit's vacatur, albeit lawfully in states currently lacking their own tip credit laws or regulations.

[106] Of course, this is assuming that she receives enough tips to satisfy the current federal minimum wage of $7.25 per hour, as required by 29 U.S.C. § 203(m)(2)(A).

[107] *See* BRADLEY, *supra* note 55, at 6-7. Employees are "protected by the FLSA" if their work regularly requires them to be "engaged in commerce or in the production of goods for commerce." *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB.: WAGE AND HOUR DIV. (July 2009), https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage [https://perma.cc/ARY4-WUWT].

they are complying with all laws and regulations they must adhere to.[108] The states generally fall into two different categories: (A) those that permit a tip credit[109] and (B) those that eliminate the tip credit.[110] States that fall under the former category can be further divided into four subcategories. To determine which category (or subcategory) would serve vulnerable tipped employees best, a thorough analysis of each is warranted.

### *A. Category One: States Permitting a Tip Credit*

As previously mentioned, the vast majority of states have enacted their own wage and hour laws.[111] Of those states, thirty-eight (and the District of Columbia) permit employers to take a tip credit.[112] With that being said, they do so in many different ways.[113] For example, some states adhere to the FLSA's tip credit and minimum wage provisions in their entirety.[114] Others tend to increase the subminimum wage above the federal mandate of $2.13 per hour, but vary in how they treat the minimum wage.[115] A smaller subset of states opt to increase the minimum wage but leave the subminimum wage at $2.13 per hour.[116] Finally, some of

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[108] *See* Hall, *supra* note 2, at 576.

[109] *See Minimum Wages for Tipped Employees,* U.S. DEP'T OF LAB.: WAGE AND HOUR DIV. (Jan. 1, 2026), https://www.dol.gov/agencies/whd/state/minimum-wage/tipped [https://perma.cc/9VMY-QYDF]. Jurisdictions that permit some form of a tip credit include Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. *Id.* This list does not include states that lack their own statutes but nevertheless permit a tip credit by way of the FLSA.

[110] *See id.* Jurisdictions that have eliminated the tip credit in its entirety include Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. *Id.*

[111] *See* BRADLEY, *supra* note 55, at 7-9.

[112] *Id.*

[113] *See id.*

[114] *See, e.g.*, IND. CODE ANN. § 22-2-2-4 (West 2020) (Indiana).

[115] *Compare* ARIZ. REV. STAT. ANN. § 23-363 (2016) (Arizona's statute increasing both the subminimum and minimum wage), *with* IOWA CODE ANN. § 91D.1 (West 2023) (Iowa's statute increasing the subminimum wage but leaving the minimum wage unaltered at $7.25 per hour).

[116] *See, e.g.*, NEB. REV. STAT. ANN. § 48-1203 (West 2022) (Nebraska).

these states alter the definition of "tipped employees,"[117] implement smaller-scale 80/20 guidance,[118] or increase the amount of tips that must be received by a tipped employee to meticulously sculpt their tip credit laws.[119] While there is some overlap between the states falling under the latter subcategory and those falling under the previous three subcategories, each approach has its own unique benefits and detriments.

**Table 1: The Approaches (by Number of Jurisdictions)**[120]

| | **Keep Subminimum Wage at $2.13 per hour** | **Increase Subminimum Wage** |
|---|---|---|
| **Keep Minimum Wage at $7.25 per hour** | Eight (8) | Seven (7) |
| **Increase Minimum Wage** | Two (2) | Twenty-Two (22) |

1. Subcategory One: States that Adhere to the FLSA

The first subcategory is comprised of states that generally permit employers to claim a tip credit but adhere to the FLSA's provisions in doing so. In other words, these states leave their subminimum wage at $2.13 per hour and minimum wage at $7.25 per hour. For the purpose of this Comment, it makes no difference whether the statutes or regulations explicitly mention the FLSA or simply incorporate the same or similar provisions in their own

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[117] *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 663(8) (2023) (Maine's statute altering the definition of "service" or "tipped" employees).

[118] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.9(a)-(b) (2024) (New York's regulation prohibiting employers from claiming a tip credit for days in which their tipped employees perform non-tipped work for more than two hours or twenty percent of his or her shift, whichever is less).

[119] *See, e.g.*, HAW. REV. STAT. ANN. § 387-2(b) (West 2022) (Hawaii's statute permitting a tip credit of $1.25 per hour if and only if a tipped employee's direct wages and tips, when combined, equals $7.00 more than the state minimum wage for *each hour worked*).

[120] This list does not include states that lack their own statutes but nevertheless permit a tip credit by way of the FLSA.

language. States that fall under this category include Georgia, Kansas, and Indiana.[121] Notably, many of these states provide that their minimum wage will increase in coordination with the FLSA.[122] Although these states have their own tip credit statutes, the effects are no different than in those states—Alabama, Louisiana, Mississippi, South Carolina, and Tennessee—that lack them altogether.

This position seems to be most beneficial for employers and the least beneficial for tipped employees. This is because none of these states have put any safeguards in place to prevent employers from requiring their tipped employees to perform higher quantities of non-tipped work. Rather, they permit employers to delegate work as they see fit while simultaneously permitting them to maintain a low wage obligation of $2.13 per hour, so long as their tipped employees earn enough tips to exceed the state minimum wage. Therefore, the issues that have the potential to arise in these jurisdictions are the very same issues that were created by the Fifth Circuit's decision to vacate the Biden Administration's 80/20/30 guidance in *Restaurant Law Center v. United States Department of Labor*. Short of implementing a variation of that guidance or other legislative safeguards, these problems are likely to persist.

### 2. Subcategory Two: States that Increase the Subminimum Wage

The second subcategory concerns states that generally permit employers to claim a tip credit but also choose to increase the subminimum wage. There are two approaches that states tend to take when enacting these statutes. The vast majority of these states, including Arizona, Colorado, and Florida, choose to

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[121] For examples of these state statutes or regulations, see GA. CODE ANN. § 34-4-3 (West 2024) (Georgia); IND. CODE ANN. § 22-2-2-4 (West 2020) (Indiana); KAN. STAT. ANN. § 44-1203 (West 2024) (Kansas); KY. REV. STAT. ANN. § 337.275 (West 2007) (Kentucky); N.C. GEN. STAT. ANN. § 95-25.3 (West 2018) (North Carolina); TEX. LAB. CODE ANN. §§ 62.051-.052 (West 2003) (Texas); UTAH CODE ANN. §§ 34-40-103 to -104 (West 2024); UTAH ADMIN. CODE R610-1-4 (West 2008) (Utah); WYO. STAT. ANN. § 27-4-202 (West 2001) (Wyoming).

[122] *See, e.g.*, KY. REV. STAT. ANN. § 337.275(1) (West 2007) (Kentucky).

increase the state minimum wage.[123] Other states, such as Idaho, North Dakota, and Wisconsin, do not, opting instead to leave their state's minimum wage at $7.25 per hour.[124]

As for the first approach (increase both the subminimum wage and the minimum wage), the results differ widely, depending on the state. For example, some states may increase the state subminimum wage and minimum wage to $4.88 per hour and $10.00 per hour, respectively. In those cases, the employer is entitled to a maximum tip credit of $5.12 per hour, which is identical to that permitted under federal law.[125] For that reason, the advantages and disadvantages of the tip credit would remain the same, other than the fact that tipped employees are entitled to higher wages.[126] Other states, however, may increase the state subminimum wage and minimum wage to $8.25 per hour and $10.00 per hour, respectively. Unlike the first example, employers in these states are entitled to a maximum tip credit of $1.75 per

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[123] For examples of these state statutes, regulations, or constitutional provisions, see ARIZ. REV. STAT. ANN. § 23-363 (2016) (Arizona); ARK. CODE ANN. §§ 11-4-210, -212 (West 2019) (Arkansas); COLO. CONST. art. XVIII, § 15 (2016) (Colorado); CONN. GEN. STAT. ANN. §§ 31-58, -60 (West 2022) (Connecticut); D.C. CODE ANN. § 32-1003 (West 2024) (District of Columbia); DEL. CODE ANN. tit. 19, § 902 (West 2021) (Delaware); FLA. CONST. art. X, § 24 (West 2020) (Florida); HAW. REV. STAT. ANN. § 387-2 (West 2022) (Hawaii); 820 ILL. COMP. STAT. ANN. 105/4 (West 2019) (Illinois); ME. REV. STAT. ANN. tit. 26, § 664 (2023) (Maine); MD. CODE ANN., LAB. & EMPL. §§ 3-413, -419 (West 2024) (Maryland); MASS. GEN. LAWS ANN. ch. 151, §§ 1, 7 (West 2023) (Massachusetts); MICH. COMP. LAWS ANN. §§ 408.414, .414d (West 2014) (Michigan); MO. ANN. STAT. §§ 290.502, .512 (West 2024) (Missouri); N.J. STAT. ANN. § 34:11-56a4 (West 2024) (New Jersey); N.M. STAT. ANN. § 50-4-22 (West 2021) (New Mexico); N.Y. LAB. LAW § 652 (McKinney 2023); N.Y. COMP. CODES R. & REGS. tit. 12, §§ 146-1.2 to -1.3 (2024) (New York); OHIO CONST. art. II, § 34a (2024) (Ohio); 28 R.I. GEN. LAWS ANN. § 28-12-3, -5 (West 2024) (Rhode Island); S.D. CODIFIED LAWS § 60-11-3 to -11-3.1 (2024) (South Dakota); VT. STAT. ANN. tit. 21, § 384 (West 2024) (Vermont); W. VA. CODE ANN. § 21-5C-2, -5C-4 (West 2014) (West Virginia).

[124] For examples of these state statutes or regulations, see IDAHO CODE ANN. § 44-1502 (West 2016) (Idaho); IOWA CODE ANN. § 91D.1 (West 2023) (Iowa); N.H. REV. STAT. ANN. § 279:21 (2016) (New Hampshire); N.D. CENT. CODE ANN. § 34-06-22 (West 2007); N.D. ADMIN. CODE 46-02-07-03 (1998) (North Dakota); OKLA. STAT. ANN. tit. 40, §§ 197.2, .16 (West 2024) (Oklahoma); 34 PA. CODE § 231.101a (2022) (Pennsylvania); WIS. STAT. ANN. § 104.035 (West 2015) (Wisconsin).

[125] Estreicher & Nash, *supra* note 11, at 8-9 (citing Eisenberg & Williams, *supra* note 34, at 391-92).

[126] In this example, the tipped employee's take-home pay would increase, either: (1) by earning more tips and exceeding the higher minimum wage threshold; or (2) by failing to meet that higher threshold, which would then require that his or her employer pay the difference.

hour. As a result, the tip credit is less advantageous, so employers may be more inclined to require their tipped employees to perform a higher percentage of non-tipped work. This is because they believe it possible, understandably so, to obtain a smaller amount of tips ($1.75 per hour as opposed to $5.12 per hour) in a shorter period of time. Should that not be the case, the employer will likely be more than comfortable paying the difference between the two wages. Regrettably, this is an unintentional consequence that may have an undesirable effect on tipped workers and their already unstable take-home pay.

As it pertains to the second approach (increase the subminimum wage but leave the minimum wage at $7.25 per hour), the consequences are substantially similar to that of the latter example, listed directly above. For instance, assume that a state increases the subminimum wage to $5.25 per hour, leaving the state minimum wage at $7.25 per hour. In these states, employers are entitled to a tip credit of merely $2.00 per hour. Based on the same reasoning above, they might be more inclined to require their tipped employees to perform a higher percentage of non-tipped work. These concerns might be mitigated in states with a lower subminimum wage, such as $4.12 per hour, but the advantages of the tip credit would still be lower than that otherwise provided by the FLSA. Once again, this is an unintended consequence that may not be prevented without the implementation of one or more legislative safeguards.

### 3. Subcategory Three: States that Solely Increase the Minimum Wage

The third subcategory is concerned with states that only increase the state minimum wage, opting to leave the subminimum wage at $2.13 per hour. This subcategory is by far the smallest, with only two states—Nebraska, and Virginia—adhering to this approach.[127] Unlike the previous subcategories, however, the states in this subcategory successfully manage to

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[127] For examples of these state statutes or regulations, see NEB. REV. STAT. ANN. § 48-1203 (West 2022) (Nebraska); VA. CODE ANN. § 40.1-28.9 to -28.10 (West 2023) (Virginia).

reach an equitable balance between protecting tipped employees and preserving tip credit benefits for their employers.

To best illustrate the benefits and detriments of this approach, consider Section 48-1203 of the Nebraska Revised Statutes Annotated. In pertinent part, the statute provides that "every employer shall pay to each of his or her employees a minimum wage of . . . [t]hirteen dollars and fifty cents per hour."[128] The statute goes on to provide: "[f]or persons compensated by way of gratuities . . . , the employer shall pay wages at the minimum rate of two dollars and thirteen cents per hour, plus all gratuities given to them for services rendered."[129] It follows that Nebraska law permits a maximum tip credit of $11.37 per hour, so long as tipped employees receive that same amount in tips.[130]

At first glance, the $2.13 per hour subminimum wage might seem to harm tipped employees more than it helps them. However, upon further examination, that is not necessarily the case. How could that be? Well, when you add the current minimum wage of $13.50 per hour into the equation, it becomes evident that these employees are entitled to statutory protections that are quite favorable. Because these tipped employees must earn tips in excess of $11.37 per hour, their employers are heavily dissuaded from requiring that higher percentages of non-tipped work be performed on a day-to-day or shift-to-shift basis. Should they continue requiring tipped employees to perform higher percentages of non-tipped work, the employers must pay the difference between the two wages if the $11.37 per hour tip threshold was not met. Obviously, this would have a substantial impact on the overall profitability of the business.

Naturally, this observation might lead to the inference that statutes like Section 48-1203 harm those who employ a significant amount of tipped employees. Once again, that is not necessarily the case. While it is true that their wage obligations may be higher due to the increase in minimum wage, tipped employees

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128 NEB. REV. STAT. ANN. § 48-1203 (West 2022) (Nebraska).

129 *Id.*

130 *Id.* The "maximum tip credit" is established by calculating the difference between the minimum wage ($13.50 per hour) and the subminimum wage ($2.13 per hour).

may earn enough tips to make up the difference ($11.37 per hour), thus entitling the employer to a much larger tip credit than would otherwise be permitted under the FLSA or other state statutes. If the employer permits his or her tipped employees to spend ample time performing tipped work, and the employees earn enough tips to exceed that state's minimum wage threshold, both sides benefit equally. With that being said, additional legislative safeguards, such as the ones examined in the following section, would only bolster the favorability of this approach.

#### 4. Other Legislative Safeguards

The final subcategory concerns states that implement other, more nuanced, tip credit provisions in order to meticulously sculpt their statutes and regulations as they see fit. For that reason, this subcategory is somewhat distinguishable from the others. Be that as it may, these provisions act as further protection for those tipped employees who may otherwise be vulnerable to the opportunistic employment practices mentioned thus far. Once again, there is some overlap between the states falling under this subcategory and those falling under the previous three subcategories. Nevertheless, these provisions are worth mentioning.

*First*, some states alter the definition of "tipped" or "service" employees, thereby increasing the threshold that must be surpassed before an employer may claim a tip credit.[131] They do so to account for the substantial inflation that has plagued the American economy since the FLSA's initial definition of a "tipped employee" was set at $20.00 per month in 1966.[132] For example, Maine defines a "[s]ervice employee" as being "any employee engaged in an occupation in which the employee customarily and regularly receives more than . . . $175 a month in tips."[133] Others,

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[131] For examples of these state statutes or regulations, see COLO. CODE REGS. § 1103-1(1.10) (2024) (Colorado); ME. REV. STAT. ANN. tit. 26, § 663(8)(C) (2023) (Maine); N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3 (2024) (New York); 34 PA. CODE § 231.1(b) (2022) (Pennsylvania); S.D. CODIFIED LAWS § 60-11-3.1 (2024) (South Dakota); VT. STAT. ANN. tit. 21, § 384(a)(2) (West 2024) (Vermont).

[132] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101, 80 Stat. 830 (1966).

[133] ME. REV. STAT. ANN. tit. 26, § 663(8)(C) (2023) (Maine).

such as Vermont and Pennsylvania, define their "tipped" or "service" employees as those who receive more than $120 per month and $135 per month in tips, respectively.[134] A third group, consisting of states like Colorado and New York, utilize an hourly approach.[135] For example, Colorado state law defines a "[t]ipped employee" as someone "who regularly receives more than $1.64 per hour in tips."[136] This hourly rate applies to all tipped employees, regardless of the period in which they are paid (weekly, bi-weekly, monthly, etc.).[137] Regardless of the state, each one typically increases their thresholds when inflation deems it necessary. Should an employee fail to meet these thresholds, he or she must be paid in accordance with that state's minimum wage. Although altering the definition of tipped employees might seem arbitrary at first, it ensures that the subminimum wage is only paid to those who are truly employed in tipped occupations.

*Second*, some states require that employers allow their tipped employees to perform a certain amount of tipped work before they may claim a tip credit.[138] For example, both Connecticut and New York have enacted regulations that effectively prevent employers from claiming a tip credit when their employees perform non-tipped work: (1) for more than two hours in one day or (2) for more than twenty percent of the employee's workday, whichever is less.[139] Arkansas's statute is somewhat similar, but it also prevents employers from claiming a tip credit for hours in which their tipped employees perform non-tipped work for more than twenty minutes.[140] Clearly, these provisions bear some similarities

[134] VT. STAT. ANN. tit. 21, § 384(a)(2) (West 2024) (Vermont); 34 PA. CODE § 231.1(b) (2022) (Pennsylvania).

[135] COLO. CODE REGS. § 1103-1(1.10) (2024) (Colorado); N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3(a) (2024) (New York).

[136] COLO. CODE REGS. § 1103-1(1.10) (2024) (Colorado).

[137] *Id.* This is assuming that the pay periods are permissible under Colorado state law. *See* COLO. REV. STAT. ANN. § 8-4-103(1)(a) (West 2019) (Colorado).

[138] For examples of these state statutes or regulations, see ARK. ADMIN. CODE 235.01.1-107(E)(2) (West 2020) (Arkansas); CONN. AGENCIES REGS. § 31-62-E3a(a) (2020) (Connecticut); N.J. ADMIN. CODE § 12:56-3.5(n) (2020) (New Jersey); N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.9(a)-(b) (2024) (New York); 34 PA. CODE § 231.111 (2022) (Pennsylvania); W. VA. CODE R. § 42-8-12.1.2 (2024) (West Virginia).

[139] CONN. AGENCIES REGS. § 31-62-E3a (2020) (Connecticut); N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.9(a)-(b) (2024) (New York).

[140] ARK. ADMIN. CODE 235.01.1-107(E)(2) (West 2020) (Arkansas).

to the Biden Administration's 80/20/30 DOL guidance, despite having gone into effect before the 2021 Final Rule.[141] Like the 2021 Final Rule, however, these provisions effectively ensure that tipped employees are paid in accordance with the subminimum wage, but only when they are given an exceptionally fair opportunity to earn service tips.

*Third*, one state (Hawaii) permits employers to claim a maximum tip credit of $1.25 per hour if, and only if, a tipped employee's hourly wage plus earned tips equals at least $7.00 more than the state minimum wage.[142] Like the previous provisions, this one ensures that tipped employees earn the minimum amount of hourly tips required under state law, but does so in a more creative way. For instance, Hawaii's current minimum wage is $14.00 per hour, while its current subminimum wage is $12.75 per hour.[143] Assuming that tipped employees are able to receive the remaining $1.25 per hour in tips in order to satisfy the minimum wage threshold, they must receive an additional $7.00 per hour in tips before their employer may be deemed eligible for the state's tip credit. In a standard eight-hour workday, this amounts to $8.25 in received tips for *each hour* worked.[144] Like the previous two safeguards, this one preserves tipped worker take-home pay. However, its serviceability is questionable, as it essentially provides for a tip credit in only the rarest of circumstances.

### *A. Category Two: States Eliminating the Tip Credit*

Although most states permit some form of a tip credit, a small minority of states have chosen to eliminate the tip credit altogether.[145] Thus, employers are required to pay their tipped

[141] *Compare* CONN. AGENCIES REGS. § 31-62-E3a (2020) (Connecticut), *and* ARK. ADMIN. CODE 235.01.1-107(E)(2) (West 2020) (Arkansas), *with* 29 C.F.R. § 531.56(f) (2024).

[142] HAW. REV. STAT. ANN. § 387-2(b) (West 2022) (Hawaii).

[143] *Id.*

[144] In a standard forty-hour work week, tipped employees must receive at least $330.00 in tips before their employer is deemed eligible to claim a tip credit for *each hour worked*. This translates to approximately $1320.00 per month, assuming the tipped employees' hours remain consistent.

[145] BRADLEY, *supra* note 55, at 6. These states are normally referred to as "no tip-credit states, or 'equal treatment' states." Beller, *supra* note 7, at 215.

employees in accordance with the applicable state or federal minimum wage, depending on which is higher.[146] States that adhere to this approach include Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington.[147] Of these states, a few provide some economic relief for employers, depending on whether they are considered to be "large" or "small."[148] Although this category is fairly small, there seems to be a movement towards implementing a gradual "phase-out" of the tip credit at the state level. This trend, as seen in prominent jurisdictions such as the District of Columbia, Massachusetts, and Michigan may continue to gain traction in the near future.[149]

In comparison to the previous approaches, this one is the least beneficial for employers and overly beneficial for tipped employees. This is because all employees are to be paid in accordance with the state minimum wage, regardless of whether they customarily and regularly receive tips or not. For instance, in a state where the minimum wage is $15.00 per hour, the employee is entitled to receive $15.00 per hour plus any service tips earned, save for a valid tip pooling arrangement. Of course, this generally ensures that the earning potential of tipped employees is much higher than it would otherwise be in other jurisdictions.

With that being said, this approach is not without its faults. This is because employers derive little to no benefit from paying

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[146] BRADLEY, *supra* note 55, at 6-7.

[147] For examples of these state statutes or regulations, see ALASKA STAT. ANN. § 23.10.065 (West 2015) (Alaska); CAL. LAB. CODE § 351 (West 2001) (California); MINN. STAT. ANN. § 177.24 (West 2024) (Minnesota); MONT. CODE ANN. § 39-3-402 (West 2023); MONT. ADMIN R. 24.16.3022 (2024) (Montana); NEV. REV. STAT. ANN. § 608.160 (West 2023) (Nevada); OR. REV. STAT. ANN. § 653.035 (West 2024) (Oregon); WASH. REV. CODE ANN. § 49.46.020 (West 2019) (Washington); WASH. ADMIN. CODE § 296-126-022 (1974) (Washington).

[148] *See* MINN. STAT. ANN. § 177.24 (West 2024) (Minnesota's statute permitting "small employers," those whose annual gross revenue is less than $500,000, to pay a lower minimum wage than is otherwise required under state law).

[149] For examples of these state statutes, regulations, or court orders, see D.C. CODE ANN. § 32-1003(f)(8) (West 2024) (District of Columbia); Mothering Just. v. Att'y Gen., No. 165325, 2024 WL 3610042 (Mich. July 31, 2024) (ordering a phased elimination of the tip credit), *as clarified by*, 10 N.W.3d 845 (Mich. 2024) (Michigan). Other jurisdictions such as Massachusetts recently had the opportunity to phase out the tip credit but ultimately chose not to. Richard I. Greenberg et al., *Election 2024 State Ballot Initiative Outcomes: What's Ahead for Employers*, JACKSON LEWIS P.C. (Nov. 20, 2024), https://www.jacksonlewis.com/insights/election-2024-state-ballot-initiative-outcomes-whats-ahead-employers [https://perma.cc/CQM3-BNLY].

their tipped employees a higher hourly wage with no prospect of a tip credit. While this may not be much of an issue in states with minimum wages that are closer to the federal minimum, it becomes more of an issue when a state's minimum wage is approaching $20.00 per hour. As a result of these higher wage obligations, the fear is that the following may occur: (1) tipped employee employment rates may decrease or (2) in the absence of any decrease, tipped employees may see a general decline in the amount of hours they are scheduled to work on a week-to-week basis. Either way, the realization of these concerns would lead to a lower overall income for tipped employees who simply cannot afford to see that happen.

## IV. SOLUTION AND APPLICATION

### *A. The Solution*

After considering the positive and negative aspects of each tip credit approach and their accompanying provisions, the most equitable approach is demonstrated by the following model statute.

> A. Definitions.
>
> For the purposes of this section:
>
> (a) A "tip" is defined as a sum presented by a customer in recognition of some service performed for the customer. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Notably, a compulsory charge for service, such as twenty percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying these provisions.
>
> (b) A "tip credit" is defined as the monetary amount employers may claim and subsequently use towards satisfying their employees' wage obligations. The maximum tip credit may be determined by calculating the difference between the statutory minimum wage and the hourly wage paid to tipped employees.

(c) A "tipped employee" is defined as any employee engaged in an occupation in which he or she customarily and regularly receives more than $193.00 per month in tips.[150] Generally, these occupations include, but are not limited to: waiters, waitresses, bartenders, bellhops, chauffeurs, beauty operators, and barbers, provided they actually receive and retain tips.

. . .

B. Minimum Wage; Subminimum Wage—Generally

(a) Except as may otherwise be provided under this chapter, every employer shall pay to every employee in any occupation, wages of a rate not less than $9.00 per hour, effective January 1, 2025.[151] Upon the establishment of a federal minimum wage in excess of the state minimum wage, the minimum wage shall be equal in amount to the federal minimum wage, except as may otherwise be provided under this chapter.

(b) Tips received by tipped employees may be considered wages for purposes of this chapter. In no event shall the subminimum rate, under this subsection, be less than $2.13 per hour. If a tipped employees' tips combined with the cash wage do not equal the minimum hourly wage, the employer must make up the difference. This subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(c) Employers may only claim a tip credit for hours worked by their employee(s) in occupations in which they qualify as a "tipped employee." Whenever a tipped employee is required to work in any occupation in which tips have not been recognized as part of the remuneration for hiring purposes:

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[150] According to the United States Bureau of Labor Statistics' Consumer Price Index ("CPI") Inflation Calculator, $20.00 in September 1966 (the threshold for being classified as a "tipped employee" at the time), if adjusted for inflation, is equivalent to approximately $192.96 in today's economy. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/KE2R-TJ5X] (last visited Nov. 20, 2024). Yet the current threshold for "tipped employee" classification under the federal statute and most state statutes remains at $30.00 per month.

[151] Depending on the jurisdiction, the minimum wage may need to be increased or decreased to account for differences in cost of living or any other notable factors.

(1) For two and one-half hours or more; or

(2) For more than twenty percent of the tipped employee's shift, whichever is less, the employer shall not claim a tip credit for tips as part of the minimum fair wage for that day.[152]

### *B. The Application*

To demonstrate the above statute, consider an employee of a hypothetical restaurant chain, Billy's Bar & Grill ("Billy's"). The employee, Sarah, is employed as a waitress who customarily and regularly receives tips while waiting tables. Her base pay is $2.13 per hour, in accordance with the FLSA's subminimum wage. For the purpose of this hypothetical, assume that the jurisdiction's minimum wage is $7.25 per hour. Recently, Billy's implemented a new policy requiring its servers perform certain amounts of non-tipped work, whether it be rolling silverware, cleaning dishes, or bussing tables, throughout their workday. Initially, Sarah thought nothing of the new policy. As time went on, however, Sarah noticed that she was spending nearly three hours per shift performing these non-tipped activities.[153] Although Sarah's direct wages and tips, when combined, always exceed the requisite minimum wage, her take-home pay is suffering. What action, if any, can Sarah take to remedy the situation?

#### 1. Without Legislative Protection (Post-*Restaurant Law Center*)

Under the current federal system (and unregulated state systems), there is little Sarah can do to remedy the situation,

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[152] One of the major concerns with the Biden Administration's 80/20/30 standard was the fact that employers were essentially required to follow their tipped employees around with a stopwatch to ensure that their non-tipped activities fell short of the thirty-minute mark. *See generally* Rainey, *supra* note 23. The same can be said for several state equivalents. This placed an undue burden on employers, whose time was better spent elsewhere. By increasing this number to 150 minutes, the issue is less burdensome, but the employees are still protected from overly opportunistic employment practices. Of course, that number could be reduced, but the issue may start to present itself yet again.

[153] In a standard eight-hour workday, three hours comprises approximately 37.5% of the entire day. That percentage falls to 33% and 30% in a nine- and ten-hour workday, respectively.

assuming that she continues to accumulate $30.00 per month in tips and earns enough to satisfy the $7.25 per hour minimum wage. This is because there is no longer a limit on the amount of non-tipped work employers may require of their tipped employees. Instead, Billy's has effectively satisfied its statutory wage obligations by allowing Sarah to make the $5.12 per hour in tips for every hour she works. So long as this continues, it makes no difference to Billy's whether Sarah spends the rest of each hour performing tipped work. Rather, it might actually benefit Billy's to have her rolling silverware or cleaning dishes during this extra time. In that case, Billy's may find it possible to schedule fewer employees on a day-to-day basis, lowering its wage obligations even further. Without any other protections, such as those previously provided by 29 C.F.R. § 531.56(f) or those mentioned in Section III, it is highly unlikely that there will be any legal recourse for Sarah.

2. With Legislative Protection (via the Model Statute)

Under the system created by the model statute, the analysis is drastically different. If Sarah's jurisdiction were to adopt it, the subminimum wage would stay at $2.13 per hour, but the minimum wage would increase to $9.00 per hour. Additionally, the definition of "tipped employee" would increase the threshold for classification from $30.00 per month to $193.00 per month. Finally, assuming that Sarah's direct wage and tips combined to reach the minimum wage threshold and that those tips satisfied the requisite amount of $193.00 per month, Billy's would no longer be permitted to have Sarah perform exorbitant amounts of non-tipped work, as required by its new policy. Rather, due to the statute's 80/20/150 provision, any policy mandating the performance of non-tipped work in excess of two and one-half hours (or 150 minutes) or twenty percent of Sarah's workday, whichever is less, is statutorily prohibited. Thus, under this statute, Sarah would likely be entitled to higher take-home pay, as well as legal recourse in the event that Billy's chose to leave its policy in place without modification. At the same time, Billy's would be entitled to a larger tip credit than is typically permitted under the FLSA ($6.87 per hour as opposed to $5.12 per hour) so long as all statutory benchmarks are met and each tipped employee is being treated in a fair and equitable manner.

## V. LEGISLATIVE CONSIDERATIONS

As with all things, tip credit laws and regulations at both the state and federal level may be subject to legislation that has been introduced in either the United States House of Representatives or the United States Senate. While the current framework permits each level of government to enact their own, more protective laws, that does not prevent the federal government from amending old statutes or enacting new statutes that effectively preempt state and local laws. The importance of this cannot be understated, as President Donald J. Trump returned to the Oval Office in January 2025. Unsurprisingly, his administration may endeavor to overhaul the current tip credit system, which could drastically alter the landscape of this issue. As such, it will be exceedingly necessary for employers and employees alike to pay close attention to any new legislation or executive action from this point forward.

## CONCLUSION

There is no question that tipped employees must be protected from overly opportunistic employment practices. With the Fifth Circuit's vacatur of 29 C.F.R. § 531.56(f), the need for these protections have arguably never been greater. This is especially true for those who reside in states lacking their own tip credit legislation. However, the legislative protections afforded to tipped employees must be weighed with the financial interests of their employers. Eliminating the tip credit altogether, while somewhat beneficial to employees, is likely not the best solution to the problem. Rather, by implementing a statute like the one listed above, states and localities may address the issue head-on, while preserving the interests of employers and employees alike. If successful, employers will be entitled to a rather generous tip credit, and their tipped employees will be protected from unfair employment practices while also seeing an increase in take-home pay.