Chapter 9

**MINIMUM WAGE REQUIREMENTS**

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I. Overview

Section 206 of the Fair Labor Standards Act (FLSA) requires that a minimum wage be paid for all hours worked.[[1]](#footnote-2) When first enacted in 1938, the FLSA established a general federal minimum wage rate of $.25 per hour. Amendments to the FLSA have incrementally raised the level of the minimum wage and extended its coverage to additional employees.[[2]](#footnote-3) The FLSA minimum wage rate now generally applies to the vast majority of employees performing work in any state, territory, or possession of the United States,[[3]](#footnote-4) except where the FLSA permits the payment of less than the minimum wage for (1) workers who are covered by a Special Certificate,[[4]](#footnote-5) and (2) youth who are paid an opportunity wage.[[5]](#footnote-6) Effective July 24, 2009, the federal minimum wage is $7.25 per hour.[[6]](#footnote-7)

Many state and local laws establish higher minimum wage rates.[[7]](#footnote-8) Payment of the FLSA-prescribed federal minimum wage does not excuse an employer from compliance with higher state or local minimum wage requirements.[[8]](#footnote-9)

This chapter discusses the character, timing, and methods of paying the minimum wage required by Section 206 of the FLSA, including the application of the Section 203(m) provisions regarding board, lodging, or other facilities and the payment of wages to tipped employees. Allowable and disallowable deductions from wages are also covered, as well as the limited circumstances under which an employer may pay certain workers at a subminimum wage rate.

The following regulations and interpretations are directly relevant to the matters treated in this chapter:

• 29 C.F.R. Part 531, Wage Payments Under the Fair Labor Standards Act of 1938; and

• 29 C.F.R. Part 778, Overtime Compensation.

Although Part 778 deals primarily with overtime compensation, some of its provisions are directly relevant to the discussion of the payment of wages generally and are therefore referenced as necessary in this chapter.

II. Payment of the Minimum Wage

**A. “Free and Clear” Payments**

The minimum wages required by the FLSA are not deemed paid unless they are paid finally and unconditionally, or “free and clear.”[[9]](#footnote-10) Similarly, the wage requirements of the FLSA are not met where the employee “kicks back,” directly or indirectly to the employer or to another person for the employer’s benefit, the whole or part of the minimum wage delivered to the employee.[[10]](#footnote-11)

For example, if an employer requires an employee to provide the tools of the trade that are specifically required for the performance of work, it would be a violation of the FLSA if the cost of these tools reduced the employee’s hourly compensation to below the FLSA minimum wage.[[11]](#footnote-12) Paying wages by coupons that are discounted to less than face value at employer-related establishments[[12]](#footnote-13) has been found to violate the FLSA’s requirement that the full amount of a minimum wage be paid to an employee “free and clear.” On the other hand, no minimum wage violation occurs if an employer deducts pay for the commissions advanced to an employee pursuant to a commission plan, so long as the employee is paid at least the minimum wage for all hours worked during the workweek.[[13]](#footnote-14) Similarly, if deductions are made from future earned commissions, such a practice is not an unlawful “kickback” because it does not unlawfully “kick back” “directly or indirectly to the employer or to another person for the employer’s benefit the whole or part of the wage *delivered* to the employee.”[[14]](#footnote-15) Therefore, this practice does not violate the “free and clear” regulation.[[15]](#footnote-16) However, the Sixth Circuit found that an employer’s policy of holding an employee liable for any unearned draw payments upon termination was not lawful.[[16]](#footnote-17)

The term “kickback” has also been used to describe the reimbursement scheme of food delivery companies whose per-delivery reimbursements were allegedly insufficient to cover the actual expenses of the driver, thereby reducing wages below the minimum wage.[[17]](#footnote-18) Minimum wage litigation involving pizza delivery has spawned competing approaches relating to reimbursement of delivery drivers’ vehicle expenses. Several Ohio district courts concluded that “either actual expenses or the IRS standard mileage reimbursement rate is the proper standard for reimbursement of pizza delivery drivers’ vehicle expenses.”[[18]](#footnote-19) Other courts determined that employers are not required to use the IRS rate but instead “may reimburse pizza delivery drivers’ expenses under the ‘reasonable approximation’ standard set forth in 29 C.F.R. §778.217, which explains how reimbursements are treated for calculating overtime rates under the FLSA.”[[19]](#footnote-20) In *Parker v. Battle Creek Pizza, Inc.*, a pair of interlocutory appeals involving challenges to how pizza delivery drivers were reimbursed for their mileage were consolidated and reviewed by the Sixth Circuit.[[20]](#footnote-21) The court rejected both a reasonable approximation approach and use of the I.R.S. rate. First, the court rejected the reasonable approximation of expenses approach because it would likely result in a minimum wage violation for low wage workers. On this point, the court said “when, as here, an employee’s hourly wage is the bare minimum wage, any underpayment of her cost of providing tools will cut into her minimum wages.”[[21]](#footnote-22) The court was likewise concerned that the I.R.S. reimbursement rate is a nationwide average that does not seek to measure an individual employee’s actual costs, which risked requiring employers to overpay drivers.[[22]](#footnote-23) The court noted that the difficulty of calculating driver expenses is not “because of any ambiguity in the regulation” but rather “because the information necessary to make that calculation can be difficult or tedious to obtain.”[[23]](#footnote-24) The court vacated both district court decisions and remanded for further consideration; in doing so, the Sixth Circuit suggested, but did not require, that a burden-shifting framework might be an appropriate technique to balance the plaintiff’s burden of proof against concerns that employers might “lowball” their estimate of driver costs.[[24]](#footnote-25)

On August 31, 2020, the DOL issued an opinion letter concerning compliance with the FLSA minimum wage requirements when reimbursing hourly, nonexempt delivery drivers for business-related expenses incurred while using their personal vehicles during the course of employment.[[25]](#footnote-26) The opinion letter states that the DOL regulations “permit[] employers to reimburse a reasonable approximation of expenses incurred for the employer’s benefit rather than the actual amount of expenses incurred.”[[26]](#footnote-27) The DOL opined that the IRS business standard mileage rate “is optional, not required” and the “regulations specifically allow other methods of approximation.”[[27]](#footnote-28) The Wage and Hour Division (WHD) explained that the “FOH provides two means of calculation here [the IRS rate or actual expenses], but that does not foreclose other methods, such as a reasonable approximation of expenses.”[[28]](#footnote-29) The opinion letter concludes that WHD regulations “permit reimbursement of a reasonable approximation of actual expenses incurred by employees for the benefit of the employer by any appropriate methodology; the IRS business standard mileage rate is not legally mandated by WHD’s regulations but is presumptively reasonable … .”[[29]](#footnote-30)

Finally, some courts have followed the FOH guidance by holding that the proper standard for reimbursement of vehicle-related expenses under the FLSA is either reimbursement of the drivers’ actual expenses or reimbursement using the IRS mileage reimbursement rate.[[30]](#footnote-31)

Indirect kickbacks that involve an intermediary are also unlawful.[[31]](#footnote-32) For example, in one case a publishing company and a union made an agreement that the union would furnish enough employees to do the work at straight-time rates. The agreement provided that, if the union could not furnish enough employees and the employer had to use overtime to get the work done, the union would pay the employer for any overtime costs incurred. To pay these overtime costs, the union assessed those who worked overtime a charge equal to the amount of their overtime payments, which were then repaid by the union to the company. The U.S. Department of Labor (DOL) Wage and Hour Administrator concluded that this arrangement amounted to an illegal “kickback”[[32]](#footnote-33) and further noted that it would be an illegal kickback even if the union paid the overtime back to the company out of its general funds because the general funds were obtained from members.[[33]](#footnote-34)

The word “kickback” is also sometimes used to describe unlawful deductions from an employee’s paycheck for items that are primarily for the benefit or convenience of the employer, including licenses, cash register shortages, customer walkouts without payment, or repayments of debts to employers.[[34]](#footnote-35) Repayment agreements in connection with employer-subsidized training or loan programs may also violate Section 206 if employer deductions for such programs reduce wages below the statutory minimum, regardless of contractual arrangements to the contrary.[[35]](#footnote-36)

**B. Method of Payment**

***1. Payment Must Be in Cash or Negotiable Instruments***

The DOL regulation states that Section 206 of the FLSA requires payment of the prescribed wages in “cash or negotiable instruments, payable at par.”[[36]](#footnote-37) Section 203(m), however, provides a limited exception by permitting employers to count as part of the wages due the reasonable cost or fair value of providing board, lodging, or other facilities to an employee.[[37]](#footnote-38)

***2. Direct Deposit Permitted***

The usual negotiable instrument is an employer’s check; however, payment of wages by direct deposit to an employee’s bank account is an increasingly common and acceptable form of wage payment. The DOL’s *Field Operations Handbook* provides:

The payment of wages through direct deposit into an employee’s bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer’s payroll direct deposit account, if it is at a place convenient to their employment and without charge to them.[[38]](#footnote-39)

Even though the DOL permits the direct deposit of an employee’s wages under these conditions, stricter mandates under state and local laws will govern.[[39]](#footnote-40)

***3. Scrip, Tokens, Coupons, and Similar Devices Not Permitted***

The DOL’s regulation is that scrip, tokens, credit cards, dope checks, coupons, and similar devices are not proper forms of payment under the FLSA[[40]](#footnote-41) because they are not cash, negotiable instruments, or “other facilities” within the meaning of Section 203(m).[[41]](#footnote-42)

An employer is permitted, however, to use devices such as tokens for the purpose of conveniently and accurately measuring wages earned or facilities furnished.[[42]](#footnote-43) For example, piecework earnings may be calculated by issuing tokens (representing a fixed amount of work performed) to the employee, which are redeemable at the end of the pay period for cash.[[43]](#footnote-44) Similarly, board, lodging, or other facilities may be furnished during the pay period in exchange for scrip or coupons that are issued before the end of the pay period.[[44]](#footnote-45) The reasonable cost of furnishing such facilities may be included as part of the wage, because payment is being made not in scrip but in facilities furnished under the requirements of Section 203(m).[[45]](#footnote-46) If an employee loses some coupons or tokens, this does not permit the employer to take credit for having paid the amount of the lost tokens to the employee, nor can an employee be charged with the loss of coupons or tokens.[[46]](#footnote-47)

In order for an instrument to satisfy the requirements of Section 203(m), it must be readily convertible to cash upon demand.[[47]](#footnote-48)

**C. Time of Payment and Changing Pay Periods**

Although the minimum wage regulations[[48]](#footnote-49) do not address when the payment of a minimum wage is due, the overtime compensation interpretations of the DOL provide such guidance. The “Time of Payment” section provides:

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.[[49]](#footnote-50)

Minimum wage payments must be made on the regular payday for each workweek.[[50]](#footnote-51) If a pay period covers more than a single week, payment of the minimum wage must be made on the regular payday for the workweek in which the pay period ends.[[51]](#footnote-52) Further, in *Benavides v*. *Miami Atlanta Airfreight, Inc*.,[[52]](#footnote-53) the Eleventh Circuit clarified that, although the FLSA requires wages to be paid on a regular payment date, there is no requirement to pay simultaneously with the end of a pay period. The court thus rejected the claim that an employer’s consistent practice of paying its employees seven to eight days after the pay period ended violated the FLSA.[[53]](#footnote-54)

Late payments violate the FLSA. In *Biggs v. Wilson*,[[54]](#footnote-55) the Ninth Circuit held that wages under the FLSA were “unpaid” unless they were paid on an employee’s regular payday. The court found that the State of California violated the FLSA when, because no state budget had been passed, it paid wages to its employees 14 to 15 days after the regular payday. The court found that such late payments did not comply with the FLSA: “The obligation [to pay the minimum wage] kicks in once an employee has done covered work in any workweek. To us, ‘shall pay’ plainly connotes shall make a payment. If a payday has passed without payment, the employer cannot have met his obligation to ‘pay.’”[[55]](#footnote-56) The Ninth Circuit also reasoned that the FLSA’s imposition of liability in the form of unpaid minimum wages and liquidated damages would be meaningless unless there were a due date after which the minimum wages would become unpaid.[[56]](#footnote-57)

An employer’s wage withholdings can result in late payment liability. For instance, in *Calderon v. Witvoet*,[[57]](#footnote-58) farm owners withheld from the workers’ paychecks $.50 per hour for hours worked from 1983 through 1985, and $.25 per hour for hours worked in 1986 and 1987, withholdings that resulted in net pay of less than the applicable minimum wage. According to the plaintiffs, “the employer used this withholding to induce laborers to remain through the harvest season and did not pay the ‘bonus’ to employees who left in mid-season.”[[58]](#footnote-59) According to the employer, the “withholding was a service to the workers, establishing a kitty they could use for transportation to their next job (or back home).”[[59]](#footnote-60) The court held that such late payments violated the FLSA: “If the FLSA requires timely payment in cash or a cash equivalent such as a check, and this requirement may not be varied by agreement, it follows that even the workers’ enthusiastic assent to deferred payment—a form of employer-held savings account—is ineffectual.”[[60]](#footnote-61)

Courts may not, however, rigidly apply the requirement where it is clear that the employer is not attempting to evade timely payment. For example, in *Rogers v. City of Troy*,[[61]](#footnote-62) the Second Circuit examined the FLSA implications of changing an employee’s payday. The court held that a series of one-day delays in payment caused by an employer’s attempt to change the pay schedule did not automatically violate the FLSA. The court set forth the conditions necessary to make a change lawful: (1) the change is made for a legitimate business reason; (2) there is no unreasonable delay in payment; (3) the employer intends the change to be permanent; and (4) the change does not have the ultimate effect of avoiding the minimum wage and overtime requirements.[[62]](#footnote-63) The court concluded that the change did not evade the minimum wage and overtime requirements because no payments were permanently skipped and the wages paid for a workweek exceeded the minimum wage even when discounted for the delay. The court, however, vacated and remanded the district court’s dismissal so that evidence could be adduced as to whether the other conditions had been met.[[63]](#footnote-64)

III. Non-Cash Wages Under Section 203(m): “Board, Lodging or Other Facilities”

Section 203(m) of the FLSA limits the circumstances under which an employer can make wage payments in a form other than cash or its equivalent.[[64]](#footnote-65) In introducing its discussion of Section 203(m), the DOL wrote:

It appears to have been the clear intention of Congress to protect the basic minimum wage and overtime compensation required to be paid to the employee by sections 6 and 7 of the Act from profiteering or manipulation by the employer in dealings with the employee. Section 3(m) of the Act and subpart B of this part accordingly prescribe certain limitations and safeguards which control the payment of wages in other than cash or its equivalent.[[65]](#footnote-66)

The FLSA defines “wage” to include “the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees … .”[[66]](#footnote-67) Thus, wages can be paid partly in cash and partly in board, lodging, or other facilities that are provided primarily for the benefit or convenience of the employee. The “facilities furnished” portion of the wage payment may either be claimed as a credit toward the employer’s wage obligations or as a deduction from the total wages due, even if the deduction reduces the cash portion of an employee’s pay below the statutorily required minimum.[[67]](#footnote-68)

In order to count as wages, the amount must be for “board, lodging, or other facilities”; it must not exceed the “reasonable cost” to the employer; and the facility must be of the type “customarily furnished” by the employer.[[68]](#footnote-69) Some courts have also held that the credit can only be used as an offset against minimum wages, not overtime pay.[[69]](#footnote-70)

In December 2015, the Administrator issued a field assistance bulletin titled “Credit toward Wages under Section 203(m) of the FLSA for Lodging Provided to Employees.”[[70]](#footnote-71) The bulletin includes examples specific to live-in domestic employees in anticipation that employers would use the Section 203(m) credit in concert with the Home Care Final Rule,[[71]](#footnote-72) which was set to go into effect earlier that year, although the bulletin notes that Section 203(m) applies in other contexts.[[72]](#footnote-73) The DOL also issued a series of questions and answers regarding Section 203(m) credits, again providing examples specific to domestic service workers.[[73]](#footnote-74)

**A. “Customarily Furnished” to the Employee**

The reasonable cost of board, lodging, or other facilities may be considered as part of the wages paid to an employee only where it is “customarily furnished” by the employer[[74]](#footnote-75) under the terms of the applicable regulations. Not only must the employee receive the benefits of the facility for which the employee is charged, but the employee’s acceptance of the facility also must be “voluntary and uncoerced.”[[75]](#footnote-76)

***1. “Voluntary and Uncoerced”***

“Voluntary and uncoerced” is not specifically defined in the FLSA; rather, the regulations[[76]](#footnote-77) refer to *Williams v. Atlantic Coast Line Railroad*.[[77]](#footnote-78) In that case, a district court held that the employer did not “furnish” employees with any facilities within the meaning of Section 203(m) because it forced employees to accept substandard housing, including railroad boxcars, as a precondition to employment solely so it could claim the highly inflated “cost” of such housing as a cash wage paid. Because of the extreme facts of *Williams*, another court has noted that this case “does little to define the scope of the requirement that acceptance be ‘voluntary and uncoerced.’”[[78]](#footnote-79)

*a. Meals*

The Fifth, Sixth, and Eleventh Circuits have declined to apply the “voluntary and uncoerced” standard to employer-provided meal credits, and the Administrator no longer enforces the voluntary acceptance rule with regard to meals.[[79]](#footnote-80) The Eleventh Circuit, in two companion cases, *Davis Bros., Inc. v. Donovan*[[80]](#footnote-81)and *Morrison, Inc. v. Donovan*,[[81]](#footnote-82) held that the Secretary of Labor had erroneously read into the statute a voluntary-choice-by-employee provision that Congress did not intend. In holding that an employer’s right to deduct from wages the reasonable cost of meals it customarily furnishes is *not* subject to a requirement that employees be given a choice between cash wages and meals, the Eleventh Circuit relied on Section 203(m)’s use of the term “customarily furnished.”[[82]](#footnote-83) According to the court, the plain language of Section 203(m) focuses on the actions of the employer, not on the employees;[[83]](#footnote-84) thus, the phrase “customarily furnished” means “regularly provided by an employer” rather than “voluntarily accepted by an employee.”[[84]](#footnote-85) Accordingly, an employer may take a credit on the cash component of its minimum wage obligation for meals that it regularly provides, even if the employees are not given the option either to take cash instead or to choose not to eat the meal.[[85]](#footnote-86)

Likewise, in *Herman v. Collis Foods, Inc*.,[[86]](#footnote-87) the Sixth Circuit affirmed the lower court’s rejection of the voluntariness provision of the Section 203(m) credit regulation as applied to meals, holding that the section permits an employer to deduct the average cost of meals offered to employees regardless of whether the employees accept the meals. The Fifth Circuit has also held, albeit without discussion, that employers may deduct the cost of employer-provided meals even if employees were not given a choice between receiving cash wages or meals.[[87]](#footnote-88)

In *Baouch v. Warner Enterprises*,[[88]](#footnote-89) the Eighth Circuit held that an employer that reported to the Internal Revenue Service (IRS) payments made to employees pursuant to a meal reimbursement plan as expense reimbursements could nevertheless also claim such payments as wages because the relevant IRS regulations were subject to an analysis different from that under the FLSA. As a result, the Eighth Circuit held that the at-issue per diempayments, which varied with the amount of work performed, were part of the employee’s regular rate under the FLSA and counted toward the minimum wage.[[89]](#footnote-90)

*b. Lodging*

Unlike the provision of meals, voluntariness of lodging may be required in some cases. In *Marshall v. Intraworld Commodities Corp*.,[[90]](#footnote-91) a federal district court denied an employer’s claim for a credit for board and lodging. In that case, a citizen of India worked in the employer’s office and home without receiving any wages. The court found that the employer had misled and taken advantage of an uneducated undocumented worker and denied the employer a credit for board and lodging, finding that the employee’s acceptance of the facility was not “voluntary and uncoerced.”[[91]](#footnote-92) Similarly, in *Chellen v. John Pickle Co*.,[[92]](#footnote-93) the court disallowed a housing offset on the grounds that the employer-provided accommodations were substandard, the employees did not use the dormitories voluntarily, and an arbitrary “rental” cost was used to calculate the supposed fair market value for the housing.

On the other hand, in *Lopez v. Rodriguez*,[[93]](#footnote-94) the District of Columbia Circuit determined that a different approach is necessary when the case involves a live-in domestic service employee: “Where, as here, ‘living-in’ is an integral part of the job, the elements of voluntarism and coercion take on different meanings than those suggested in *Intraworld*.”[[94]](#footnote-95) Under the *Lopez* analysis, the *Intraworld* case contained the implicit finding that “living-in” was not a necessary condition of employment:

However, in the present case appellants were concededly seeking to employ a “live-in” housekeeper and babysitter when they hired appellee. If appellee understood this when she accepted the job, and if her acceptance of the job was voluntary and uncoerced, then it is idle to inquire whether her *initial* acceptance of board and lodging was voluntary and uncoerced. Appellee had no choice but to accept the lawful “live-in” condition if she desired the job.[[95]](#footnote-96)

The court acknowledged, however, that even where an employee voluntarily and knowingly accepts a job that requires board and lodging in the employer’s home, the employer may impose “coercive” conditions such that the employee’s continued employment and acceptance of board and lodging ceases to be voluntary.[[96]](#footnote-97) The District of Columbia Circuit remanded the case for a determination as to whether, at any point during the employment, the live-in domestic employee sought to leave her job but realistically could not do so because of coercive conditions imposed by the employer.[[97]](#footnote-98)

The DOL’s Wage and Hour Division (WHD) will ordinarily consider the lodging to be voluntarily accepted by the employee when living at or near the site of the work is necessary for the employee to perform the job.[[98]](#footnote-99) According to the Administrator, this presumption of voluntariness may be overcome in cases involving coercion.[[99]](#footnote-100)

***2. “Customarily Furnished”***

Where facilities are furnished to the employee, they will be considered to be furnished “customarily” if the employer furnishes the facilities regularly to its employees, or if other employers engaged in the same or similar trade, business, or occupation customarily furnish the same or similar facilities in the same or similar communities.[[100]](#footnote-101) Facilities furnished in violation of any federal, state, or local law, ordinance, or prohibition will not be considered facilities that are customarily furnished.[[101]](#footnote-102) Thus, for example, Section 203(m) credit for lodging may be inappropriate where the lodging provided does not have the required occupancy permits, is not zoned for residential use, or is substandard.[[102]](#footnote-103)

An employer is not required to provide lodging to all of its employees in order to show that lodging is “customarily furnished.”[[103]](#footnote-104) Instead, it need only show that it provides lodging, regularly and indiscriminately, to all of a particular class of employee.[[104]](#footnote-105)

**B. “Board, Lodging or Other Facilities”**

***1. Meals***

Meals are always considered as primarily for the benefit and convenience of the employee.[[105]](#footnote-106) An employer is entitled to a credit for the “reasonable cost to the employer” of meals regularly furnished to employees.[[106]](#footnote-107) The Eleventh Circuit has found that this is so even where the employer was obligated by law to promise and by individual contract to provide reimbursements for meals.[[107]](#footnote-108)

The reasonable cost of meals furnished by an employer cannot exceed the actual cost to the employer of the food, its preparation, and related supplies,[[108]](#footnote-109) and it may not include any employer profit.[[109]](#footnote-110) Courts have determined that, without adequate records to demonstrate the actual cost of employer-provided meals, the cost of those meals cannot be deducted.[[110]](#footnote-111)

The DOL has approved meal credits through the use of employer-issued credit cards used in the company’s factory lunch room or canteen with the following restrictions: (1) the employer’s obligation to provide the meals must have been discharged within a month after the credit card was purchased; (2) the price of the meal cannot exceed its reasonable cost; (3) the employee is given the right to redeem the card, at any time, at its par value for cash rather than using it to purchase meals without any discount; and (4) loss of the card is not charged to the employee.[[111]](#footnote-112)

Courts typically do not permit employers to take meal credits that are excessive or unjustified. In *Hodgson v. Frisch Dixie, Inc*.,[[112]](#footnote-113) the court disallowed the employer’s deduction for a meal credit because it found that requiring employees to accept the free meal was to ensure that the employees were available to provide uncompensated labor during mealtime.[[113]](#footnote-114) Similarly, the Sixth Circuit in *Herman v. Palo Group Foster Home, Inc*.[[114]](#footnote-115) held that meal credits claimed by the employer were excessive and unjustified, particularly because the DOL had told the employer during a previous investigation that complete and accurate records were required and that the amount of the credit the employer was claiming was excessive.

Because employers may take a credit for the “reasonable cost” of employer-provided meals even though employees do not always accept the meals,[[115]](#footnote-116) the Sixth Circuit in *Herman v. Collis Foods, Inc*.[[116]](#footnote-117) held that Section 203(m) permitted an employer to take a meal credit for each employee for each shift based on the “average cost” of a meal where the employer kept detailed records of the cost of food on hand and food acquired on a weekly basis: “Such averages may be ‘used in lieu of actual measure of cost in determining the wage paid to any employee.’”[[117]](#footnote-118)

***2. Lodging***

Housing costs may be included as part of an employee’s wage where the housing is provided for the benefit of the employee.[[118]](#footnote-119) In appropriate circumstances, as determined by the Administrator, this presumption is subject to challenge and rebuttal pursuant to a DOL regulation that requires the balancing of benefits accruing to the employer with the benefits accruing to the employee.[[119]](#footnote-120) When an employer requires an employee to live on the worksite in order to meet a particular need of the employer, or when an employee is required to be on call at the employer’s behest, a credit for lodging may be unavailable to the employer.[[120]](#footnote-121) However, where employees received “fully functional, private apartments designed and maintained for normal residential use” and were free to enjoy their apartments to the same extent as any other paying tenant, employees could not rebut the presumption that free lodging was for their primary benefit even though the employer required them to live on premises and be “on call” for substantial periods of time.[[121]](#footnote-122)

In addition, courts have held that the cost of substandard housing cannot be credited against employee wages.[[122]](#footnote-123) Instead, the employer must demonstrate that the housing provided is adequate and that the money withheld from wages bears a reasonable relationship to the quality of the housing provided.[[123]](#footnote-124)

Examples of cases in which a wage credit for housing has been allowed include the following:

• living quarters furnished to ambulance drivers, because the quarters were not furnished primarily for the benefit of the employer and the drivers, most of whom were young men, would have had to pay rent for their lodging in any event;[[124]](#footnote-125)

• housing facilities furnished to migrant farm workers, because they primarily benefited the workers and qualified in part as “wages” where the workers were not required to live on the farms as a condition of employment, and the on-site housing provided comradeship for many who did not speak English; however, amounts that the growers could credit against the workers’ wages were limited where the housing conditions were substandard[[125]](#footnote-126)

• the cost of board, lodging, and other facilities, but limited to periods when employees were compensably employed.[[126]](#footnote-127)

Cases in which wage credits for providing facilities to employees have been denied involve employers who seek excessive credit for grossly inadequate facilities coupled with oppressive working conditions,[[127]](#footnote-128) as well as employers whose provision of lodging was primarily for their own benefit.[[128]](#footnote-129)

***3. “Other Facilities”***

According to the regulations, “other facilities” must be something like board or lodging.[[129]](#footnote-130) At least one court has also found that medical and telephone expenses qualify as facilities.[[130]](#footnote-131) The Administrator has deemed the provisions discussed below to be within the meaning of the term “facilities.”

*a. General Merchandise*

General merchandise consisting of items furnished at company stores and commissaries, including food, articles of clothing, and household effects, are considered to be facilities within the meaning of Section 203(m).[[131]](#footnote-132) Here again, the items furnished must primarily benefit the employee.[[132]](#footnote-133) In order to take such deductions, an employer must keep adequate records of the items purchased by employees and only deduct the reasonable cost of such items.[[133]](#footnote-134)

*b. Fuel, Electricity, Water, and Gas*

The reasonable cost of fuel, electricity, water, and gas furnished for an employee’s benefit are also considered facilities.[[134]](#footnote-135) As with other employer-provided facilities, an employer that seeks to deduct the cost of utilities must adequately document the reasonable cost of providing those facilities. General testimony by the employer regarding average monthly utility bills will not meet this standard.[[135]](#footnote-136) Nor can the employer claim a credit when it is required by law to provide such utilities to employees.[[136]](#footnote-137)

*c. Transportation*

The term “other facilities” also includes the cost of employer-provided transportation of employees between home and work.[[137]](#footnote-138) For example, in *Montoya v. CRST Expedited, Inc*.,[[138]](#footnote-139) a district court granted partial summary judgment to drivers who alleged their employer violated the FLSA by deducting from their wages transportation expenses the company paid for transporting them to training activities that were part of the company’s on-boarding process for new employees. Because the transportation costs were not ordinary commuting expenses and were primarily for the benefit of the employer, the court concluded, the expenses were not “other facilities” under Section 203(m) and thus were not deductible from the drivers’ wages to the extent such deductions reduced drivers’ pay below the minimum wage.[[139]](#footnote-140)

*d. Educational Costs*

The reasonable cost of tuition furnished by a college or university to its student-employees may be counted toward wages.[[140]](#footnote-141) Such tuition costs include tuition payments that are absorbed by the school through such means as reduced tuition, reductions in the regular tuition charged to student-workers, or a grant that is credited to the student’s account. These amounts may be properly included in student wages for purposes of determining whether the employer’s wage obligations have been met.[[141]](#footnote-142)

***4. Items Primarily for the Benefit or Convenience of the Employer Are Not Facilities***

Facilities that are primarily for the benefit or convenience of the employer do not fall within the terms of Section 203(m) and therefore are excluded in computing an employee’s wage. In 1967, the DOL published interpretive regulations and found the following items to be primarily for the benefit or convenience of the employer and therefore not facilities:

• tools of the trade and other materials and services incidental to carrying on the employer’s business;

• the cost of any construction by and for the employer;

• the cost of uniforms, their rental, and their laundering where the nature of the business requires the employee to wear a uniform;[[142]](#footnote-143)

• safety caps, explosives, and miners’ lamps (in the mining industry);

• electric power used for commercial production in the interest of the employer;

• company police and guard protection;

• taxes and insurance on employer buildings that are not used for lodging furnished to the employee;

• “dues” to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate its factory in a particular community;

• transportation charges where such transportation is incidental and necessary to the employment, as in the case of maintenance-of-way employees of a railroad; and

• medical services and hospitalization that the employer is bound to furnish under workers’ compensation acts or similar federal, state, or local law.[[143]](#footnote-144)

**C. Determining “Reasonable Cost”**

29 C.F.R. §531.33(a) provides three methods whereby an employer may ascertain the permissible amount of any furnished facility that can be counted as part of wages:

(1) an employer may calculate the “reasonable cost” of facilities in accordance with the requirements set forth in Section 531.3;[[144]](#footnote-145)

(2) an employer may request that a determination by the Administrator of “reasonable cost” be made, including a determination having particular application; and

(3) an employer may request that a determination by the Administrator of “fair value” of the furnished facilities be made to be used in lieu of the actual measure of the cost of the furnished facilities in assessing the “wages” paid to an employee.[[145]](#footnote-146)

***1. General Determination***

An employer may make its own determination of reasonable cost in the manner prescribed by 29 C.F.R. § 531.3.[[146]](#footnote-147) The term “reasonable cost” as used in Section 203(m) of the FLSA is not more than the actual cost to the employer of the board, lodging, or other facilities that are customarily furnished by the employer to its employees.[[147]](#footnote-148) “Reasonable cost” does not include a profit to the employer or to any affiliated person,[[148]](#footnote-149) nor does it include the cost of furnishing facilities that are primarily for the benefit or convenience of the employer.[[149]](#footnote-150) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is

the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices.[[150]](#footnote-151)

***2. Procedure for Administrator Determination of “Reasonable Cost”***

The process by which the Administrator determines “reasonable cost” begins upon the petition of any interested person (e.g., an employee or an authorized representative of the employee, an employer, or a group of employers). The Administrator then determines generally or particularly the “reasonable cost” to the employer of furnishing any employee with board, lodging, or other facilities if the board, lodging, or other facilities are customarily furnished by the employer to its employees. Notice of the proposed determination is published in the *Federal Register*, and interested persons are given an opportunity to participate through submission of written data, views, or arguments.[[151]](#footnote-152)

Any petition for a determination of reasonable cost must include the following information:

(1) the name and location of the employer or employer’s place or places of business;

(2) a detailed description of the board, lodging, or other facilities furnished by the employer or employers, and a representation as to whether these facilities are customarily furnished by the employer or employers and as to whether they are alleged to constitute “wages”;

(3) the charges or deductions made for the facility or facilities by the employer or employers;

(4) when the actual cost of the facility or facilities is known, an itemized statement of that cost to the employer or employers of the furnished facility or facilities;

(5) the cash wages paid;

(6) the reason or reasons for which the determination is requested, including any reason or reasons why the determinations in Section 531.3 should not apply; and

(7) whether an opportunity to make an oral presentation is requested, and if it is requested, inclusion of a summary of any expected presentation.[[152]](#footnote-153)

An employer may not take credit when it does not incur a cost. For example, no credit may be taken where an employee does not eat a meal made available to the employee and the employer retains the meal in its inventory for service to customers.[[153]](#footnote-154)

***3. Procedure for Determining “Fair Value”***

Section 203(m) of the FLSA gives the Secretary authority to determine the “fair value” of facilities for defined classes of employees and in defined areas, on the basis of the average cost to the employer or other appropriate measures of “fair value,” and prescribes that “such evaluations [of fair value], where applicable and pertinent, shall be used in lieu of the actual measure of cost in determining the wage paid to any employee.”[[154]](#footnote-155)

The procedures that govern determining the “fair value” under Section 203(m) of the FLSA are essentially the same as those prescribed for determining “reasonable cost.”[[155]](#footnote-156) Any petition by an employee or an authorized representative of the employee for determining “fair value” under Section 203(m) must contain the same information required under paragraph (b) of Section 531.4 and also, to the extent possible, the following:

(1) a proposed definition of the class or classes of employees involved;

(2) a proposed definition of the area to which any requested determination would apply; and

(3) any measure of fair value of the furnished facilities that may be appropriate in addition to the cost of those facilities.[[156]](#footnote-157)

**D. Effect of Collective Bargaining Agreements**

The cost of board, lodging, or other facilities must not be included as part of the wage paid to any employee if it is excluded as wages under the terms of a bona fide collective bargaining agreement (CBA) that applies to the particular employee.[[157]](#footnote-158)

A CBA is deemed to be “bona fide” if it is made with a labor organization that has been certified by the National Labor Relations Board or is the certified representative of employees under the provisions of the Railway Labor Act, as amended.[[158]](#footnote-159) Collective bargaining agreements made with representatives who have not been so certified will be ruled upon individually when submitted to the Administrator.[[159]](#footnote-160)

IV. Payment of Wages to Tipped Employees

Tipped employees are subject to the Section 206(a)(1) minimum wage requirements of the FLSA.[[160]](#footnote-161) However, Section 203(m) of the FLSA permits an employer to claim a partial credit against its minimum wage obligation to a tipped employee based on the tips received by the employee.[[161]](#footnote-162) This credit against wages due is called a “tip credit.”[[162]](#footnote-163) The cash wage required under Section 203(m), when an employer takes a tip credit, is not a subminimum wage. Tipped employees are entitled to the full Section 206(a)(1) minimum wage, which may be composed of both a direct or cash wage and a tip credit as set forth in Section 203(m).[[163]](#footnote-164) As described below, employers may only take a tip credit for those employees in certain occupations who customarily and regularly receive more than $30 a month in tips.[[164]](#footnote-165) An employer seeking to take a tip credit bears the burden of showing the employer’s compliance with Section 203(m).[[165]](#footnote-166) If the employer does not meet this burden, it may be liable for the full minimum wage owed for every hour worked by the employee.[[166]](#footnote-167)

The tip credit is another area of wage and hour law where state and local laws should be consulted, as they may provide different and more stringent requirements or may prohibit a tip credit altogether.[[167]](#footnote-168)

On March 23, 2018, Congress enacted the Consolidated Appropriations Act of 2018, which amended Sections 203(m) and 216(b) of the FLSA.[[168]](#footnote-169) These amendments are addressed in the appropriate subsections below.

**A. Historical Background of the Tip Credit**

As first enacted, the FLSA had no special provisions for tips or tipped employees. Many employers undertook to meet their newly imposed FLSA obligations with regard to tipped employees by “agreeing” with those employees that all or part of their tips would be surrendered to the employer and then returned to the employee in an amount that fulfilled the employer’s statutory payment obligations. An early case, *Williams v. Jacksonville Terminal Co*.,[[169]](#footnote-170) typified this structure. As summarized by a later court,

*Williams* involved the red caps at the Jacksonville, Florida, railroad terminal. Prior to the enactment of the Fair Labor Standards Act, the red caps received the tips earned and were paid nothing by the Terminal. After the passage of the Act, the Terminal was required to pay a minimum wage to these employees. To meet this obligation, the Terminal established a method of compensation under which the tips received would be treated as wages and credited against the minimum wage with the employer making up the difference between the tips received and the minimum wage. The red caps protested and demanded that the tips should not be treated as partial wages and credited against their minimum wage. The Supreme Court sustained the employer in its right to change the method of compensating the red caps in order to comply with the Act and found unavailing the red caps’ protests because they had, with knowledge of the new method, continued to work and receive their compensation under the new plan.

The Court said:

Although continuously protesting the authority of the railroads to take over the tips, the redcaps remained at work subject to the requirement. Such protests were unavailing against the employers. Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads’ credit so much of the tips as it affected. By continuing to work, a new contract was created.[[170]](#footnote-171)

Similar arrangements as approved in *Jacksonville Terminal* continued in various industries until Congress intervened to regulate this practice in 1966.[[171]](#footnote-172)

Beginning with the 1966 Amendments, the FLSA allowed an employer to take a credit for tips actually received by a “tipped employee” for up to 50 percent of the applicable minimum wage.[[172]](#footnote-173) However, the employer was not required to use the tip credit approach; the DOL took the position that the statute still allowed an employer to require employees to relinquish all tips to the employer and receive payment for the full minimum hourly rate for all hours worked by the employee.[[173]](#footnote-174) This was known as the “hourly wage method” for computing wages of a tipped employee who was required to relinquish all tips to the employer.[[174]](#footnote-175) The DOL issued its initial tip regulations in 1967 in which it specifically permitted agreements under which tips received by employees could be transferred to the employer.[[175]](#footnote-176)

In 1974, Congress again amended Section 203(m) of the FLSA. The purpose of the amendments was to make it clear “that an employer could not use the tips of a ‘tipped employee’ to satisfy more than 50 percent of the Act’s applicable minimum wage”[[176]](#footnote-177) and to ensure that “all tips received by such employee … be retained by the employee,”[[177]](#footnote-178) except to the extent that there is a valid arrangement for “pooling of tips among employees who customarily and regularly receive tips.”[[178]](#footnote-179) In order to take advantage of the tip credit, an employer must (1) inform each tipped employee about the tip credit allowance, and (2) permit the employee to retain all tips (except to the extent the employee participates in a lawful tip pool).[[179]](#footnote-180)

In 1975, the DOL published an opinion letter stating that the interpretations issued before the 1974 Amendments (published as 29 C.F.R. §531.50–.60) “have no effect to the extent that they are in conflict with the amended Act.”[[180]](#footnote-181) Subsequently, courts have held that the “hourly wage method” of paying tipped employees is no longer valid under Section 203(m).[[181]](#footnote-182)

Since the 1996 Amendments to the FLSA, an employer is required to pay a “tipped employee” a direct “cash wage” of at least $2.13 an hour,[[182]](#footnote-183) and if the employee’s tips combined with the employer’s direct wages do not equal the effective general minimum hourly wage, the employer must make up the difference.[[183]](#footnote-184) In 2008, the DOL published a notice of proposed rulemaking (NPRM)[[184]](#footnote-185) that involved proposed changes to several regulations relating to tipped employees.[[185]](#footnote-186) According to its Preamble, the NPRM “updates the regulations to incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the [DOL’s] interpretations.”[[186]](#footnote-187)

Many comments were submitted in response to the 2008 NPRM and, as described by the Ninth Circuit in *Oregon Restaurant & Lodging Association v. Perez,*[[187]](#footnote-188)“these comments disclosed that section 203(m)’s tip pooling restrictions could be read to apply only to employers who take a tip credit.”[[188]](#footnote-189)

In 2011, in response to the “numerous comments received” with respect to tipped employees,[[189]](#footnote-190) the DOL promulgated a new rule to clarify its position, which stated:

Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a “tipped employee” within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.[[190]](#footnote-191)

Following the issuance of the 2011 regulations, circuit courts were split on the issue of whether tips were the property of the employee. In *Oregon Restaurant & Lodging Association v*. *Perez*,[[191]](#footnote-192) the Ninth Circuit upheld the 2011 DOL regulations. The majority reconciled its decision with *Cumbie v.* *Woody Woo*[[192]](#footnote-193) on the grounds that, when the Ninth Circuit decided *Woody Woo*, it engaged in a pure statutory analysis as to whether the text of Section 203(m) restricted tip pooling arrangements when no tip credit is taken.[[193]](#footnote-194) However, in *Oregon Restaurant*, the court addressed the subsequently issued 2011 regulations and engaged in a traditional *Chevron* deference analysis.[[194]](#footnote-195) In upholding the 2011 regulations, the court reasoned that the DOL acted within its discretion under *Chevron* in issuing the regulations because (1) Section 203(m) is silent regarding the DOL’s ability to regulate tip practices when the employer does not take a tip credit (and therefore such regulation is not prohibited by the statute), and (2) the DOL’s rule regarding tip practices was reasonable and aligned with the FLSA’s language, legislative history, and purpose.[[195]](#footnote-196)

In contrast, in *Trejo v*. *Ryman Hospitality Properties, Inc*.,[[196]](#footnote-197) the Fourth Circuit held that servers for hotels and restaurants paid at or above the minimum wage in direct wages did not have a claim for tips under Section 203(m). The Fourth Circuit reasoned as follows:

It is not clear that [the language in Section 203(m)], standing alone, achieves what the Plaintiffs claim, but when read in context, it is clear that this language—whatever its import—could give rise to a cause of action only if the employer is using tips to satisfy its minimum wage requirements. The FLSA is the “minimum wage/maximum hour law.” Given that context, §203(m) “does not state freestanding *requirements* pertaining to all tipped employees,” but rather creates rights and obligations for employers attempting to use tips as a credit against the minimum wage. The FLSA “requires payment of minimum wages and overtime wages only,” and “is unavailing where wages do not fall below the statutory minimum and hours do not rise above the overtime threshold.” We thus find that the statutory requirements that an employer inform an employee of §203(m) and permit the employee to retain all his tips unless the employee is in a tip pool with other regularly tipped employees does not apply to employees, like the Plaintiffs, who are seeking only the recovery of the tips unrelated to a minimum wage or overtime claim.[[197]](#footnote-198)

Similarly, other courts reached the same conclusion in holding that the 2011 DOL regulations were invalid. These courts reasoned that the regulations were contrary to the clear intent of Congress in Section 203(m), which was to limit the use of tips by employers only when a tip credit was taken, and not to impose a freestanding requirement pertaining to all tipped employees.[[198]](#footnote-199)

**B. Current Statutory Provisions Regarding Tipped Employees**

In 2018, in the Consolidated Appropriations Act (CAA),[[199]](#footnote-200) Congress addressed the conflict between the circuit courts and the DOL regarding the 2011 regulations by amending Section 203(m) of the FLSA to explicitly prohibit employers, including managers and supervisors, from keeping any portion of employee tips regardless of whether the employer takes a tip credit.[[200]](#footnote-201)

Courts have recognized that the 2018 amendment creates a private right of action for withheld tips, regardless of whether an employer utilizes the tip credit, but have declined to give the amendment retroactive effect.[[201]](#footnote-202)

Sections 203(m) and 203(t) of the FLSA deal with “tipped employees.” As a result of amendments made to Section 203(m) by the CAA, all of the tip provisions in the former Section 203(m) were moved to a new section titled Section 203(m)(2), which provides:

(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee’s employer shall be an amount equal to—

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under Section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.[[202]](#footnote-203)

Section 203(t) provides that “tipped employee” means any employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips.[[203]](#footnote-204) To determine whether a tip credit may be taken in paying wages to a particular employee, it is necessary to know (1) what payments constitute “tips,” (2) whether the employee receives “more than $30 a month” in such payments in the occupation in which the employee is engaged, and (3) whether in such occupation the employee “customarily and regularly” receives $30 a month.[[204]](#footnote-205)

The following sections discuss the principles to be applied in resolving these issues.

**C. Tip Credit Principles**

***1. General Characteristics of “Tips”***

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer;[[205]](#footnote-206) it is to be distinguished from payment of a “charge” for the service provided. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally the customer has the right to determine who shall be the recipient of the gratuity.[[206]](#footnote-207)

The term “customer” is not defined by the FLSA or its regulations. The term has been construed broadly to include more than just an employer’s customers. In *Johnson v. VGC Holding Corp.*,[[207]](#footnote-208) the court found that independent contractors of the employer were customers of employees for the purpose of determining that payments made by the independent contractors to employees were “tips” under Section 531.52.[[208]](#footnote-209) In that case, exotic dancers of a nightclub who were classified as independent contractors paid tips to the emcees.[[209]](#footnote-210) The court found that the dancers were “customers” of the emcees; the emcees provided services to the dancers by promoting them (announcing their names on stage), setting the mood, selecting energizing music, and galvanizing the audience.[[210]](#footnote-211) Also, the dancers determined whether and how much money to give the emcees.[[211]](#footnote-212)

The employer is prohibited from using an employee’s tips, regardless of whether it has taken a tip credit, for any reasons other than that which is statutorily permitted in Section 203(m): as a credit against its minimum wage obligation to the employee, or in furtherance of a valid tip pool.[[212]](#footnote-213) Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a “tipped employee” within the meaning of the FLSA.[[213]](#footnote-214)

In addition to cash tips received by an employee, tips may include amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips.[[214]](#footnote-215) Gifts in forms other than money or its equivalent, as described earlier, such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of the FLSA.[[215]](#footnote-216)

***2. Notice Requirement***

Under Section 203(m), an employer is not eligible to take the tip credit unless an employee “has been informed by the employer of the provisions [of Section 3(m)(2)].”[[216]](#footnote-217) When an employer does not inform the tipped employee of the use of the tip credit, the full minimum wage is due.[[217]](#footnote-218)

What information must be included in employer-provided notice has been the subject of changing DOL regulations and case law. On April 5, 2011, the DOL issued regulations that specified that the tip credit notice must include the following information:

(1) the amount of the cash wage that is to be paid to the tipped employee by the employer; (2) the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit shall not apply to any employee who has not been informed of these requirements in this section.[[218]](#footnote-219)

The 2011 regulations also required employers to notify employees of any required tip pool contributions.[[219]](#footnote-220) Such notices need not be in writing.[[220]](#footnote-221)

The 2018 Consolidated Appropriations Act that amended Section 203(m) states that Sections 531.52, 531.54, and 531.59 of the 2011 regulations “are not addressed by Section 3(m) of the [FLSA] (29 U.S.C. 203(m)) (as such section was in effect on April 5, 2011), [and] shall have no further force or effect until any future action taken by the Administrator of the Wage and Hour Division of the Department of Labor.”[[221]](#footnote-222) As a result, the 2018 amendment to Section 203(m) appears to have rescinded the detailed notice requirements contained in 29 C.F.R. §531.59. However, courts continue to require employers to provide notice to employees of the provisions of Section 203(m)[[222]](#footnote-223) and in at least one instance have applied the factors detailed in 29 C.F.R. §531.59 in granting summary judgment to the plaintiffs because the regulation “restates, in plain English, no more and no less than what is contained in the statute.”[[223]](#footnote-224)

Prior to the 2011 regulations, most courts found that, to satisfy the notice requirement in Section 203(m), employers were required to “at the very least [give] notice to employees of the employer’s intention to treat tips as part of the employee’s minimum wage obligation.”[[224]](#footnote-225) Applying this rule, the Sixth Circuit, in *Kilgore v. Outback Steakhouse of Florida, Inc.*,[[225]](#footnote-226) held that the steakhouse met the statutory notice requirement by providing Kilgore with a written tip policy that stated that tips would be credited toward the minimum wage and fully quoted Section 203(m) of the FLSA.[[226]](#footnote-227) In doing so, the court reasoned that the employer only had a duty to “inform” the employee of the tip credit, and that it had no duty to “explain” the tip credit:

As to how the employer may deliver that information to the employee, we conclude that an employer must provide notice to the employees, but need not necessarily “explain” the tip credit as argued by the plaintiffs. The statute requires that the employee be “informed” of the tip credit. As the magistrate judge concluded, “inform” requires less from an employer than the word “explain” would.

…

[T]he content of the written notice provided by Outback here satisfies the express requirements of subsection 203(m).[[227]](#footnote-228)

A number of courts analyzing the notice requirement prior to the issuance of the 2011 regulations held that informing employees that they would be paid an hourly wage plus tips, without more, was insufficient to satisfy the notice requirement.[[228]](#footnote-229) Moreover, some courts found that posting DOL-required FLSA notices, without further information, was insufficient notice of the employer’s intention to utilize the tip credit.[[229]](#footnote-230) Other courts, however, applied a more relaxed standard, finding that verbally informing employees that they would be paid at least $2.13 per hour, plus tips, along with displaying DOL-required posters in open areas, was sufficient notice under Section 203(m).[[230]](#footnote-231) The First Circuit held that pay stubs showing wages for employees below minimum wage and tip amounts sufficient to bring them above minimum wage did not satisfy the employer’s notice obligation under Section 203(m).[[231]](#footnote-232)

***3. Compulsory Charges for Service Are Not Tips***

Under the applicable regulations, “[a] tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him.”[[232]](#footnote-233) However, “[s]ervice charges and other similar sums which become part of the employer’s gross receipts are not tips for the purposes of the Act.”[[233]](#footnote-234) An example of a service charge is a compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer’s establishment.[[234]](#footnote-235) For example, in *Wai Man Tom v. Hospital Ventures LLC*,[[235]](#footnote-236) the Fourth Circuit affirmed the lower court’s grant of summary judgment for the employer, explaining that where “customers did not have unfettered discretion to leave (or not leave) the twenty-percent gratuity,” the plaintiffs failed to raise a question of fact as to whether “automatic gratuities were tips.”[[236]](#footnote-237) The Fourth Circuit explained that, even if the plaintiffs could prove that the employer “would occasionally waive the automatic gratuities, that fact would not be material” because the decision to do so was vested solely with the employer, and no reasonable jury could conclude that “the twenty-percent automatic gratuity was a tip.”[[237]](#footnote-238) Similarly, in *Compere v. Nusret Miami, LLC*,[[238]](#footnote-239) the Eleventh Circuit affirmed summary judgment in favor of the employer because a mandatory 18 percent service charge was not a tip where it was a “compulsory charge for service” and the decision to pay it—and the amount to pay—were not “determined solely by the customer.”[[239]](#footnote-240)

Service charges that “are distributed by the employer to its employees … may be used in their entirety to satisfy the monetary requirements of the [FLSA].”[[240]](#footnote-241)

Because service charges and other similar sums that become part of the employer’s gross receipts are not tips for the purposes of the FLSA, even if the employer distributes the service charge to its employees, the charge cannot be counted as a tip received in applying Sections 203(m) and (t).[[241]](#footnote-242) Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.[[242]](#footnote-243)

In *Hurst v. Youngston*,[[243]](#footnote-244) the court found that the fees that the employees received from the customers were tips, not service charges, because the employer did not record any of the payments that it made to entertainers, and the fees that customers paid the dancers went directly from the customers to dancers. Because such payments were tips and not service charges, the payments could not be used to offset the employer’s minimum wage responsibilities.[[244]](#footnote-245)

In an opinion letter issued on September 2, 2005,[[245]](#footnote-246) the DOL considered whether an “imposed gratuity” could be applied toward the employer’s tip credit. Under the proposed compensation scheme, the employer would pay chauffeurs a cash wage of $2.13 an hour in addition to a 15 percent “imposed gratuity” that would be added to every reservation and “transferred through directly to the chauffeur.”[[246]](#footnote-247) The company would not include the imposed gratuity in its gross receipts. Moreover, customers would be informed that they may provide an additional gratuity. The chauffeurs would receive at least $30 per month in additional gratuities in order to qualify as tipped employees. Finally, the regular rates for the chauffeurs would be calculated by adding the cash wage of $2.13 an hour, the imposed gratuity, and the nonimposed tips up to the tip credit of $3.02, and dividing that total sum by the number of hours worked. Relying on pertinent FLSA interpretations, the DOL opined that the imposed gratuities were not “tips” under the FLSA and could not be applied towards the tip credit allowed under Section 203(m). However, the employer could lawfully choose to pay the chauffeurs $2.13 an hour and take tip credit for the nonimposed gratuities.[[247]](#footnote-248)

***4. “Customarily and Regularly Receives More Than $30 a Month in Tips”***

An employee who receives tips within the meaning of the FLSA is a “tipped employee” under the definition in Section 203(t) when, in that particular occupation, the employee “customarily and regularly receives more than $30 a month in tips.”[[248]](#footnote-249) Such an employee may be employed full-time or part-time.[[249]](#footnote-250) A full- or part-time employee who does not customarily and regularly receive more than $30 a month in tips is not a “tipped employee” and must receive the minimum wage without any deductions for tips.[[250]](#footnote-251)

The regulations do not require that a calendar month be used in determining whether more than $30 a month is received as tips; any appropriate recurring monthly period beginning on the same day of the calendar month may be used.[[251]](#footnote-252) The regulations require the employer and the employee to keep records of the tips received;[[252]](#footnote-253) failure to do so may result in a finding that the employee is not a “tipped employee.”[[253]](#footnote-254)

The employee must “customarily and regularly” receive more than $30 a month in tips in the occupation in which the employee is engaged in order to qualify as a tipped employee under Section 203(t).[[254]](#footnote-255) If an employee always receives more than $30 each month, as may be the case with many employees in occupations such as waiter, bellhop, taxicab driver, barber, or beauty operator, that employee will qualify, and the tip credit provisions of Section 203(m) may be applied.[[255]](#footnote-256) Where an employee only occasionally or sporadically receives tips totaling more than $30 a month, however, such as during holiday seasons when customers may be more generous than usual, that employee will not be considered a “tipped employee.”[[256]](#footnote-257) The phrase “customarily and regularly” signifies a frequency that must be greater than occasional but that may be less than constant.[[257]](#footnote-258) An employee will still be considered a tipped employee even though occasionally, because of sickness, vacation, seasonal fluctuations, or the like, the employee fails to receive more than $30 in tips in a particular month.[[258]](#footnote-259)

An employee must customarily and regularly receive more than $30 a month in tips *individually* in order to qualify as a tipped employee. The fact that the employee is part of a *group* that has a record of receiving more than $30 a month in tips will not qualify that employee as a tipped employee.[[259]](#footnote-260) For example, a waitress who is newly hired will not be considered a tipped employee merely because the other waitresses in the establishment receive tips in the requisite amount.[[260]](#footnote-261) However, in the case of the initial and terminal months of employment, an exception is made to the requirement that an employee, whether full-time, part-time, permanent, or temporary, will qualify as a tipped employee only if the employee customarily and regularly receives more than $30 a month in tips.[[261]](#footnote-262) In such months, if a tipped employee receives tips in the particular week or weeks of that month at a rate that exceeds $30 a month, the provisions of the statute will be met.[[262]](#footnote-263)

**D. Dual Jobs**

When an individual is employed in a tipped occupation and a non-tipped occupation—for example, as a server and janitor (i.e., dual jobs)—the tip credit is available only for the hours the employee spends working in the tipped occupation, provided the employee customarily and regularly receives more than $30 per month in tips.[[263]](#footnote-264)

According to the regulations, a dual jobs situation is distinguishable from a situation where a tipped employee performs certain non-tipped tasks, for example,

In some situations an employee is employed in dual jobs, as, for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least $30 a month in tips for the employee’s work as a server, the employee is engaged in a tipped occupation only when employed as a server. The employee is employed in two occupations, and no tip credit can be taken for the employee’s hours of employment in the occupation of maintenance person.[[264]](#footnote-265)

Department of Labor guidance on the dividing line between a related, non-tip-generating duty and a dual job has changed significantly.[[265]](#footnote-266) Prior to 2018, Section 30d00(f) of the DOL’s *Field Operations Handbook* explained the dividing line as follows:

Where the facts indicate that tipped employees spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.

Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.[[266]](#footnote-267)

Numerous courts deferred to the DOL’s 20-percent rule when determining whether a tipped employee had engaged in dual jobs.[[267]](#footnote-268) Several courts, however, declined to do so.[[268]](#footnote-269) Further, although the DOL intended the 20-percent limitation for “related duties” to be a strict rule, courts applied the rule differently. For example, in *Fast v. Applebee’s International, Inc*.,[[269]](#footnote-270) the Eighth Circuit held that the provision prohibited the taking of a tip credit for duties related to the tip-producing occupation if they exceeded 20 percent of the employee’s working time, and denied the employer’s motion for summary judgment because the determination of which duties were related to the tip-producing occupation was a question of fact. In *Pellon v. Business* *Representation International, Inc*.,[[270]](#footnote-271) the court acknowledged that consideration of the 20-percent rule was “unnecessary under [the] facts presented in the case,” but distinguished *Fast* on the grounds that “the tasks that allegedly violate the minimum wage are intertwined with direct tip-producing tasks throughout the day.”[[271]](#footnote-272)

The job duties of an employee employed in a tipped occupation fall generally under one of three categories: (1) tipped duties; (2) “related” duties incidental to tipped duties; and (3) non-tipped duties.[[272]](#footnote-273) “Tipped duties” are tip-producing and include customer interaction.[[273]](#footnote-274) “Related duties” include tasks that were not themselves tip-producing but are incidental or ancillary to tip-producing duties, such as setting tables, toasting bread, or making a pot of coffee.[[274]](#footnote-275) As noted above, some courts have held that an employer could generally take a tip credit for work performed on such “related duties,” unless those duties exceeded 20 percent of the employee’s overall duties. [[275]](#footnote-276) Finally, “non-tipped duties” are those of a separate and distinct occupation and generally have to be compensated at the full minimum wage rate.[[276]](#footnote-277)

The manner of performing non-tipped duties is also significant to the analysis of whether the employee held dual jobs. For example, where there was a clear dividing line as to when the employee performed non-tipped duties, it was more likely to be a dual job situation.[[277]](#footnote-278) Likewise, when otherwise tip-eligible employees performed non-tipped duties for an entire shift, the employees could not participate in a mandatory tip pool during that shift.[[278]](#footnote-279) Conversely, where duties are performed intermittently as part of the primary tipped occupation, then the court would likely find there was not a dual job situation.[[279]](#footnote-280)

Whether other non-tipped employees were engaged to perform the non-tipped tasks is a factor in the dual job analysis. For example, preparing food before the restaurant opened or cleaning the restaurant after it closed may be deemed incidental to a servers’ tipped occupation if no other employees are employed to perform those tasks; however, where the employer employed food preparers or maintenance persons to perform those duties, they could be considered dual jobs for the servers.[[280]](#footnote-281)

Since 2018, the DOL’s proposed regulatory guidance relating to the 80/20 rule has seen significant changes and proposed amendments. For example, in 2018 and 2019, the DOL rescinded the 80/20 rule, issued new subregulatory guidance by way of an opinion letter and field assistance bulletin, and made changes to its *Field Operations Handbook* providing that the DOL would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, nontipped duties, as long as those duties were performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties.[[281]](#footnote-282) Multiple courts declined to give *Auer* or *Skidmore* deference to the DOL’s November 2018 opinion letter and other guidance.[[282]](#footnote-283) For example, in *Cope v. Let’s Eat Out, Inc*.,[[283]](#footnote-284) the court found that the opinion letter’s reasoning conflicted with earlier guidance issued by the DOL supporting the 20-percent rule, conflicted with positions the DOL had taken in other lawsuits, offered no reasoning as to why it reversed its prior support for the 20-percent rule, and the new rule would amount to “unfair surprise.”[[284]](#footnote-285) The court also found that, regardless of the DOL’sNovember2018 opinion letter, an 80/20 rule is a reasonable interpretation of the dual jobs regulation.[[285]](#footnote-286) However, at least one court deferred to the DOL’s November 2018 opinion letter.[[286]](#footnote-287)

On December 30, 2020, the DOL published the 2020 Tip final rule updating Section 531.56(e) largely incorporating the 2018-2019 guidance addressing dual job situations where an employee performs both tipped and non-tipped duties.[[287]](#footnote-288) However, that rule never went into effect.[[288]](#footnote-289) Instead, on June 23, 2021, the DOL issued an NPRM to withdraw the dual jobs portion of the 2020 Tip final rule and amending its regulations

to clarify that an employee is only engaged in a tipped occupation under 29 U.S.C. §203(t) when the employee either performs work that produces tips, or performs work that directly supports the tip producing work, provided that the directly supporting work is not performed for a substantial amount of time.[[289]](#footnote-290)

After making changes to the proposed rule in response to comments, the regulation went into effect on December 28, 2021.[[290]](#footnote-291) The rule has several provisions:

First, it clarifies that the tip credit is only available for hours spent working in the tipped occupation. 86 Fed. Reg. at 60157 (codified at 29 C.F.R. §531.56(e)). Second, it codifies the 80/20 guidance and adds a thirty-minute limitation on non-tipped work allowable when taking the tip credit. 86 Fed. Reg. at 60157 (codified at 29 C.F.R. §531.56(f)). Third, it elaborates on who qualifies for the tip credit, stating that an employee is “engaged in a tipped occupation when the employee performs work that is part of the tipped occupation” and “may only take a tip credit for work performed by a tipped employee that is part of the employee’s tipped occupation.”[[291]](#footnote-292)

Further, it sets out a three-part framework to classify tipped work: (1) work that is part of the tipped occupation and produces tips; (2) work that is part of the tipped occupation and directly supports tip-producing work (subject to the 30-minute rule), although it is not directly tip-producing; and (3) other nontipped work that is not subject to the tip credit.[[292]](#footnote-293) Finally, the rule adds examples to illustrate the above.[[293]](#footnote-294)

However, in *Restaurant Law Center v. U.S. Department of Labor*,[[294]](#footnote-295) the Fifth Circuit struck down the 80/20/30 rule, concluding that: “Because the Final Rule is contrary to the Fair Labor Standards Act’s clear statutory text, it is not in accordance with the law. And because it imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious.”[[295]](#footnote-296) The Court explained:

The Final Rule is attempting to answer a question that DOL itself, not the FLSA, has posed. The FLSA is clear: an employer may claim the tip credit for any employee who, when “engaged in” her given “occupation ... customarily and regularly receives more than $30 a month in tips.” [29 U.S.C. § 203(t)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=29USCAS203&originatingDoc=I045ca4e0619011ef91788bc459416e35&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=9fba876ecfdd4e3eac1cb087e1b9f448&contextData=(sc.Search)#co_pp_3a8700004efc7) (emphasis added). The FLSA does not ask whether duties composing that given occupation are themselves each individually tip-producing.

Put another way, being “engaged in an occupation in which [the employee] customarily and regularly receives more than $30 a month in tips” cannot be twisted to mean being “engaged in duties that directly produce tips, or in duties that directly support such tip-producing duties (but only if those supporting duties have not already made up 20 percent of the work week and have not been occurring for 30 consecutive minutes) and not engaged in duties that do not produce tips.”[[296]](#footnote-297)

The Fifth Circuit further concluded “the Final Rule is arbitrary and capricious because it draws a line for application of the tip credit based on impermissible considerations and contrary to the statutory scheme enacted by Congress,”[[297]](#footnote-298) in that “as to supporting work, the Final Rule replaces the Congressionally chosen touchstone of the tip-credit analysis—the occupation—with one of DOL’s making—the timesheet. And as to untipped work, the Final Rule again ignores such work’s clear connection to the occupation itself and instead elevates its lack of connection to tipping. The Final Rule is therefore ‘a completely different approach to the tip credit.’”[[298]](#footnote-299)

**E. Tip Pooling**

Section 203(m)(2) permits “the pooling of tips among employees who customarily and regularly receive tips.”[[299]](#footnote-300) A “tip pool” is an arrangement whereby employees contribute a portion of their tips to a general pool to be shared by others. For example, where waiters give a portion of their tips to employees who bus tables, both the amounts retained by the waiters and those given the bussers are considered to be the tips of the individuals who retain them in applying the provisions of Sections 203(m) and 203(t).[[300]](#footnote-301) Similarly, where an accounting is made to an employee for his or her information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed, the amounts received and retained by each individual as his or her own are counted as his or her tips for purposes of the FLSA.[[301]](#footnote-302)

On March 23, 2018, Congress amended the FLSA by way of the Consolidated Appropriations Act (CAA).[[302]](#footnote-303) The CAA addressed tip pooling in two ways. First, Section 203(m)(2)(A) of the FLSA provides that “this subsection [203(m)(2)(A)] shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.”[[303]](#footnote-304) Second, Section 203(m)(2)(B) states that, “An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.”[[304]](#footnote-305)

As a result, the amended Section 203(m) did not change the existing tip pool rules that apply to employers that take a tip credit, now in Section 203(m)(2)(A) of the FLSA, which provides that such employers may institute a mandatory, “traditional” tip pool that is limited to employees who “customarily and regularly” receive tips.[[305]](#footnote-306) However, because the 2018 amendment to Section 203(m) expressly rescinded portions of the 2011 DOL regulations related to permissible participants in a tip pool (29 C.F.R.§§531.52, 531.54, and 531.59), it “eliminate[d] the regulatory restrictions on an employer’s ability to require tip pooling when it does not take a tip credit: Such employers may now implement mandatory, ‘nontraditional’ tip pools in which employees who do not customarily and regularly receive tips, such as cooks and dishwashers, may participate.”[[306]](#footnote-307) The Act continues to prohibit managers and supervisors from participating in tip pools, however, as the Act equates such participation with the employer’s keeping the tips.[[307]](#footnote-308)

Following enactment of the CAA, the WHD issued a field assistance bulletin[[308]](#footnote-309) in which it set forth how the WHD intended to respond to the enactment:

This Field Assistance Bulletin … provides guidance concerning the [WHD’s] enforcement of tip credit rules under the [FLSA] after Congress amended the FLSA in the [CAA], Pub. L. No. 115-141, Div. S., Tit. XII, § 1201. The Act prohibits employers from keeping tips received by their employees, regardless whether the employer takes a tip credit under 29 U.S.C. § 203(m). The Act also provides that portions of WHD’s regulations codified at 29 C.F.R. §§ 531.52, 531.54, and 531.59 that barred tip pooling when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit shall have no further force or effect (until any future action by the WHD Administrator). WHD expects to proceed with rulemaking in the near future to fully address the impact of the 2018 amendments.

The bulletin noted that “[t]he Act does not impact WHD’s enforcement when an employer claims a tip credit under Section 3(m)” and that “[a]dministering a permissible tip pool does not constitute either unlawful retention of tips or unlawful tip pool participation under the Act by employers, managers, or supervisors.”[[309]](#footnote-310)

On December 30, 2020, the Department of Labor published a final rule addressing the amendments to Section 203(m) effectuated by the Consolidated Appropriations Act of 2018 (CAA).[[310]](#footnote-311) Those amendments prohibit employers from (1) keeping tips received by their employees, regardless of whether the employer takes a tip credit; and (2) allowing managers or supervisors to keep any portion of employee’s tips.[[311]](#footnote-312) In the final rule, the DOL amended its tip regulations to address those amendments.[[312]](#footnote-313) In addition, the final rule codified the DOL’s guidance regarding the tip credit’s application to employees who perform tipped and nontipped duties.[[313]](#footnote-314)

The CAA amendments to Section 203(m) did not affect longstanding regulations applicable to employers that take a tip credit for employees who customarily and regularly receive $30 per month in tips[[314]](#footnote-315)—that is, employers that claim a tip credit must be sure that a mandatory “traditional” tip pool includes only workers who customarily and regularly receive tips.[[315]](#footnote-316) Thus, employees such as cooks or dishwashers could not be part of such a tip pool. However, the CAA amendments removed the regulatory restrictions on an employer’s ability to require tip pooling when it does not take a tip credit; those employers can now implement mandatory, “nontraditional” tip pools, which may include employees such as cooks and dishwashers.[[316]](#footnote-317)

In 2020 and 2021, the DOL completed a series of rulemakings relating to tipped workers. As a result, DOL regulations now include:

* A prohibition on employers, including supervisors and managers, keeping tips received by workers, regardless of whether the employer takes a tip credit.
* The ability of an employer that does not take a tip credit to include non-tipped workers, such as cooks and dishwashers, in nontraditional tip-sharing agreements.[[317]](#footnote-318)

In addition the DOL restored its ability to assess civil money penalties against employers who violate the FLSA by taking tips earned by their employees.[[318]](#footnote-319) The Department also clarified that, while managers or supervisors may not receive tips from the tip pool, they may contribute to mandatory tip pools, and may keep those tips received from customers directly for services they solely and directly provide. Finally, the DOL issued a final rule that addresses the application of the FLSA tip credit to tipped employees who perform both tipped and nontipped duties (i.e., dual jobs).[[319]](#footnote-320)

If the employer applies the tip credit against the minimum wage, participants in tip pools must continue to be employees who “customarily and regularly” receive tips.[[320]](#footnote-321) “Front-of-the-house” staff such as servers, bartenders, and bellhops generally receive tips and meet the requirement.[[321]](#footnote-322) Cooks, dishwashers, janitors, washroom attendants, and other “back-of-the-house” staff, however, generally do not customarily and regularly receive tips and usually cannot participate in a mandatory tip pool where the employer applies the tip credit.[[322]](#footnote-323)

Courts have considered customer interaction as a factor in determining whether an employee customarily and regularly receives tips.[[323]](#footnote-324) Courts also may consider the intent of the customer, if it can be discerned.[[324]](#footnote-325) Some courts, but not all, consider whether the tip-sharing arrangement is in accord with the customs and practices of other establishments in the general area or industry.[[325]](#footnote-326)

According to the DOL, tips need not be received directly from the customer to be considered the tips of the individuals who customarily and regularly receive tips: “where employees practice tip splitting, as where waiters give a portion of their tips to the busser, both the amounts retained by the waiters and those given the bussers are considered tips of the individuals who retain them[.]” [[326]](#footnote-327) Thus, employees who customarily and regularly receive more than $30 a month in tips from coworkers who share customer tips may be eligible to participate in a tip pool.[[327]](#footnote-328) The Fifth Circuit has qualified this rule by holding that, for such an employee to participate in the tip pool, the employer must prove that the employee would customarily and regularly directly receive tips if coworkers were not required to include the employee in the tip pool.[[328]](#footnote-329)

A tip pool is not valid if the “employer” participates in the tip pool (i.e., receives a portion of tips from the pool), because the employer (including its managers and supervisors) may not retain any of the employees’ tips or use them for any other purpose.[[329]](#footnote-330) In making the determination of whether someone is an “employer,” the regulations provide that “the term ‘manager’ or ‘supervisor’ shall mean any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101”.[[330]](#footnote-331) Courts have generally applied this standard.[[331]](#footnote-332)

Owners of a business are typically considered an “employer,” even if they also perform some tipped job duties.[[332]](#footnote-333) Employees with managerial and supervisory authority may be considered the “employer” as well in certain circumstances.[[333]](#footnote-334) However, before the 2018 regulation, some courts had held that an employee with managerial or supervisory authority may still qualify as a “tipped employee” for tip pool purposes if, for example, the employee performs tipped job duties by engaging in regular customer service and interaction and customarily and regularly receives more than $30 a month in tips.[[334]](#footnote-335)

Aside from a tip-pool arrangement, tipped employees may voluntarily share their tips with anyone. The FLSA does not govern voluntary tip-sharing as long as it is truly voluntary and free of coercion or control by the employer and the employer plays no role in distributing the tips.[[335]](#footnote-336) Such shared amounts may not, however, be used for tip credit.[[336]](#footnote-337)

**F. Deductions From Tips**

***1. Generally***

When the employer claims a Section 203(m) tip credit, the tipped employee is considered to have been paid only the minimum wage for all non-overtime hours worked in a tipped occupation. Because Section 203(m) caps a tipped employee’s hourly wage in a non-overtime week at the minimum wage, an employer that claims a Section 203(m) tip credit may not take deductions for non–Section 203(m) costs (e.g., walkouts, cash register shortages, breakage, cost of uniforms, etc.), because any such deduction would reduce the tipped employee’s wages below the minimum wage.[[337]](#footnote-338) Therefore, all deductions from non-overtime hours are subject to the same rules discussed below in Section VI [Deductions From Wages]. Employers who impermissibly deduct from wages or tips from tipped employees may disqualify themselves from taking advantage of the FLSA’s tip credit provisions.[[338]](#footnote-339)

***2. Deductions to Recoup Credit Card Charges***

Even where an employer claims a tip credit, it may lawfully deduct amounts from an employee’s tips to recoup for charges that credit card companies impose when a customer’s tip is charged to a credit card.[[339]](#footnote-340) Such recoupment is also addressed in the DOL’s *Field Operations Handbook:*

When tips are charged to credit cards, the employer may reduce the amount of tips paid to the employee by the percentage charged by the credit card company (*i.e.*, transactional fee). However, the employer cannot reduce the amount of tips paid to the employee by any amount greater than the transactional fee. For example, where a credit card company charges an employer 3 percent on all sales charged to its credit service, the employer may pay the employee 97 percent of the tips without violating FLSA.[[340]](#footnote-341)

In a January 13, 2006 opinion letter, the Administrator analyzed the permissible limits of a restaurant’s ability to deduct from an employee’s tips for reimbursement of credit card company charges imposed on the restaurant when the employee’s tip is charged by credit card.[[341]](#footnote-342) The Administrator determined that the employer “may deduct an average standard composite amount from tip transactions in some circumstances, rather than the exact charges associated with each individual transaction.”[[342]](#footnote-343) The Administrator cautioned, however, that only the costs associated with the actual liquidation of credit card tips into cash could be assessed and not charges for phone lines or other administrative costs.[[343]](#footnote-344)

Ordinarily, employers must pay minimum wage and overtime compensation, including the charged tips, due a “tipped employee” at the regular payday for the workweek, or when the pay period covers more than a single workweek, at the regular payday for the period in which the particular workweek ends. The procedures required to process charges made by customers through credit cards may delay actual receipt of the funds by the employer for one or two months. Nevertheless, the employer is required to pay over the charged tips to the employee on the employee’s next regular payday.[[344]](#footnote-345)

The WHD has opined that if a credit card transaction is not collected from a credit card company, the employer is not required to pay a tipped employee the amount of tips specified on the credit card slip, presuming, of course, that the inability to collect is not a result of the employer’s failure to submit the slip for reimbursement.[[345]](#footnote-346) Where a credit card charge is uncollectible, the employer is not required to pay the employee the amount of tip specified on that credit card slip. Instead, the employer may recover from a tipped employee those tips that have been paid to the employee when the credit card charge is uncollectible; however, such recovered tips may not reduce the tips retained by the employee below the amount of the tip credit claimed in the workweek in which the credit card tip was paid to the employee.[[346]](#footnote-347)

Tip pool recipients must reimburse the employer for the share of tips from an uncollected credit card transaction that was allocated into the tip pool.[[347]](#footnote-348) The tipped employee who contributed the uncollected tip to the tip pool can only be held accountable for the portion of the uncollected tip the employee received back from the tip pool.[[348]](#footnote-349)

***3. Deductions for Taxes***

Employers are prohibited from deducting taxes from tips.[[349]](#footnote-350) While tips are subject to the withholding of payroll taxes (including those required under the income tax provisions and the Federal Insurance Contributions Act), to perform the withholding, the employee is required to report his or her tips to the employer.[[350]](#footnote-351) The employer then must deduct the withholdings from the employee’s subsequent paycheck and forward the taxes to the Internal Revenue Service (IRS).[[351]](#footnote-352) If the employer withholds the taxes but fails to send the taxes to the IRS, the result will be a minimum wage violation as to the tipped employee.[[352]](#footnote-353) “Where an employer withholds taxes from a tipped employee based upon a percentage of sales, rather than on reported tips, a reduction in an individual employee’s net pay may result, but this is not an FLSA violation.”[[353]](#footnote-354)

**G. Determining the “Tip Credit” an Employer May Claim Against Its Minimum Wage Obligation**

Section 203(m) limits the tip credit an employer may claim against its minimum wage obligations to the difference between the Section 206(a)(1) minimum wage and the cash wage paid by the employer. Under this formula, the cash wage paid by the employer, which may not be less than $2.13 per hour, plus the FLSA tip credit must equal the Section   
206(a)(1) minimum wage.[[354]](#footnote-355) Sometimes employers choose to pay a higher cash wage (above $2.13 per hour), and such instances result in a lower Section 203(m) tip credit.[[355]](#footnote-356) Similarly, as explained below in Section §IV.H [Payment of Wages to Tipped Employees; Overtime Payments to Tipped Employees], determining the amount of the tip credit is necessary to determine the regular rate of pay for overtime purposes.[[356]](#footnote-357)

The *Field Operations Handbook* has set forth examples of how to compute an employer’s tip credit when the employer’s cash wage rate varies.[[357]](#footnote-358) For purposes of these examples, assume that the Section 206(a)(1) wage rate is $7.25 per hour, the employee worked no overtime hours, the employee meets the Section 203(t) definition of “tipped employee,” the employer properly advised the employee in advance of the requirements outlined in 29 C.F.R.§531.59(b), and the employer maintained appropriate payroll records:

(1) These examples illustrate that the amount of the FLSA 3(m) tip credit will vary depending on the cash or direct wage paid to the employee.

a. If the employer pays a cash wage paid of $2.13 per hour, it may claim a tip credit of $5.12 per hour ($7.25 - $2.13 = $5.12).

b. If the employer pays a cash wage paid of $3.63 per hour, it may claim a tip credit of $3.62 per hour ($7.25 - $3.63 = $3.62).

c.  If the employer pays a cash wage paid of $4.86 per hour, it may claim a tip credit of $2.39 per hour ($7.25 - $4.86 = $2.39).

d. If the employer pays a cash wage of less than the minimum required by the FLSA ($2.13 per hour), it may not claim an FLSA 3(m) tip credit and must pay the difference between the minimum wage and the cash wage that was paid. For example, if an employer pays a cash wage of $2.00 per hour, it would not be entitled to claim an FLSA 3(m) tip credit and must also pay $5.25 per hour as the difference between the minimum wage and the cash wage paid ($7.25 - $2.00 = $5.25).

(2) When the state minimum wage is higher than the section 6(a)(1) wage, the formula in section 3(m) still limits the amount of the FLSA 3(m) tip credit the employer may claim to the difference between the cash wage paid and the federal minimum wage. As illustrated in the examples below, where the state recognizes a higher tip credit than the FLSA 3(m) tip credit, there will not be a FLSA minimum wage violation as long as the employer has paid a cash wage of at least $2.13 per hour and the employee receives sufficient tips to satisfy the section 6(a)(1) minimum wage.

a. The state minimum wage is $7.40 per hour. The employer pays a cash wage of $2.89 per hour as required by the state law and claims a tip credit of $4.51 per hour as permitted under state law ($7.40 - $2.89 = $4.51). However, the employer is limited to an FLSA 3(m) tip credit of $4.36 ($7.25 - $2.89 = $4.36).

$7.25 (FLSA minimum wage) - $2.89 (cash wage paid) = $4.36 (FLSA 3(m) tip credit)

$7.40 (state minimum wage) - $2.89 (cash wage paid) = $4.51 (state tip credit)

Even though the employer has paid a direct wage in excess of the required minimum of $2.13, for FLSA purposes the employee has received only $7.25 per hour.

b.  The state minimum wage is $8.15 per hour. The employer pays a cash wage of $3.95 as required by state law and claims a tip credit of $4.20 per hour as permitted under state law ($8.15 - $3.95 = $4.20). The employer is limited to an FLSA 3(m) tip credit of $3.30 ($7.25 - $3.95 = $3.30).

$7.25 (FLSA minimum wage) - $3.95 (cash wage paid) = $3.30 (FLSA 3(m) tip credit)

$8.15 (state minimum wage) - $3.95 (cash wage paid) = $4.20 (state tip credit)

Even though the employer has paid a direct wage in excess of the required minimum of $2.13, for FLSA purposes the employee has received only $7.25 per hour.

c.  The state minimum wage is $7.50 per hour, and the state requires a cash wage of at least $2.13 per hour. The employer claims a tip credit of $5.37 per hour ($7.50 - $2.13 = $5.37) as permitted under state law. The employer is limited to an FLSA 3(m) tip credit of $5.12 ($7.25 - $2.13 = $5.12).

$7.25 (FLSA minimum wage) - $2.13 (cash wage paid) = $5.12 (FLSA 3(m) tip credit)

$7.50 (state minimum wage) - $2.13 (cash wage paid) = $5.37 (state tip credit)

For FLSA purposes, the employee has received only $7.25 per hour.[[358]](#footnote-359)

**H. Overtime Payments to Tipped Employees**

For tipped employees, the minimum overtime cash wage is the employee’s regular rate of pay before subtracting any tip credit, multiplied by 1.5, minus the tip credit.[[359]](#footnote-360) Pursuant to Section 203(m), a tipped employee’s regular rate of pay also includes “the reasonable cost or fair value of any facilities furnished to the employee by the employer, and the cash wages, including commissions and certain bonuses paid by the employer.”[[360]](#footnote-361)

Any tip received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.[[361]](#footnote-362)

The DOL’s *Field Operations Handbook* explains the regular rate calculation as follows:

The regular rate for a tipped employee is determined by dividing the total remuneration in any workweek, minus statutory exclusions, by the total hours worked. See 29 CFR 778.109. The regular rate can never be less than the highest applicable minimum wage. See 29 CFR 778.5. For example, in a state with a state minimum wage of $9.00, the regular rate cannot be less than $9.00 per hour.

An employer may claim a tip credit and also provide board, lodging, or other facilities. See 29 CFR 531 and FOH 30c. In determining the regular rate for a tipped employee, all components of the employee’s wages must be considered (i.e., cash, board, lodging, facilities, and tip credit). Tips in excess of the allowable tip credit are not considered wages and are not considered in determining the regular rate. See 29 CFR 531.60.

In determining the regular rate for a tipped employee, both the direct wage and any tip credit must be included. For example, if the employee is paid a direct wage of $2.13 and the employer claims an FLSA [Section 203(m)] tip credit of $5.12, the regular rate will be $7.25 ($2.13 + $5.12 = $7.25) and the overtime rate will be $10.88 ($7.25 × 1.5 = $10.88). The direct wage payment in overtime hours would be $5.76 ($10.88 - $5.12 = $5.76); the overtime direct wage payment is not one and one-half times the non-overtime direct wage payment of $2.13.[[362]](#footnote-363)

After the regular rate is determined, the proper method for calculating the overtime rates for tipped employees are set forth below. For purposes of these examples, assume the following: that the Section 206(a)(1) minimum wage rate is $7.25 per hour, the employee worked 45 hours in the workweek, all hours worked were in a tipped occupation, the employee meets the Section 203(t) definition of a “tipped employee,” the employer complied with the requirements in 29 C.F.R. §531.59(b) to inform employees about the tip credit, and the payroll records are accurate.[[363]](#footnote-364)

Scenario 1:

The state minimum wage is $7.25 per hour, and the employer pays a cash wage of $2.13 per hour as required under state law and claims a tip credit of $5.12 per hour in compliance with federal and state law. The FLSA [Section 203(m)] tip credit is $5.12 ($7.25 (FLSA minimum wage) - $2.13 (cash wage paid) = $5.12. The employee’s regular rate is $7.25 per hour.

45 hours (straight time hours) × $7.25 (regular rate) = $326.25 (straight time wages due)

5 hours (overtime hours) × .5 × $7.25 (regular rate) = $18.13 (overtime wages due)

$326.25 (straight time wages due) + $18.13 (overtime wages due) = $344.38 (total wages due)

45 hours (total hours worked) × $5.12 (FLSA [Section 203(m)] tip credit) = $230.40 (total FLSA [Section 203(m)] tip credit)

$344.38 (total wages due) - $230.40 (total FLSA [Section 203(m)] tip credit) = $113.98 (direct or cash wage due)

Scenario 2:

The state minimum wage is $10.00 per hour, and the employer pays a cash wage of $7.00 per hour as required under state law and claims a state tip credit of $3.00 in compliance with state law. The employee’s regular rate is $10.00 per hour.

The employer takes an FLSA [Section 203(m)] tip credit of $0.25 per hour ($7.25 (FLSA minimum wage) - $7.00 (cash wage paid) = $0.25) and an additional overtime tip credit of $2.75 per hour ($3.00 (state tip credit) - $0.25 (FLSA [Section 203(m)] tip credit) = $2.75 (additional overtime tip credit)).

45 hours (straight time hours) × $10.00 (regular rate) = $450.00 (straight time wages due)

5 hours (overtime hours) × .5 × $10.00 (regular rate) = $25.00 (overtime wages due) $450.00 (straight time wages due) + $25.00 (overtime wages due) = $475.00 (total wages due)

45 hours (total hours worked) × $0.25 (FLSA [Section 203(m)] tip credit) = $11.25 (total FLSA [Section 203(m)] tip credit)

45 hours (total hours worked) × $2.75 (additional overtime tip credit) = $123.75 (total additional overtime tip credit)

$475.00 (total wages due) - $11.25 (total FLSA [Section 203(m)] tip credit) - $123.75 (total additional overtime tip credit) = $340.00 (direct or cash wage due).[[364]](#footnote-365)

It is a violation of Section 207(a) for an employer to subtract the tip credit first and then multiply the reduced rate by 1.5.[[365]](#footnote-366) Questions regarding the proper calculation of overtime pay often arise in situations where state law requires an employer to pay a higher minimum wage than required by the FLSA and permits the employer to claim a higher tip credit than permitted under the FLSA. In an overtime workweek where a tipped employee’s regular rate is determined based on a state minimum wage that exceeds the Section 206(a)(1) minimum wage[[366]](#footnote-367) and the state permits a higher tip credit than the 203(m) tip credit, the employer may claim an additional overtime tip credit toward satisfying its overtime compensation obligation under the FLSA.[[367]](#footnote-368) This additional overtime tip credit is equal to the difference between the Section 203(m) tip credit and the state tip credit. In such situations, the total tip credit that will be counted toward satisfying the employer’s FLSA overtime compensation obligation will consist of the Section 203(m) tip credit and the additional overtime tip credit, the sum of which will total the state tip credit.[[368]](#footnote-369) The WHD will not permit a total tip credit that exceeds the amount of tips received and retained by the employee.[[369]](#footnote-370)

V. Satisfying the Minimum Wage Requirement

**A. The General Framework: Averaging Earnings Over the Workweek**[[370]](#footnote-371)

A literal reading of Section 206 of the FLSA requires the payment of the applicable minimum wage at an hourly rate.[[371]](#footnote-372) The Supreme Court, however, has approved the averaging of earnings over a standard workweek.[[372]](#footnote-373)

To determine whether a wage payment meets the minimum wage requirements under Section 206 of the FLSA, the actual compensation received by the employee for that week should be divided by the total number of hours that the employee worked in that same period. That derived hourly rate must meet or exceed the specified minimum wage.[[373]](#footnote-374) Where employees allege that they were not paid for all of the hours they worked (as, for example, where they allege they were not paid for off-the-clock work), if their total compensation exceeds the minimum wage multiplied by all of the alleged number of hours worked, courts have rejected FLSA minimum wage claims.[[374]](#footnote-375) However, other district courts have rejected the “weekly measuring rod” approach in *United States v. Klinghoffer Bros. Realty Corp.*[[375]](#footnote-376) and have endorsed an “hourly measuring rod” approach where each hour stands alone and must be paid without spreading payments for other paid hours across unpaid hours.[[376]](#footnote-377) Another district court refused to endorse either the “weekly measuring rod” position in *Klinghoffer* or the strict “hourly measuring rod” position[[377]](#footnote-378) and instead examined the compensation structure between the employer and employee to consider whether a minimum wage violation occurred.[[378]](#footnote-379) Under this approach, minimum wage claims are predicated on a “contract measuring rod” theory that assesses whether the employer requires additional work not required by the contract but for compensation that is below the minimum wage.[[379]](#footnote-380)

According to DOL regulations, an employee’s workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods.[[380]](#footnote-381) In no case may the earnings of employees paid by the hour be averaged over a period longer than the single workweek.[[381]](#footnote-382) Thus, the average hourly earnings above the minimum in one workweek may not be used to offset earnings below the minimum in another workweek.[[382]](#footnote-383)

**B. Satisfying the Minimum Requirements Under Non-Hourly Pay Structures**

Employees covered by the FLSA’s minimum wage requirements who are paid on a weekly or monthly salary basis, on a commission basis, or on a piecework basis must be paid the minimum wage per hour worked.[[383]](#footnote-384) When employees are paid on these bases, issues may arise concerning application of the hourly minimum wage requirement.

***1. Monthly Salaries***

To determine whether a fixed monthly salary complies with the minimum wage requirements of the FLSA, the monthly salary must be multiplied by 12 and then divided by 52 to obtain the weekly rate of pay. The weekly rate of pay must then be divided by the number of hours worked each week to determine the hourly rate for that week. This hourly rate must equal or exceed the statutory minimum wage rate.[[384]](#footnote-385)

Where an employee is paid a fixed monthly salary and works alternately long and short weeks of a fixed number of hours each week during a month so that an equal allocation of the salary would result in payments of less than the minimum wage for the long weeks, there is no violation of the FLSA’s minimum wage provision as long as (1) the salary is sufficient to meet the minimum wage requirement for all hours worked during the pay period, and (2) there is an agreement or understanding between the parties that a larger portion of the salary is to be allocated to the longer weeks.[[385]](#footnote-386)

***2. Commission Payments***

Commissions (whether based on a percentage of total sales, sales in excess of a specific amount, or some other formula) are payments for hours worked.[[386]](#footnote-387) This is true regardless of whether the commission is the sole source of the employee’s compensation, is paid in addition to a guaranteed salary or hourly rate, or is paid on some other basis, and regardless of the method, frequency, or regularity of computing, allocating, and paying the commission.[[387]](#footnote-388)

Commission earnings may be computed daily, weekly, biweekly, semimonthly, or at some other interval.[[388]](#footnote-389) However, the employer must compute and record the hours worked on a workweek basis, and the employee must be paid at least the applicable minimum wage for all time worked in each workweek.[[389]](#footnote-390) In addition, if an employee fails to earn the statutory minimum wage in one workweek but exceeds that minimum in another, the employer may not average the two weeks together to bring the pay level up to the statutory minimum wage.[[390]](#footnote-391)

It is not always certain whether commissions that are computed monthly will meet the minimum wage requirement for any workweek. The Administrator advised that compliance would be assured by a guarantee that, for any workweek when the commissions do not meet the requirement, the employee will be paid an additional amount that will make up the difference without any corresponding reduction in payments allocable to any workweek.[[391]](#footnote-392)

*a. Commission Paid on a Weekly Basis*

An employee may be employed solely on a commission basis if the commissions received each week are sufficient to meet the minimum wage requirement for that week.[[392]](#footnote-393) Nothing in the statute or regulations prevents an employer from paying solely commissions as long as nonexempt employees are paid the minimum wage.

The Administrator has opined that, if an employee is paid an hourly rate for part of a workweek and is paid on a commission basis for the balance, earnings at the hourly rate that exceed the applicable minimum may not be used to make up deficiencies in the commission earnings during the other part of the week.[[393]](#footnote-394) For example, for 20 hours each week an employee works as a radio announcer and is paid an hourly rate above the minimum wage. During the remaining 20 hours of the workweek, the employee sells radio time on a straight commission basis. In some weeks the commissions yield less than the minimum wage for the selling time. The Administrator would regard the minimum wage requirement as satisfied only if the earnings for the commission hours and the earnings for the hourly rate hours *each* averaged at least the statutory minimum wage rate. Earnings above the minimum at the hourly rate may not offset those that are below the minimum at the commission rate.[[394]](#footnote-395) Therefore, in this example, the minimum wage requirement would not be satisfied during weeks when the announcer’s commissions yielded less than the minimum wage.

Where employees are paid a commission in addition to an hourly rate (or other additional compensation), no violation of Section 206 occurs so long as the weekly total of commissions and hourly wages, if any, results in an average hourly pay that meets or exceeds the minimum hourly requirement.[[395]](#footnote-396) When a commissioned employee is also paid a “base” or hourly wage that is below the minimum, an employer should keep complete and detailed records of the total wages paid and hours worked. Employee claims alleging that they have worked more hours than acknowledged by the employer may raise triable issues if the additional hours would result in the employee receiving less than the minimum wage.[[396]](#footnote-397)

*b. Monthly and Longer Commission Period*

The FLSA does not prohibit use of a monthly or longer commission period to determine an employee’s earnings, but the computation and recording of hours worked must be on a workweek basis, and the employee must be paid compensation equal to at least the applicable minimum wage for each hour worked in the workweek on the payday for that week.[[397]](#footnote-398)

The fact that the period used for a monthly computation includes workweeks with low as well as high sales volume does not mean that there is any recoupment by the employer from the employee by way of offsetting payments required by the FLSA in the low-volume workweeks.[[398]](#footnote-399)

In *Rogers v. Savings First Mortgage, LLC*,[[399]](#footnote-400) a federal district court in Maryland entered summary judgment for the plaintiffs on their minimum wage claims, holding that commission payments would be apportioned over the workweeks encompassed in the semimonthly pay period in which the commissions were actually paid to determine whether the plaintiffs were paid the minimum wage.[[400]](#footnote-401) Although the plaintiffs, loan officers for a mortgage company, were paid commissions on loans that had gone to closing and were funded, they received no salary, guarantee, or hourly wage.[[401]](#footnote-402) The plaintiffs alleged that in many pay periods they were paid nothing because none of their loans had closed during the period.[[402]](#footnote-403) The defendant argued that because the typical loan took 51 days to close, the commission income generated by the loan should be allocated equally over the 51-day period regardless of when the ­commission was actually paid.[[403]](#footnote-404) The court rejected the defendant’s argument, noting that the defendant had taken the position that the plaintiffs had “earned” nothing prior to the date the loan closed under the terms of their pay system.[[404]](#footnote-405) Moreover, the court held that the defendant could not retroactively modify its semimonthly pay period to allow for the spreading of commissions over multiple pay periods to escape FLSA liability.[[405]](#footnote-406) The court noted that the proper method to determine whether the FLSA’s minimum wage was paid in a particular workweek was to allocate the commission income paid in each bimonthly pay period pro rata over each day within the pay period, and then determine whether the daily compensation paid over a particular workweek under this method satisfied the minimum wage requirements.[[406]](#footnote-407)

***3. Piece Rates***

Employee earnings may be calculated on a piece-rate basis, but an employer that pays its employees under a piece-rate system is not relieved of its obligation to ensure that each employee is paid at least the statutory minimum hourly rate for all hours worked.[[407]](#footnote-408) The fact that some workers are slower than others will not excuse management from paying them the minimum rate.[[408]](#footnote-409) The employer must divide the employee’s straight-time earnings—including piece-rate earnings and nondiscretionary bonuses—due in a week by the total hours worked during that week. The resulting hourly rate must equal or exceed the statutory minimum rate.[[409]](#footnote-410)

*a. Nonproductive Activities*

An employee who is paid on a piece-rate basis may also receive an hourly rate of less than the applicable minimum wage for nonproductive work such as attendance at safety meetings, cleanup time, clothes-changing, or the like. If the employer and the employee have an understanding that the piece rate, through an adjustment factor, includes an amount to compensate in part for the normal amount of nonproductive time per week, the Administrator has held that the hourly payment will not be deemed to be the sole payment for such nonproductive time. In that case, the incentive earnings may be averaged with the non-incentive earnings to determine at the end of the week whether the statutory minimum has been met.[[410]](#footnote-411) Without such a clear understanding, averaging of the piece-rate and hourly rate compensation would not be permitted in determining whether the minimum wage requirement had been satisfied.[[411]](#footnote-412)

*b. Average Earnings of Beginners*

If a new piece-rate employee is unable to meet the production levels necessary to ensure that the employee receives the statutory minimum, the employer must make up the difference between actual piece-rate earnings and the applicable minimum wage. Employers may not try to recapture this difference in later weeks when the beginner’s production level increases to the degree that the beginner is earning more than the minimum in piece rates.[[412]](#footnote-413) Moreover, it is an illegal kickback for an employer to keep records of the amount it had to pay a beginner to bring the beginner’s weekly earnings up to the statutory minimum and then, when the beginner’s production increases so that the beginner is earning more than the minimum in piece rates, pay only the statutory minimum until the amount the company had paid during the learning period is paid back.[[413]](#footnote-414)

VI. Deductions From Wages[[414]](#footnote-415)

Two issues commonly arise when evaluating the lawfulness of employer deductions from an employee’s paycheck: (1) whether the FLSA permits the deduction if it reduces the employee’s wages below the statutory minimum wage; and (2) whether the deduction is permitted under state and local law. This treatise deals only with the first issue.[[415]](#footnote-416)

The employer has the burden of segregating permissible deductions from impermissible ones.[[416]](#footnote-417) Where valid deductions are commingled with invalid ones and the proper amounts cannot be segregated from the improper ones, no deductions will be allowed.[[417]](#footnote-418)

**A. Amounts Deducted for Taxes**

Federal, state, and local taxes that are assessed against the employee and are collected by the employer and forwarded to the appropriate governmental agency may be included as wages, even though these taxes do not technically constitute “board, lodging, or other facilities” within the meaning of Section 203(m) of the FLSA.[[418]](#footnote-419) Such taxes include the employee’s share of Social Security and state unemployment insurance taxes as well as other federal, state, or local taxes, levies, and assessments.[[419]](#footnote-420) An employer may not, however, deduct from an employee’s wages any tax or share of a tax that the law requires to be borne by the employer.[[420]](#footnote-421)

**B. Payments to Third Persons Pursuant to Court Orders**

Where an employer is legally obligated, as, for example, by order of a court of competent jurisdiction, to pay a sum to a creditor of the employee, trustee, or other third party pursuant to garnishment, wage attachment, trustee process, or a bankruptcy proceeding, deduction of the sum is not prohibited as long as the employer or any person acting on the employer’s behalf derives no profit or benefit from the transaction.[[421]](#footnote-422) The amount of wages that may be deducted pursuant to court order may not exceed the restriction imposed by the Consumer Credit Protection Act.[[422]](#footnote-423)

**C. Payments to an Employee’s Assignees**

When an employee directs the employer to deduct from the employee’s wages a sum that the employee wants to assign voluntarily to a third party, such as a creditor or donee, the deduction is not prohibited as long as the employer or any person acting in its interest does not derive profit or benefit from the transaction.[[423]](#footnote-424) Wages so assigned are included in the regular rate as a payment made to the employee. Examples of voluntary assignments include the following:

• union dues paid pursuant to a collective bargaining agreement with bona fide representatives of the employees and as permitted by law;[[424]](#footnote-425)

• purchase of U.S. savings bonds or U.S. savings stamps;[[425]](#footnote-426)

• payment to employee’s store accounts with merchants wholly independent of the employer;[[426]](#footnote-427)

• payment of insurance premiums to independent insurance companies where the employer is under no obligation to supply the insurance and derives no benefit or profit from providing the insurance;[[427]](#footnote-428)

• repayments of loans to banks or credit unions, as long as the lender is independent from the employer;[[428]](#footnote-429) and

• voluntary contributions to churches and charitable, fraternal, athletic, and social organizations or societies from which the employer neither receives benefit nor profits directly or indirectly.[[429]](#footnote-430)

Deductions for Christmas savings funds are also permissible if the savings accounts are maintained in the employee’s name or, if in the employer’s name, the employer assumes fiduciary responsibilities imposed by applicable law.[[430]](#footnote-431)

The regulations caution that any such voluntary assignments must not profit or benefit, either directly or indirectly, the employer or “any person acting in his or her behalf or interest.”[[431]](#footnote-432) Assuming that the applicable conditions are all met, deductions may be made from an employee’s wages for voluntary contributions as specified earlier even where the employee is paid only the statutory minimum wage.[[432]](#footnote-433)

**D. Shortages**

Deductions for shortages, such as cash register shortages resulting from unaccountable circumstances, mathematical errors, customers leaving without paying checks, and losses resulting from bad or uncollectable credit card charges have been found to be unlawful where those deductions bring the employee’s compensation below the minimum wage.[[433]](#footnote-434)

Theft or misappropriation of funds by the employee, however, may be treated differently. The courts and the Administrator agree that, when an employee misappropriates funds of the employer, it is lawful to deduct the funds from the employee’s wages even if it reduces those wages below the statutory minimum.[[434]](#footnote-435)

On the other hand, requiring employees as a condition of employment to sign an agreement stating that the employee will make “voluntary” repayments of cash register shortages when the shortages occur through “misappropriation, theft, or otherwise” violates the minimum wage requirements of the FLSA to the extent that (1) the required payments reduce wages to below the minimum wage and (2) where the agreement was used to deduct wages for any kind of shortage (not just those from theft).[[435]](#footnote-436) Under these circumstances, the agreement may be considered an impermissible attempt to get the employee to “waive” the minimum wage requirements of the FLSA.[[436]](#footnote-437)

**E. Other Debts to the Employer**

As discussed below, the DOL and the courts have analyzed the handling of debts to employers in a number of different contexts.

***1. Cash Advances and Bona Fide Loans***

When the employer is an employee’s creditor, repayment generally may not be made by deductions that reduce the employee’s net pay below the minimum wage; this is so because the employee must receive the statutory minimum wage “free and clear.”[[437]](#footnote-438) Indebtedness incurred by a cash advance or bona fide loan, however, may be distinguished from other types of debts claimed to be owed by the employee to the employer. The DOL’s longstanding position has been that “where an employer makes a loan or an advance of wages to an employee, the principal may be deducted from the employee’s earnings even if such deduction cuts into the minimum wage or overtime pay due the employee under the FLSA.”[[438]](#footnote-439) However, deductions for interest or for the administrative cost of a loan are permissible only if they do not impinge on the minimum wage or overtime that is due the employee.[[439]](#footnote-440) Deductions that violate other statutory provisions, such as state laws against usurious transactions, are themselves unlawful and cannot be considered as wages received.[[440]](#footnote-441)

The distinction between permissible and impermissible deductions is illustrated in the Fifth Circuit’s decision in *Brennan v. Veterans Cleaning Service*.[[441]](#footnote-442) The court found that deductions to recoup amounts spent by the employer on an employee’s fine and to compensate the owner of an automobile damaged by the employee in a traffic accident were permissible, because the payment by the employer to a third party was equivalent to a loan to the employee of an advance salary.[[442]](#footnote-443) Deductions for the employee-caused damage to the employer’s own truck, however, were not permitted where the deductions reduced the employee’s net wage below the statutory minimum.[[443]](#footnote-444)

***2. Overpayment of Wages***

A common issue is whether an employer can deduct from an employee’s paycheck to recoup an overpayment of wages previously made by the employer. According to the DOL, this falls into the same category as a bona fide loan or cash advance. The DOL has found that an employer may deduct wages from an employee if it overpays the employee in a previous pay period.[[444]](#footnote-445) The amount deducted in the next pay period is at the employer’s discretion.[[445]](#footnote-446) “It does not matter whether the deduction was made in the next pay period or several pay periods later.”[[446]](#footnote-447) The employer may not, however, make any assessment for administrative costs or charge any interest payment that brings the employee below the minimum wage.[[447]](#footnote-448) Different states may have additional rules regarding recouping for the overpayment of wages.

***3. Unearned Vacation***

Another common issue is whether an employer can deduct from an employee’s paycheck to recoup unearned vacation previously taken by the employee. According to the DOL, this falls into the same category as a bona fide loan or cash advance. The DOL has found that where an employee has been informed in advance of the unearned vacation time policy and that the employer will deduct the cost of any negative leave balance from pay when the employee leaves employment, such a deduction is permissible even where it cuts into the minimum wage.[[448]](#footnote-449) The employer may not, however, make any assessment for administrative costs or charge any interest payment that brings the employee below the minimum wage.[[449]](#footnote-450)

***4. Training Costs***

Some employers enter into repayment agreements with employees in connection with subsidizing training or educational costs. The courts and the DOL have permitted repayment only where the deduction does not cut into the minimum wage.

In *Heder v. City of Two Rivers*,[[450]](#footnote-451) the employer subsidized paramedic training in exchange for an employee’s agreement to repay the training costs if he voluntarily resigned within three years of receiving the training. The employee firefighter sued after his employer withheld money from his final paycheck to recover the training costs pursuant to the repayment agreement. The Seventh Circuit reversed the district court’s refusal to enforce the agreement, holding that the former employer could withhold such money, but only down to the minimum wage for hours worked in the final pay periods. The court also noted that the city was free to attempt to recoup that amount as an ordinary creditor.[[451]](#footnote-452) Other cases have likewise held that training costs may be recouped by the employer so long as minimum wages are received by the employee.[[452]](#footnote-453) In contrast, another case has held that a plausible minimum wage claim was pled where the employer sought to collect the costs of a leadership development program equal to nearly a year’s compensation and further factual development was required to determine whether the costs of training was a bona fide loan or a kickback of salary.[[453]](#footnote-454) In a 2005 opinion letter, the DOL addressed a similar factual scenario in considering whether an Oklahoma police department could recoup the entire amount of salary paid to an officer while in training, or only that amount exceeding the applicable minimum wage.[[454]](#footnote-455) At issue was an Oklahoma state law providing that if a law enforcement agency pays the salary of a person attending a basic police course and that person resigns and is hired by another Oklahoma law enforcement agency within one year, the second employing agency or the person receiving the training must reimburse the salary paid to the officer during training. The DOL observed that wages cannot be considered paid unless they are paid unconditionally or “free and clear.”[[455]](#footnote-456) Therefore, according to the DOL, any reimbursement paid by the officer that results in the payment of less than the applicable minimum wage and/or overtime requirements violates the FLSA. The agency could ask the officer to pay the amount of salary in excess of the minimum wage but could not ask him to repay the entire amount. However, because the FLSA does not regulate arrangements between two law enforcement agencies under state law, it does not affect any remedy the first employing agency may have against the second for the full salary amount.

**F. Transportation and Visa Expenses for Foreign Workers**

***1. Employees Hired Under the H-2A Program***

Under the H-2A Program, agricultural employers are permitted to hire nonimmigrant aliens as workers. The conditions under which an H-2A worker may be allowed into the United States for temporary agricultural employment are prescribed by the H-2A regulations.[[456]](#footnote-457) The provisions of the FLSA also apply to H-2A workers.[[457]](#footnote-458) Costs incurred by H-2A workers in coming to the United States as agricultural workers include inbound travel costs from the worker’s country of origin, visa costs, and recruiting costs.

In 2002, in *Arriaga v. Florida Pacific Farms, LLC*,[[458]](#footnote-459) the Eleventh Circuit addressed whether it was lawful for an employer to deduct these costs from the wages of an H-2A worker.

With respect to the transportation costs, the Eleventh Circuit found 29 C.F.R. §531.32 applicable. Under that regulation, transportation may or may not be considered “other facilities” depending on whether the travel is “an incident of and necessary to the employment.”[[459]](#footnote-460) If the transportation charge falls into this category, the employer would be required to reimburse the expense up to the point that the FLSA minimum wage provisions are met. The Eleventh Circuit found that “[e]mployers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs; transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers.”[[460]](#footnote-461) On this basis, the court reversed the judgment of the district court and found that transportation costs were “an incident of and necessary to the employment” of H-2A workers.

With respect to visa costs, visa application fees, and immigration fees for the entry documents, the Eleventh Circuit again found that these costs were necessitated by the employment of the H-2A workers. “By participating in the H-2A program, the Growers created the need for these visa costs, which are not the type of expense they are permitted to pass on to the Farmworkers as “other facilities.”[[461]](#footnote-462) The court found that although immediate reimbursement was not necessary, “payment may be required within the first week if the employees’ wages, once the costs are subtracted, are below the minimum wage. If so, the employer must provide reimbursement up to the point where the minimum wage is met.”[[462]](#footnote-463)

Finally, the H-2A workers contended that the recruitment fees they were charged by the recruiters in the village where they came from should be reimbursed. At issue in the case was whether the Growers should be held liable for the unauthorized acts of their agents. The court held that, “[b]ecause the [plaintiffs] have failed to allege facts to support the creation of apparent authority [by the defendants with respect to the recruiting agency], the Growers are not liable for the recruitment fees.”[[463]](#footnote-464)

***2. Employees Hired Under the H-2B Program***

The H-2B nonimmigrant program permits employers to temporarily hire nonimmigrants to perform nonagricultural labor or services in the United States. The employment must be of a temporary nature for a limited period of time, such as a one-time occurrence, seasonal need, peakload need, or intermittent need. The H-2B program requires the employer to attest to the DOL that it will offer a wage that equals or exceeds the highest of the prevailing wage, applicable federal minimum wage, the state minimum wage, or the local minimum wage to the H-2B nonimmigrant worker for the occupation in the area of intended employment during the entire period of the approved H-2B labor certification.

On April 29, 2015, the DOL and the Department of Homeland Security (DHS) jointly issued an interim final rule (IFR) that immediately implemented a strengthened H-2B program. The departments also jointly issued a final wage rule that establishes the prevailing wage methodology for that program.

As part of these rules, the DOL issued Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program.[[464]](#footnote-465) With respect to inbound transportation, Fact Sheet #78F provides:

The FLSA applies independently of H-2B and requires employers covered by the FLSA to pay costs that are primarily for the benefit of the employer if such costs would take a non-exempt employee’s wages below the FLSA minimum wage. As discussed in the preamble to the 2015 H-2B Interim Final, the Department views the inbound transportation costs to be primarily for the benefit of the H-2B employer. Under the FLSA, there is no difference between deducting a cost directly from a worker’s wages and shifting a cost to the worker. Therefore, failure to reimburse such worker-incurred costs would be a de facto deduction from the first week’s wages that would constitute a minimum wage violation under the FLSA for employers subject to the Act if bearing such costs would effectively bring the worker’s wages below the minimum wage.[[465]](#footnote-466)

The DOL also provides an example of how this principle would be applied. Assume that the worker incurred $200 for the most reasonable and economical cost of common carrier transportation from the home community to the place of employment. Then, an FLSA-covered employer would be required to reimburse the full $200 in the first workweek so that the employee receives at least the FLSA minimum wage and would also be required to pay at least the FLSA minimum wage for each hour worked. Once this amount has been reimbursed, the employer may elect to recoup this money in subsequent workweeks by making deductions from the worker’s paycheck to the extent that such deductions do not violate the FLSA minimum wage requirement.[[466]](#footnote-467) The deductions may only be made until the employer has recouped the entire transportation cost. In no case may this deduction be made after the 50-percent point of the work contract.

With respect to the cost of a visa, visa processing and other related fees incurred by the worker, the IFR provides that the employer must either pay or reimburse the H-2B worker in the first workweek for these costs. However, an employer is not required to pay for a passport or other charges that are primarily for the benefit of the worker.

Finally with respect to recruitment fees, the fact sheet provides that employers must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) that the employer engages, directly or indirectly, in recruitment of H-2B workers *from seeking or receiving payments or other compensation from prospective workers*.[[467]](#footnote-468) This documentation must be made available upon request by the certifying officer or other federal representative. In addition, the employer and its attorney, agents, or employees cannot seek or receive payment of any kind from workers for recruitment costs.[[468]](#footnote-469)

A number of other courts have followed *Arriaga*[[469]](#footnote-470)in finding that costs associated with transportation and visa application fees must be borne by the employer with respect to both H-2A and H-2B workers. [[470]](#footnote-471) Some courts also have found that recruitment fees must be paid by the employer where the employee has no choice but to pay the fee in order to gain access to the employment opportunity.[[471]](#footnote-472)

**G. Uniforms and Uniform Cleaning**

The Administrator published guidelines for employers regarding minimum wage issues that arise when employees are required to wear uniforms or to pay for cleaning the uniforms.[[472]](#footnote-473)

If wearing a uniform or wearing a clean uniform is required by law, by the employer, or by the nature of the work, the cost of renting, buying, and/or maintaining clean uniforms may not be treated as wages.[[473]](#footnote-474) Thus, it is unlawful for an employer to deduct the cost of a uniform or its maintenance from an employee’s wages when the deduction reduces the wages of that employee below the minimum.[[474]](#footnote-475)

***1. What Is a Uniform?***

Where an employer requires a type or style of clothing that is suitable for a particular profession, is usually worn in that profession,[[475]](#footnote-476) and is not suitable for use on other occasions, that clothing constitutes a uniform. For example, where a restaurant or hotel requires a tuxedo or skirt or a shirt or blouse and jacket of a specific or distinctive style, color, and quality, that clothing would be considered a uniform.[[476]](#footnote-477) Any article of clothing that is associated with a specific employer, by virtue of an emblem, logo, or distinctive color scheme, would be considered a uniform.[[477]](#footnote-478)

If the employer prescribes a general type of street clothing for employees to wear to work but permits variations in detail, the garments are not considered uniforms. For example, it is not a uniform if the employer specifies “white or light blue, button-down, long-sleeved, wash-and-wear shirt with tan or navy blue slacks and closed-toe shoes that complement the outfit.”[[478]](#footnote-479) If most of the employees consider the clothing to be objectionable or distasteful for street wear, however, then the clothing is a uniform.[[479]](#footnote-480) If the employer requires specific items and colors—for example, a red blazer and blue trousers—this is a uniform.[[480]](#footnote-481) If the clothing is not considered a uniform, then the employer has no obligation regarding the purchase or care of the clothing.[[481]](#footnote-482) Conversely, if the clothing is considered a uniform, then the cost of the uniform charged to the employee cannot reduce the employee’s wages below the minimum wage.[[482]](#footnote-483) Nor can the employer recover the costs of cleaning employee uniforms from employee tips to the extent that the charges would reduce the tipped employee’s compensation below the minimum wage.[[483]](#footnote-484)

***2. Paying for the Uniform***

Under some circumstances, an employer may provide its employee with uniforms and recoup the cost out of future employee compensation. However, the employer cannot deduct any part of the cost of the uniform if doing so would reduce the employee’s wages below the minimum wage or cut into overtime compensation required by the FLSA.[[484]](#footnote-485) Although an employer may require a prospective employee to purchase a uniform as a condition of employment, it must reimburse that employee for the uniform cost no later than the next regular payday to the extent that the cost of the uniform cuts into the minimum wage or overtime compensation required by the FLSA.[[485]](#footnote-486) Security deposits to cover the cost of a uniform are, “in effect, [advances] by the employee to the employer of an expense that should be borne by the employer.”[[486]](#footnote-487) Accordingly, such security deposits are unlawful if deducting the amount would reduce the employee’s wage below the minimum.[[487]](#footnote-488)

If an employee has a uniform provided by a past employer that is acceptable to the new employer, the new employer is not required to reimburse the employee for the cost of the uniform.[[488]](#footnote-489) Employers may agree to pay an employee an amount in excess of the applicable minimum wage, with the understanding that the excess payment is to enable the employee to replace the uniform when it is worn out, as long as the amount paid in excess of the minimum wage is sufficient to purchase a replacement uniform.[[489]](#footnote-490) Employers may also prorate deductions for uniform costs over a number of paydays as long as the prorated deductions do not reduce an employee’s wages below the required minimum wage or required overtime compensation in any workweek.[[490]](#footnote-491)

***3. Caring for the Uniform***

Unless an employer is paying an amount sufficiently in excess of the applicable minimum wage, it must reimburse employees for laundry and maintenance costs in order to prevent those costs from cutting into the minimum wage or overtime pay required by the FLSA.[[491]](#footnote-492) The cost to the employee of laundering a mandated uniform may not cut into minimum wage or overtime pay.[[492]](#footnote-493)

Where the employer arranges for a cleaning service for those employees who wish to participate and the employer pays for the service, a cleaning deduction from the employees’ wages is permissible if it does not reduce their wages below the minimum wage.[[493]](#footnote-494) Because the actual cost of laundering “may be administratively difficult and burdensome for employers to determine,” the DOL deems payment to an employee of $3.35 a week to be sufficient as reimbursement for laundering.[[494]](#footnote-495) An employer may also reimburse an employee for laundering by providing an hourly supplement to the basic minimum wage. Where it can be demonstrated that the cost of laundering is higher than $3.35 per week, that amount must be reimbursed by the employer.[[495]](#footnote-496) If the uniforms are of a wash-and-wear material that requires only washing and tumble or drip drying, and if they can be laundered with other personal garments, a uniform maintenance reimbursement is not required.[[496]](#footnote-497) For uniforms that require daily or special laundering due to heavy soiling or use, ironing, dry cleaning, or patching and repairs due to the nature of the work, a uniform maintenance reimbursement is required.[[497]](#footnote-498)

In a 2006 opinion letter, the DOL rejected a restaurant association’s proposal to permit tipped employees to allow the employer to apply a portion of the employer tip credit toward the cost of cleaning the garments worn by restaurant servers. The DOL opined that the cost of cleaning and pressing uniforms is a cost of doing business that may not be imposed on employees if doing so reduces their wages below the minimum wage.[[498]](#footnote-499) The DOL has clarified that where an employer supplies an employee with a sufficient number of uniforms and replaces any uniforms that are damaged in the course of work-related duties free of charge, the employer has met its duty to pay expenses that are primarily for the benefit of the employer.[[499]](#footnote-500) However, where an employee voluntarily elects to purchase additional uniforms in excess of the required number, the employer is not obligated to reimburse the employee, nor is it required to replace uniforms that are damaged during the course of non-work-related duties.[[500]](#footnote-501)

In summary, “uniforms”—as opposed to generic clothing that can be used for other purposes—are not considered “facilities” within the meaning of the regulations, and the reasonable cost of a uniform and its maintenance cannot be used to help satisfy the minimum wage or overtime obligations of the employer.[[501]](#footnote-502) Moreover, the supply of required uniforms and their maintenance (other than normal washing) is an employer expense and cannot be charged to the employee if the cost would reduce the employee’s wages below the statutorily required minimum.

VII. Special Minimum Wage Requirements

Certain categories of employees can be paid amounts less than the FLSA minimum wage as straight-time payment for each hour worked.

**A. Employees Working Under Special Certificates**

Under Section 213(a)(7) of the FLSA, an employer may pay an employee less than the minimum wage required under Section 206 if the employer obtains a special certificate[[502]](#footnote-503) issued by the Secretary of Labor under Section 214 of the FLSA. Section 214 provides that the Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation provide for employment of certain types of workers at wages lower than the minimum wage, subject to such limitations as to time, number, preparation, and length of service as the Secretary shall prescribe.[[503]](#footnote-504) The workers covered by this provision are

• learners;

• apprentices;

• messengers;

• student-learners;

• disabled workers; and

• full-time students.

A full discussion of special certificates and their requirements is found in Chapter 2, Operations and Functions of the Department of Labor, §V [Special Certificates Allowing Subminimum Wage].

**B. Employees Under Age 20 Paid an Opportunity Wage**

As part of the Small Business Job Protection Act of 1996,[[504]](#footnote-505) the FLSA was amended to provide for an opportunity wage for employees under age 20 who were in their first 90 consecutive calendar days of employment.[[505]](#footnote-506) Subsection (g) of Section 206 now provides that, in lieu of the rate prescribed in Section 206(a)(1), any employer may pay any employee who has not attained age 20, during the first 90 consecutive calendar days after such an employee is initially employed, a wage that is not less than $4.25 an hour.[[506]](#footnote-507) However, employers who hire individuals at the opportunity wage rate may not displace other employees;[[507]](#footnote-508) this includes partial displacements such as reducing hours, wages, or employment benefits.[[508]](#footnote-509)

**C. Territories of the United States**

In 1938, when Congress passed the FLSA, the only reference in the Act to “territories or possessions” was found in Section 203(d): “State means any State of the United States or the District of Columbia or any Territory or possession of the United States.”[[509]](#footnote-510)

Thereafter, through various procedures and over different time periods, the federal minimum wage has come to be applied in most but not all of these “territories or possessions.” A brief history of those processes is set out below.

***1. Guam***

The United States acquired Guam in 1898 during the Spanish-American War. For the next 50 years, it remained under the jurisdiction of the U.S. Navy.[[510]](#footnote-511) In 1949, President Truman transferred administration of the island to the Department of the Interior, and in 1950, Congress established a system of civil government for the island.[[511]](#footnote-512) As a U.S. “territory or possession,” Guam was covered under the 1938 enactment of the FLSA, but the statute was never enforced there.[[512]](#footnote-513) For this reason, among others, Guamanian employers were not involved in amendments to the Act pushed by Puerto Rico and the Virgin Islands in 1940. However, in 1957, Congress amended the FLSA under which Guam, American Samoa, and certain other jurisdictions were specifically written into the Act.[[513]](#footnote-514) Section 206(a)(1) of the FLSA is currently enforced in Guam.

***2. Puerto Rico and the Virgin Islands***

In 1938, the minimum wage in Puerto Rico and the Virgin Islands was set at the same rate as in the continental United States ($0.25 per hour).[[514]](#footnote-515) However, during the period 1939–40, various industry groups argued for “remedial legislation for Puerto Rico,” claiming that “failure to secure relief means the total collapse of industries vital to our economic structure and [unemployment for] thousands of wage earners.”[[515]](#footnote-516)

In 1940, Congress amended the FLSA to permit special industry committees (SICs) to visit Puerto Rico and the Virgin Islands to assess their economies and to make recommendations for a subminimum wage in certain industries.[[516]](#footnote-517) These subminimum wages were developed by the industry committees in cooperation with the U.S. DOL to purportedly reflect the economic realities of the islands.[[517]](#footnote-518)

In 1989, Congress enacted legislation that eliminated the SIC structure in both Puerto Rico and the Virgin Islands, based in part on a congressional review that showed that in most areas of production, the island employers were meeting national standards. Since that time, the minimum wage in the Virgin Islands has been the same as in the continental United States. In Puerto Rico, minimum wages by industry were raised, in steps, until they were the same as in the continental United States by April 1, 1996.[[518]](#footnote-519)

***3. American Samoa***

In 1900, President McKinley ordered the U.S. Navy to assume responsibility for American Samoa.[[519]](#footnote-520) McKinley’s directive remained in effect until 1950, when authority fell to the Department of the Interior. Although American Samoa was covered by the FLSA in 1938, the Act was not enforced there until the late 1950s.

In 1953, tuna canning operations began in American Samoa, and industry executives became concerned about the likely enforcement of the FLSA’s minimum wage standards.[[520]](#footnote-521) In 1956, at the urging of Van Camp Sea Food Co., Inc., the U.S. Senate amended the FLSA to create SICs similar to those then in effect in Puerto Rico and the Virgin Islands.[[521]](#footnote-522) The SICs reviewed minimum wage rates in the various local industries every two years and recommended wage rates based on input from the community and an analysis of the extent to which the economy could support increases in the minimum wage without substantially curtailing employment.[[522]](#footnote-523)

In 2007, Congress inserted a provision into the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act[[523]](#footnote-524) that repealed the special industry committee provisions of the FLSA and over time imposed the full federal minimum wage on employers in American Samoa. The rate, with “each industry and classification” treated separately, would increase by $.50 per hour within 60 days of enactment and $.50/hour each year thereafter until the rate was coequal with the FLSA.[[524]](#footnote-525)

In 2010, as a result of an assessment of the minimum wage increases on living standards and rates of employment in American Samoa, the planned increases for 2010 and 2011 were postponed.[[525]](#footnote-526)

In 2012, the Insular Areas Act of 2011 delayed the planned increases of the minimum wages in American Samoa for 2012, 2013, and 2014.[[526]](#footnote-527) In 2015, Congress amended the 2007 legislation by reducing the scheduled increases in American Samoa from $.50 per hour to $.40 per hour, with increases taking effect every three years thereafter until all rates had reached the FLSA minimum.[[527]](#footnote-528) The first raise for local industries was put in place on May 25, 2009; the second on September 30, 2015; and the third on September 30, 2018. The next increase is scheduled for September 2021. The current minimum wage in American Samoa varies depending on the industry. In 2020, the applicable minimum wage ranged from $4.98 to $6.39 per hour.

***4. Commonwealth of the Northern Mariana Islands***

In the mid 1970s, the United States and the Commonwealth of the Northern Mariana Islands (CNMI)[[528]](#footnote-529) entered into a covenant association.[[529]](#footnote-530) Under that covenant, CNMI retained control over the minimum wage in the islands, a rate that was lower than the FLSA standard. However, as noted earlier with respect to American Samoa, in 2007 Congress inserted a provision into the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act that preempted the covenant association by establishing the federal minimum wage as applicable, over time, to CNMI.[[530]](#footnote-531) The statute mandated an increase in the minimum wage of $.50 per hour within 60 days of enactment and $.50 per hour each year thereafter until the rate was coequal with the FLSA.

In 2010, as a result of an assessment of the minimum wage increases on living standards and rates of employment in CNMI, the planned increases for 2010 and 2011 were postponed.[[531]](#footnote-532)

On September 30, 2012, the minimum wage in CNMI was increased by $.50 per hour to $5.55. Two additional increases of $0.50 per hour occurred in 2014 and 2016, bringing the minimum wage to $6.55 per hour, effective September 30, 2016. The following year, the minimum wage increased by $0.50 per hour to $7.05; then, on September 30, 2018, the minimum wage increased $0.20 per hour to $7.25, making it equal to the U.S. mainland minimum wage.

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1. 29 U.S.C. §206. [↑](#footnote-ref-2)
2. *See* *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009,* U.S. Dep’t of Labor, Wage & Hour Div*.,* http://www.dol.gov/whd/minwage/chart.htm (last visited Jan. 20, 2020). [↑](#footnote-ref-3)
3. 29 U.S.C. §206. For a discussion of the application of the FLSA’s minimum wage to Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, see §VII.C [Special Minimum Wage Requirements; Territories of the United States] of this chapter. [↑](#footnote-ref-4)
4. 29 U.S.C. §213(a)(7). See §VII.A [Special Minimum Wage Requirements; Employees Working Under Special Certificates] of this chapter, and Chapter 2, Operations and Functions of the Department of Labor, §V [Special Certificates Allowing Subminimum Wage], which covers the payment of subminimum wages to full-time students, student-learners, apprentices, learners, disabled workers, messengers, and student-workers if the special certificates requirements are met. [↑](#footnote-ref-5)
5. 29 U.S.C. §206(g). See §VII.B [Special Minimum Wage Requirements; Employees Under Age 20 Paid an Opportunity Wage] of this chapter. [↑](#footnote-ref-6)
6. The Fair Minimum Wage Act of 2007 amended the FLSA to provide for phased increases to the minimum wage: $5.85 per hour effective July 24, 2007; $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009. Pub. L. No. 110-28, 121 Stat. 188, §8102. [↑](#footnote-ref-7)
7. *See* *Minimum Wage Laws in the States,* U.S. Dep’t of Labor, Wage & Hour Div., http://www.dol.gov/whd/minwage/america.htm (last visited Jan. 20, 2020), for listings of state minimum wage requirements; *see also* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-8)
8. 29 U.S.C. §218(a); 29 C.F.R. §531.26. Section 218(a) of the FLSA specifically provides that if any federal, state, or municipal law requires a minimum wage higher than that established by the FLSA, the FLSA does not excuse noncompliance with that law. The regulations provide that other federal, state, or local laws will apply if they do not contravene the requirements of the FLSA, including laws that require “payment of wages in cash; prohibit or regulate issuance of scrip, tokens, credit cards, ‘dope checks,’ or coupons; prevent or restrict payment of wages in services or facilities; control company stores and commissaries; outlaw ‘kickbacks’; restrain assignment and garnishment of wages; and generally govern the calculation of wages and the frequency and manner of paying them.” 29 C.F.R. §531.26. As the regulations note, “nothing in the Act, the regulations, or the interpretations … should be taken to override or nullify the provisions of these [federal, state, or local] laws.” *Id*. Some states have no law regarding payment of a minimum wage and thus rely on the FLSA to set minimum wage rates within those jurisdictions. [↑](#footnote-ref-9)
9. 29 C.F.R. §531.35; *see also* WH Op. FLSA2001-7, 2001 WL 1558766 (Feb. 16, 2001). [↑](#footnote-ref-10)
10. 29 C.F.R. §531.35. *See* Trujeque v. DirecTV, LLC, 2017 WL 8238315, at \*18–19 (C.D. Cal. Nov. 2, 2017) (denying motion to dismiss where plaintiff alleged that, after deducting plaintiff’s weekly work-related expenses and employer-imposed chargebacks from his gross wages, plaintiff earned less than minimum wage), *vacated and remanded sub nom*. Lasater v. DirecTV, LLC, 772 F. App’x 582 (9th Cir. 2019). [↑](#footnote-ref-11)
11. 29 C.F.R. §531.35; 29 C.F.R. §531.32(c). [↑](#footnote-ref-12)
12. Walling v. Peavy-Wilson Lumber Co., 49 F. Supp. 846, 857 (W.D. La. 1943). [↑](#footnote-ref-13)
13. Morgangelli v. Chemed Corp*.*, 922 F. Supp. 2d 278 (E.D.N.Y. 2013). [↑](#footnote-ref-14)
14. Stein v. HHGREGG, Inc., 873 F.3d 523, 531 (6th Cir. 2017) (citing 29 C.F.R. §531.35) (emphasis added). [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *Id*. at 535–36. The court observed that there was “no support for the claim that a company may demand repayment of wages already paid upon termination.” *Id*. at 535. [↑](#footnote-ref-17)
17. *First Circuit:* Matias-Rossello v. Epoch LLC*,* 2022 BL 115198, 2022 WL 993601, at \*9 (D.P.R. Mar. 31, 2022) (holding that employer was not required to track its employees’ actual expenses or use IRS reimbursement rate and could have employed a “reasonable approximation” reimbursement method, but granting summary judgment to defendant because plaintiff failed to show defendants’ reimbursement method of $1 per delivery actually reduced his wage rate below minimum wage); Orth v. J & J & J Pizza, Inc., 2020 BL 110789,2020 WL 1446735 (D. Mass. Mar. 25, 2020) (denying motion to dismiss and rejecting defendant’s argument that plaintiff could not state cause of action unless he pled his exact automobile expenses).

    *Sixth Circuit:* Parker v. Battle Creek Pizza, Inc.,95 F.4th 1009, 1015–16 (6th Cir. 2024) (rejecting both “reasonable approximation” and IRS reimbursement rates for calculating delivery driver expenses; vacating and remanding two cases to the district courts for further proceedings).

    *Eighth Circuit*: Perrin v. Papa John’s Int’l, Inc., 818 F. Supp. 2d 1146 (E.D. Mo. 2011) (finding that claim was legally viable on motion to dismiss).

    *Tenth Circuit*: Darrow v. WKRP Mgmt., LLC, 2011 BL 148383, 2011 WL 2174496 (D. Colo. June 3, 2011) (denying defendants’ motion to dismiss case where plaintiffs alleged that employer did not reimburse mileage expenses at IRS mileage rates but instead paid flat fee for each delivery, which was not proportional to actual average delivery distance).

    *Eleventh Circuit*: Benton v. Deli Mgmt., Inc., 396 F. Supp. 3d 1261, 1273 (N.D. Ga. 2019) (granting summary judgment to plaintiffs, stating that regulations “provide more of a framework for analysis than a hard and fast set of rules about which expenses are/are not to be reimbursed under the FLSA,” so “question is really about the nature of the expenses themselves and whether they are of the type that should be borne by the employer rather than the employee”; finding that plaintiffs’ fixed costs of insurance and registration resulted in illegal kickback to employer because employer’s need for vehicle was directly incidental to its business and employer benefitted from plaintiffs paying these costs; holding that portion of these expenses proportional to miles plaintiffs drove for employer were reimbursable). [↑](#footnote-ref-18)
18. Bradford v. Team Pizza, Inc., 2021 BL 196077, 2021 WL 2142531, at \*3 (S.D. Ohio May 26, 2021). [↑](#footnote-ref-19)
19. *Bradford*, 2021 BL 196077, 2021 WL 2142531, at \*4*.* [↑](#footnote-ref-20)
20. 95 F.4th 1009 (6th Cir. 2024). [↑](#footnote-ref-21)
21. *Id.* at 1015. [↑](#footnote-ref-22)
22. *Id*. at 1016–17. [↑](#footnote-ref-23)
23. *Id*. at 1018. [↑](#footnote-ref-24)
24. *Id*. at 1019; *see also* Lofton v. EYM Pizza of Ill., LLC, 725 F. Supp. 3d 857 (N.D. Ill. 2024) (collecting cases and holding that to comply with the minimum wage regulations in the pizza delivery driver context, employers may reimburse using the IRS rate, keep records of actual expenses and reimburse for them, or reasonably approximate expenses). [↑](#footnote-ref-25)
25. WH Op. FLSA2020-12 (Aug. 31, 2020). [↑](#footnote-ref-26)
26. *Id.* at 2 (citing 29 C.F.R. §§531.32(c), 778.217). [↑](#footnote-ref-27)
27. *Id.* at 3. [↑](#footnote-ref-28)
28. *Id.* at 4. [↑](#footnote-ref-29)
29. *Id.* at 7. [↑](#footnote-ref-30)
30. *See* Zellaguiv. MCD Pizza, Inc., 59 F. Supp. 3d 712, 716 (E.D. Pa. 2014) (on motion for default judgment, following FOH and finding employer should reimburse employee at the IRS rate or keep contemporaneous records of drivers’ actual expenses); Burton v. DRAS Partners, LLC, 2019 BL 411611, 2019 WL 5550579, at \*2–4 (N.D. Ill. Oct. 27, 2019) (on default judgment, holding IRS mileage rate is appropriate method to determine minimum wage violations under FLSA kickback theory where employer failed to maintain detailed records of employees' expenses pursuant to FOH). [↑](#footnote-ref-31)
31. 29 C.F.R. §531.35. [↑](#footnote-ref-32)
32. WH Op. (May 1943). [↑](#footnote-ref-33)
33. *Id*. [↑](#footnote-ref-34)
34. 29 C.F.R. §531.35; Calderon v. Witvoet, 999 F.2d 1101, 1107 (7th Cir. 1993) (employers “may not reduce the wage below the statutory minimum to collect a debt to the employer”); Adams v. Aztar Indiana Gaming Co., 2021 BL 365187, 2021 WL 4316906 (S.D. Ind. Sept. 22, 2021) (denying motion to dismiss and holding that plaintiff plausibly alleged that deductions to pay for state-issued gaming licenses, which are non-transferable and valid only for the casino at which they were issued, were primarily for the benefit of the employer and caused plaintiff’s pay rate to fall below FLSA minimum wage for weeks in which deductions were made); Lockett v. Pinnacle Entm’t, Inc., 408 F. Supp. 3d 1043, 1048 (W.D. Mo. 2019) (licensing fees deducted from casino employees’ pay that resulted in subminimum wages impermissible because they did not “primarily benefit the employee” and were a “business expense of the employer.”). [↑](#footnote-ref-35)
35. These and other types of unlawful deductions are discussed in §VI [Deductions From Wages] of this chapter. [↑](#footnote-ref-36)
36. 29 C.F.R §531.27. [↑](#footnote-ref-37)
37. *Id.* This limited exception is discussed in greater detail in §III [Non-Cash Wages Under Section 203(m): “Board, Lodging, or Other Facilities”] of this chapter. [↑](#footnote-ref-38)
38. U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook ch. 30, §30c00b, https://www.dol.gov/agencies/whd/field-operations-handbook [hereinafter FOH]. [↑](#footnote-ref-39)
39. 29 C.F.R. §531.26. *See* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.), regarding permissibility and requirements for direct deposit in various states. [↑](#footnote-ref-40)
40. 29 C.F.R. §531.34. [↑](#footnote-ref-41)
41. *Id*. [↑](#footnote-ref-42)
42. WH Op. (July 19, 1963) (observing that token tickets may be used within pay period as means of keeping record of work done and amount due to each employee on payday). [↑](#footnote-ref-43)
43. 29 C.F.R. §531.34. [↑](#footnote-ref-44)
44. *Id.* [↑](#footnote-ref-45)
45. The provisions of §203(m) dealing with board, lodging, and facilities are discussed in §III [Non-Cash Wages Under Section 203(m): “Board, Lodging or Other Facilities”] of this chapter. [↑](#footnote-ref-46)
46. 29 C.F.R. §531.34. [↑](#footnote-ref-47)
47. *Id*. [↑](#footnote-ref-48)
48. *Id.* Part 531. [↑](#footnote-ref-49)
49. *Id.* §778.106; *see also* Nolan v. City of Chi., 162 F. Supp. 2d 999, 1004–05 (N.D. Ill. 2001) (upholding employer practice, under collective bargaining agreement (CBA), of delaying overtime payments until just before end of next 28-day pay period after the overtime was earned, where such timing was agreed to by the parties and was “reasonably necessary” under 29 C.F.R. §778.106). [↑](#footnote-ref-50)
50. United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 491, 14 WH Cases 765, 767 (2d Cir. 1960) (“While the FLSA does not expressly set forth a requirement of prompt payment, such a requirement is clearly established by the authorities, and is codified in interpretative regulations, 29 C.F.R. §772.2(a).”); *see also* FOH §30b04; Gordon v. Maxim Healthcare Servs., Inc., 2014 WL 3438007 (E.D. Pa. July 15, 2014) (late payment of wages is equivalent to nonpayment under FLSA). [↑](#footnote-ref-51)
51. FOH §30b04. [↑](#footnote-ref-52)
52. 322 F. App’x 746 (11th Cir. 2009). [↑](#footnote-ref-53)
53. *Id*.; *see also* Arroyave v. Rossi, 2008 WL 4605949 (11th Cir. Oct. 17, 2008) (10-day delay not unreasonable). [↑](#footnote-ref-54)
54. 1 F.3d 1537, 1 WH Cases2d 897 (9th Cir. 1993). [↑](#footnote-ref-55)
55. 1 F.3d at 1539. [↑](#footnote-ref-56)
56. *Id*. [↑](#footnote-ref-57)
57. 999 F.2d 1101, 1 WH Cases2d 872 (7th Cir. 1993). [↑](#footnote-ref-58)
58. 999 F.2d at 1107, 1 WH Cases2d at 877. [↑](#footnote-ref-59)
59. *Id*. [↑](#footnote-ref-60)
60. *Id.* The court noted that the employer could have urged their workers to save part of their weekly wages, but the only way to *compel* them to save, as the employer did here, was to pay the minimum wage promptly and defer payment of an additional sum*. Id.* at 1108. [↑](#footnote-ref-61)
61. 148 F.3d 52, 4 WH Cases2d 1089 (2d Cir. 1998). [↑](#footnote-ref-62)
62. 148 F.3d at 58. [↑](#footnote-ref-63)
63. *Id*. at 60. One member of the three-judge panel dissented, arguing that the FLSA demands prompt payment on the regular payday and that any delay, reasonable or not, violates the requirement. *Id.* at 62–63. [↑](#footnote-ref-64)
64. 29 U.S.C. §203(m). [↑](#footnote-ref-65)
65. 29 C.F.R. §531.28. [↑](#footnote-ref-66)
66. 29 U.S.C. §203(m). Although not defined in the regulations, “board” is defined by *Black’s Law Dictionary* as “[d]aily meals furnished to a guest at an inn, boardinghouse, or other lodging.” Black’s Law Dictionary (8th ed. 2004). [↑](#footnote-ref-67)
67. 29 C.F.R. §531.28. [↑](#footnote-ref-68)
68. *Id*. §§531.29–.30; Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011). [↑](#footnote-ref-69)
69. Ramirez v. Rifkin, 568 F. Supp. 2d 262 (E.D.N.Y. 2008); Estanislau v. Manchester Devs., LLC, 316 F. Supp. 2d 104 (D. Conn. 2004); Moon v. Kwon, 248 F. Supp. 2d 201 (S.D.N.Y. 2003). [↑](#footnote-ref-70)
70. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1 (Dec. 17, 2015). [↑](#footnote-ref-71)
71. Home Care Final Rule, Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013). The final rule is discussed in greater detail in Chapter 6, Other Statutory Exemptions, §III.F.2.b [Section 213(a) Exemptions From the Minimum Wage and Overtime Requirements of the FLSA; Casual-Basis Babysitters and Domestic Companionship Service Providers; Companionship Services; The 2013 Final Rule]. [↑](#footnote-ref-72)
72. Field Assistance Bull. No. 2015-1. [↑](#footnote-ref-73)
73. *Minimum Wage and Overtime Pay for Direct Care Workers: Credit towards Wages under Section 3(m) Questions and Answers,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq (last visited Mar. 6, 2020). [↑](#footnote-ref-74)
74. 29 U.S.C. §203(m). [↑](#footnote-ref-75)
75. 29 C.F.R. §531.30. [↑](#footnote-ref-76)
76. *Id*. [↑](#footnote-ref-77)
77. 1 WH Cases 289 (E.D.N.C. 1940). [↑](#footnote-ref-78)
78. Lopez v. Rodriguez, 668 F.2d 1376, 1379 n.6, 25 WH Cases 181, 183 n.6 (D.C. Cir. 1981). [↑](#footnote-ref-79)
79. FOH §30c09 (“where an employee is required to accept a meal provided by the employer as a condition of employment, the [Wage and Hour Division] will take no enforcement action, provided that the employer takes credit for no more than the actual cost incurred”); WH Op., 1997 WL 998104 (Apr. 29, 1997) (“Although §531.30 of the regulations provides that an employee’s acceptance of facilities must be ‘voluntary and uncoerced,’ such provisions have been rejected by several appellate as well as district courts with respect to meals provided to employees. Wage and Hour no longer enforces the ‘voluntary’ provision with respect to meal credits or deductions.”); U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1 (Dec. 17, 2015) (reiterating that the DOL does not enforce the voluntary acceptance rule with respect to meals). [↑](#footnote-ref-80)
80. 700 F.2d 1368, 26 WH Cases 29 (11th Cir. 1983). [↑](#footnote-ref-81)
81. 700 F.2d 1374, 26 WH Cases 33 (11th Cir. 1983). [↑](#footnote-ref-82)
82. *Davis Bros*., 700 F.2d at 1370. [↑](#footnote-ref-83)
83. *Id*. [↑](#footnote-ref-84)
84. *Id*. [↑](#footnote-ref-85)
85. *See also* Rahman v. Limani 51, LLC, 2022 BL 307580, 2022 WL 3927814, at \*3–4 (S.D.N.Y. Aug. 31, 2022) (analyzing 29 C.F.R. §531.30 and declining to give Chevron deference to the DOL on the meaning of “customarily furnished” because the DOL impermissibly shifted the focus from employer behavior to employee behavior; holding “furnished” means only “to supply,” which does not connote acceptance of what is being supplied). [↑](#footnote-ref-86)
86. 176 F.3d 912, 5 WH Cases2d 545 (6th Cir. 1999). [↑](#footnote-ref-87)
87. Donovan v. Miller Props., 711 F.2d 49, 26 WH Cases 514 (5th Cir. 1983). [↑](#footnote-ref-88)
88. 908 F.3d 1107 (8th Cir. 2018). [↑](#footnote-ref-89)
89. *Id.* at 1116–17. [↑](#footnote-ref-90)
90. 1980 WL 2097, 24 WH Cases 860 (E.D.N.Y. 1980). [↑](#footnote-ref-91)
91. *Id.* at \*5, 24 WH Cases at 864. [↑](#footnote-ref-92)
92. 446 F. Supp. 2d 1247 (N.D. Okla. 2006), *superseding* 434 F. Supp. 2d 1069 (N.D. Okla. 2006). [↑](#footnote-ref-93)
93. 668 F.2d 1376, 25 WH Cases 181 (D.C. Cir. 1981). [↑](#footnote-ref-94)
94. 668 F.2d at 1380, 25 WH Cases at 184. [↑](#footnote-ref-95)
95. *Id*. (emphasis in original). [↑](#footnote-ref-96)
96. *Id*. [↑](#footnote-ref-97)
97. *Id*. *See also* Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1186–87 (D. Nev. 2018) (following *Lopez* and finding that employees’ lodging was voluntary and uncoerced where they understood and accepted the live-in requirement when they accepted the job). [↑](#footnote-ref-98)
98. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1 (Dec. 17, 2015) (collecting cases). [↑](#footnote-ref-99)
99. *Id*. [↑](#footnote-ref-100)
100. 29 C.F.R. §531.31; *see also* Southern Pac. Co. v. Joint Council, 165 F.2d 26, 7 WH Cases 536, 537 (9th Cir. 1947); Walling v. Alaska Pac. Consol. Mining Co., 152 F.2d 812, 815, 5 WH Cases 789 (9th Cir. 1945); *see also* Balczyrak-Lichosyt v. Soniya Hotel, LLC, 2018 WL 4861393, at \*5 (E.D.N.Y. Sept. 28, 2018); Sun v. AAA Venture Capital, Inc., 2016 WL 5793198, at \*8 (E.D.N.Y. Sept. 12, 2016), *report & recommendation adopted as modified,* 2016 WL 5868579 (E.D.N.Y. Oct. 6, 2016). [↑](#footnote-ref-101)
101. 29 C.F.R. §531.31; *see also* Soler v. G & U, Inc., 768 F. Supp. 452, 463 (S.D.N.Y. 1991) (holding that employer that provided housing to migrant workers without heat, in violation of New York law, could not deduct cost of housing from workers’ wages). [↑](#footnote-ref-102)
102. Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 640 (W.D. Tex. 1999); U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1 (Dec. 17, 2015) (collecting cases). [↑](#footnote-ref-103)
103. Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1185 (D. Nev. 2018). [↑](#footnote-ref-104)
104. *Id.*; *see also* WH Op. (July 10, 1963). [↑](#footnote-ref-105)
105. 29 C.F.R. §531.32(c). [↑](#footnote-ref-106)
106. *Id*. §531.33. [↑](#footnote-ref-107)
107. Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011). [↑](#footnote-ref-108)
108. WH Op., 1975 WL 41665 (May 27, 1975) (observing that because restaurant employees typically obtained their own meals from kitchen and returned their own empty plates, only proportional cost per meal for kitchen personnel engaged in food preparation would be attributable to reasonable cost of employees’ meals, rather than entire labor cost associated with serving a meal to a customer). [↑](#footnote-ref-109)
109. 29 C.F.R. §531.3(b). [↑](#footnote-ref-110)
110. *See, e.g*.,

     *Second Circuit:* Gamero v. Koodo Sushi Corp., 272 F. Supp. 3d 481, 501–05 (S.D.N.Y 2017), *aff’d*, 2018 WL 5098817 (2d Cir. Oct. 18, 2018) (holding that defendant not entitled to meal credits where defendant did not maintain records cataloging cost of meals provided to plaintiffs); Fuk Lin Pau v. Jian Le Chen, 2015 WL 6386508, at \*2 (D. Conn. Oct. 21, 2015) (holding that defendant not entitled to credit for meals or lodging where defendant failed to produce contemporary records reflecting number and actual cost of meals provided to plaintiff and value of housing that plaintiff occupied).

     *Fourth Circuit:* Jones v. Way of Hope, Inc., 2009 WL 3756843 (D. Md. Nov. 6, 2009) (holding employer not entitled to meal credit because it failed to keep records detailing value and did not provide employee with written documentation showing amount of any credits); Brock v. Hamad, 28 WH Cases 714, 717 (E.D.N.C. 1987), *aff’d*, 867 F.2d 804, 29 WH Cases 277 (4th Cir. 1989) (requiring employer to produce credible records that demonstrate cost of meals); Frenel v. Freezeland Orchard Co., 28 WH Cases 666, 667 (E.D. Va. 1987) (same).

     *Fifth Circuit:* Dole v. Bishop, 740 F. Supp. 1221, 1227, 29 WH Cases 1410, 1414 (S.D. Miss. 1990) (holding that, without records of meal credits, employer that arbitrarily set costs of employee meals at half their retail price could not deduct cost of meals from employee wages).

     *Sixth Circuit:* Solis v. Min Fang Yang, 2009 WL 2017906, 345 F. App’x 35, 38 (6th Cir. 2009) (holding that employer could not take meal credit “because it could not produce contemporary records reflecting the number and actual cost of the meals provided to Tasty Buffet employees and the value of the housing that individual employees occupied, as required by 29 C.F.R. §516.27(a)”). [↑](#footnote-ref-111)
111. WH Op. (Aug. 5, 1942). [↑](#footnote-ref-112)
112. 20 WH Cases 167 (W.D. Ky. 1971), *aff’d*, 469 F.2d 82, 20 WH Cases 973 (6th Cir. 1972). [↑](#footnote-ref-113)
113. 20 WH Cases at 170–71; *see also* Marshall v. Intraworld Commodities Corp., 24 WH Cases 860, 864 (E.D.N.Y. 1980) (holding that where employer took advantage of uneducated foreign worker by requiring him to work long hours six to seven days a week while paying him little more than room and board, employer could not deduct cost of room and board). [↑](#footnote-ref-114)
114. 183 F.3d 468, 5 WH Cases2d 837 (6th Cir. 1999). [↑](#footnote-ref-115)
115. See §III.A.1.a. [Non-Cash Wages Under Section 203(m): “Board, Lodging or Other Facilities”; “Customarily Furnished”; “Voluntary and Uncoerced”; Meals] of this chapter. [↑](#footnote-ref-116)
116. 176 F.3d 912, 5 WH Cases2d 545 (6th Cir. 1999). [↑](#footnote-ref-117)
117. 176 F.3d at 920 (citing 29 U.S.C. §203(m)). [↑](#footnote-ref-118)
118. 29 C.F.R. §531.3(d)(1). [↑](#footnote-ref-119)
119. *Id*. *See also* Soler v. G & U, Inc., 833 F.2d 1104, 1110, 28 WH Cases 593, 597 (2d Cir. 1987) (“as a general rule the Administrator may rely on the statutory presumption accorded housing facilities under [§203(m)], but that in appropriate circumstances, as determined by the Administrator, the presumption is subject to challenge and rebuttal under the Regulation’s balancing of benefits standards”). [↑](#footnote-ref-120)
120. *See, e.g*., Marshall v. DeBord, 23 WH Cases 1188, 1192 (E.D. Okla. 1978) (concluding lodging furnished to nursing home employees was primarily for benefit of employer because employees were required to live on premises and at least one employee had to be available at all times); Bailey v. Pilots’ Ass’n, 406 F. Supp. 1302, 1309, 22 WH Cases 723, 727 (E.D. Pa. 1976) (apprentice sailor’s sleeping quarters and shore-side station provided primarily for benefit of employer because sailor was required to be on duty seven days at a time). *See also* U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2015-1, at 5–6 (Dec. 17, 2015) (noting that employer’s demands on employee may be so great or constant so as to render lodging primarily for benefit of employer). [↑](#footnote-ref-121)
121. Rocesv. Reno Hous. Auth., 300 F. Supp. 3d 1172, 1190–91 (D. Nev. 2018). [↑](#footnote-ref-122)
122. *See* Osias v. Marc, 700 F. Supp. 842, 845, 28 WH Cases 1570, 1572 (D. Md. 1988) (holding housing furnished to migrant farm workers that was “seriously substandard” could not be claimed as wage credit); Balbed v. Eden Park Guest House LLC, 2021 BL 145337,2021 WL 1545953 (D. Md. Apr. 20, 2021) (no wage credit allowed where lodging was furnished in violation of local law). [↑](#footnote-ref-123)
123. *See, e.g*., Jones v. Way of Hope, Inc., 2009 WL 3756843 (D. Md. Nov. 6, 2009) (holding employer not entitled to lodging and meal credit because it failed to keep records detailing value and did not provide employee with written documentation showing amount of any credits); Calderon v. Witvoet, 764 F. Supp. 536, 540, 30 WH Cases 536 (C.D. Ill. 1991), *aff’d in part*, 999 F.2d 1101, 1 WH Cases2d 872 (7th Cir. 1993) (denying wage credit for housing where employer of migrant farm workers made no attempt to show adequacy of housing that workers claimed was insufficient). [↑](#footnote-ref-124)
124. Shultz v. A-1 Ambulance Serv., 299 F. Supp. 197, 19 WH Cases 713 (E.D. Ark. 1970), *rev’d on other grounds sub nom*. Hodgson v. A-1 Ambulance Serv., 455 F.2d 372, 20 WH Cases 456 (8th Cir. 1970). [↑](#footnote-ref-125)
125. Soler v. G & U, Inc., 833 F.2d 1104, 1110, 28 WH Cases 593, 597 (2d Cir. 1987). [↑](#footnote-ref-126)
126. Brock v. Tony & Susan Alamo Found., 842 F.2d 1018, 28 WH Cases 897 (8th Cir. 1988). [↑](#footnote-ref-127)
127. *See* Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 640 (W.D. Tex. 1999); Marshall v. Intraworld Commodities Corp., 24 WH Cases 860, 864 (E.D.N.Y. 1980); Hodgson v. Frisch Dixie, Inc., 20 WH Cases 167, 171 (W.D. Ky. 1971), *aff’d*, 469 F.2d 82 (6th Cir. 1972). [↑](#footnote-ref-128)
128. *Third Circuit:* Bailey v. Pilots’ Ass’n, 406 F. Supp. 1302, 1309, 22 WH Cases 723, 727 (E.D. Pa. 1976) (holding that sleeping facilities furnished to apprenticed pilot aboard ship and at his shore-side station were furnished primarily for benefit of employer, because apprenticed pilot was required to be on duty seven days at a time).

     *Fifth Circuit:* Rosales v. Lore, 149 F. App’x 245 (5th Cir. 2005).

     *Tenth Circuit:* Marshall v. DeBord, 23 WH Cases 1188, 1192 (E.D. Okla. 1978) (holding employer that operated rest home for sick and aged could not include cost of lodging in computing wages because lodging was primarily furnished for employer’s benefit) (decision issued prior to revised home health care regulations at 29 C.F.R. §552.6).

     *Eleventh Circuit:* Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011) (holding that provision of housing primarily benefited employer because federal law required employer to provide housing free of charge). [↑](#footnote-ref-129)
129. 29 C.F.R. §531.32(a). [↑](#footnote-ref-130)
130. Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247, 11 WH Cases2d 921 (N.D. Okla. 2006). [↑](#footnote-ref-131)
131. 29 C.F.R. §531.32(a). [↑](#footnote-ref-132)
132. *Id*. §531.3(d)(1). [↑](#footnote-ref-133)
133. Smith v. Bonds, 1993 WL 556781, at \*4, 1 WH Cases2d 1198, 1202 (E.D.N.C. 1993) (finding employer who failed to present any records substantiating deductions taken for employee purchases of beer and cigarettes at company to be in violation of §206(a) of FLSA). [↑](#footnote-ref-134)
134. 29 C.F.R. §531.32(a). [↑](#footnote-ref-135)
135. Fields v. Luther, 28 WH Cases 1062, 1074 (D. Md. 1988) (disallowing $10 per week deduction from employees’ wages for gas and electric services). [↑](#footnote-ref-136)
136. Soler v. G & U Inc., 768 F. Supp. 452, 1 WH Cases2d 180, 188 (S.D.N.Y. 1991). [↑](#footnote-ref-137)
137. 29 C.F.R. §531.32(a). [↑](#footnote-ref-138)
138. 404 F. Supp. 3d 364, 392 (D. Mass. 2019). [↑](#footnote-ref-139)
139. *Id*. [↑](#footnote-ref-140)
140. 29 C.F.R. §531.32(a). [↑](#footnote-ref-141)
141. WH Op., 1971 WL 33057 (Feb. 4, 1971). [↑](#footnote-ref-142)
142. For a discussion of employer deductions for clothing, including uniforms, see §VI.G [Deductions From Wages; Uniforms and Uniform Cleaning] of this chapter. [↑](#footnote-ref-143)
143. 29 C.F.R. §531.32(c). [↑](#footnote-ref-144)
144. 29 C.F.R. §531.3(c) explains how to make a determination of “reasonable cost” where an employer is not already subject to a determination by the Administrator. [↑](#footnote-ref-145)
145. *Id*. §531.33(a). [↑](#footnote-ref-146)
146. *See*

     *Second Circuit*: Estanislau v. Manchester Devs., LLC, 316 F. Supp. 2d 104, 108 (D. Conn. 2004) (noting that while employer may seek determination from Administrator, it was not required to do so to obtain a credit against overtime wages).

     *Fifth Circuit*: Worsham v. B.G. Prop. Mgmt., LLC, 2020 BL 450325, 2020 WL 7353906, at \*1 (S.D. Tex. Sept. 4, 2020) (because defendant did not request determination from Administrator or Secretary of Labor, reasonable cost analysis described in 29 C.F.R. §531.3 was required to be followed, and defendant’s failure to maintain records precluded it from taking credit for rental rooms).

     *Eighth Circuit*: Spears v. Bay Inn & Suites Foley, LLC, 2022 BL 261089, 2022 WL 2980022 (S.D. Ala. July 27, 2022) (refusing defendants’ attempt to rely on their own determination of costs of lodging for other employees after finding employer failed to obtain a proper determination of cost from WHD).

     *Ninth Circuit*: Roces v. Reno Hous. Auth., 300 F. Supp. 3d 1172 (D. Nev. 2018) (statute provides that Administrator is to make determinations of reasonable cost of furnishing employees with board, lodging, or other facilities; however**,** Administrator permits employers, subject to strict guidelines, to make their own determinations of reasonable cost where, as here, there has been no prior determination by Administrator).

     *Eleventh Circuit*: Chavez v. Arancedo, 2018 WL 4610564 (S.D. Fla. Sept. 24, 2018) (finding plaintiffs’ argument that employer was not entitled to take meal or lodging credit under §203(m) because defendant never contacted DOL to be invalid, but granted plaintiff’s partial summary judgment motion that defendant was not entitled to cost credit because defendant failed to provide necessary records for a cost credit as required under FLSA regulations 29 C.F.R. §§516.27(a) and 531.3(c)). [↑](#footnote-ref-147)
147. 29 C.F.R. §531.3(a); *Estanislau*, 316 F. Supp. 2d at 109 (rejecting employer’s claim that “reasonable cost” determination should be based on fair market rent of plaintiff’s apartment, noting that amount could not include profit, and concluding that employer could only claim actual mortgage and other costs it paid for apartment). [↑](#footnote-ref-148)
148. 29 C.F.R. §531.3(b). Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities, they will normally be deemed “affiliated persons” within the meaning of the regulations: (1) a spouse, child, parent, or other close relative of the employer; (2) a partner, officer, or employee in the employer company or firm; (3) a parent, subsidiary, or otherwise closely connected corporation; and (4) an agent of the employer. *Id*. §§531.33(a), (b). [↑](#footnote-ref-149)
149. *Id*. §531.3(d)(1). [↑](#footnote-ref-150)
150. *Id.* §531.3(c). [↑](#footnote-ref-151)
151. *Id*. §531.4(a). [↑](#footnote-ref-152)
152. *Id.* §531.4(b). [↑](#footnote-ref-153)
153. FOH §30c05c. [↑](#footnote-ref-154)
154. 29 U.S.C. §203(m). [↑](#footnote-ref-155)
155. 29 C.F.R. §531.5(a). [↑](#footnote-ref-156)
156. *Id*. §531.5(b). [↑](#footnote-ref-157)
157. 29 U.S.C. §203(m); 29 C.F.R. §531.6. [↑](#footnote-ref-158)
158. 29 C.F.R. §531.6(b). [↑](#footnote-ref-159)
159. *Id*. §531.6(c). [↑](#footnote-ref-160)
160. FOH §30d00. [↑](#footnote-ref-161)
161. 29 U.S.C. §203(m). [↑](#footnote-ref-162)
162. FOH §30d00(a). [↑](#footnote-ref-163)
163. *Id.* [↑](#footnote-ref-164)
164. 29 U.S.C. §203(t). [↑](#footnote-ref-165)
165. *First Circuit:* Perez v. Lorraine Enters., Inc., 769 F.3d 23, 27 (1st Cir. 2014); Johnson v. VCG Holding Corp., 845 F. Supp. 2d 353, 376 (D. Me. 2012).

     *Fifth Circuit:* Montano v. Montrose Rest. Assocs., Inc., 800 F.3d 186, 189 (5th Cir. 2015); Barcelona v. Tiffany English Pub., Inc., 597 F.2d 464, 467 (5th Cir. 1979); Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714, 724 (W.D. Tex. 2010).

     *Sixth Circuit*: Myer v. Cooper Celler Corp., 192 F.3d 546, 550 n.4 (6th Cir. 1999).

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872, 882 (8th Cir. 2011). [↑](#footnote-ref-166)
166. *First Circuit:* Martin v. Tango’s Rest., 969 F.2d 1319 (1st Cir. 1992).

     *Third Circuit:* Reich v. Chez Roberts, Inc., 28 F.3d 401, 403 (3d Cir. 1994).

     *Fifth Circuit:* Gustavos v. Cazos, Inc., 774 F. Supp. 2d 856 (S.D. Tex. 2011). [↑](#footnote-ref-167)
167. *See* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). The DOL provides a chart for tip credit state laws, which can be found at https://www.dol.gov/agencies/whd/state/minimum-wage/tipped (last visited Jan. 1, 2020). [↑](#footnote-ref-168)
168. Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348 (Mar. 23, 2018). [↑](#footnote-ref-169)
169. 315 U.S. 386, 2 WH Cases 17 (1942). [↑](#footnote-ref-170)
170. Bodie v. City of Columbia, 934 F.2d 561, 564 n.5 (4th Cir. 1991) (quoting Williams v. Jacksonville Terminal Co., 315 U.S. 386, 398 (1942)) (involving question whether employee had agreed to exclusion of sleep time from hours worked). [↑](#footnote-ref-171)
171. Pub. L. No. 89-601, §101, 80 Stat. 830 (1966) (codified as amended at 29 U.S.C. §203(m)). [↑](#footnote-ref-172)
172. *Id.* [↑](#footnote-ref-173)
173. *U.S. Supreme Court:* *Jacksonville Terminal,* 315 U.S. at 407.

     *Fourth Circuit:* Usery v. Emersons Ltd., 1976 WL 1668, at \*3 (E.D. Va. Nov. 23, 1976).

     *Fifth Circuit:* Hayden v. Bowen, 404 F.2d 682, 686 (5th Cir. 1968) (same); Hodgson v. Bern’s Steakhouse, 1971 WL 843, at \*9–10 (M.D. Fla. Oct. 1, 1971).

     *DOL Opinion Letters:* WH Op., 1973 WL 36857 (Dec. 26, 1973). [↑](#footnote-ref-174)
174. *See* WH Op., 1973 WL 36857 (Dec. 26, 1973); *Hodgson,* 1971 WL 843, at \*2 (holding agreement where waiters accepted tips as wages under the Act, and employer agreed to make up difference if any waiters did not receive statutory minimum wage in tips, was permissible, explaining that “[n]either Section 3(m) nor Section 3(t) impose the sole or exclusive method by which employers who employ persons who receive tips in the course of their employment must be compensated”); Winans v. W.A.S., Inc., 772 P.2d 1001, 1008 (Wash. 1989). [↑](#footnote-ref-175)
175. *See* 32 Fed Reg. 13,575 (Sept. 28, 1967). [↑](#footnote-ref-176)
176. *See* H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2855; *see also* Richard v. Marriott Corp., 549 F.2d 303, 304 (4th Cir. 1977); *Usery*, 1976 WL 1668, at \*4; Winans v. W.A.S., Inc., 752 P.2d 503, 507–09 (Wash. Ct. App. 1988), *aff’d*, 772 P.2d 1001 (Wash. 1989). [↑](#footnote-ref-177)
177. *See* WH Op., 1975 WL 40945 (Apr. 30, 1975). [↑](#footnote-ref-178)
178. *Id*.; Doty v. Elias, 733 F.2d 720, 724 (10th Cir. 1984) (requiring employee agreement for employer to retain tips and pay them as wages to satisfy minimum wage requirement). [↑](#footnote-ref-179)
179. 20 U.S.C. §203(m); WH Op., 1975 WL 40945 (Apr. 30, 1975); WH Op., 1975 WL 30945 (Apr. 30, 1975). [↑](#footnote-ref-180)
180. *See* WH Op., 1975 WL 40934 (Feb. 18, 1975); *see also* WH Op., 1975 WL 30945 (Apr. 30, 1975) (“those parts of our bulletin have been superseded by Section 3(m) as modified in 1974”). [↑](#footnote-ref-181)
181. *See*

     *Fourth Circuit:* *Richard,* 549 F.2d at 304; Usery v. Emersons Ltd., 1976 WL 1668, at \*4 (E.D. Va. Nov. 23, 1976).

     *Sixth Circuit:* Marshall v. Krystal Co., 467 F. Supp. 9, 13 (E.D. Tenn. 1978).

     *Ninth Circuit:* *Winans,* 772 P.2d at 1008.

     *Tenth Circuit:* *Doty,* 733 F.2d at 724. [↑](#footnote-ref-182)
182. $2.13 is equivalent to 50% of the then-applicable minimum wage of $4.25/hour. Despite subsequent increases in the minimum wage since 1996, the required tip wage has not been increased. [↑](#footnote-ref-183)
183. Pub. L. No. 104-188 (1996) (codified as amended at 29 U.S.C. §203(m)). The reader is reminded to check state laws to determine if tip credits are permitted. [↑](#footnote-ref-184)
184. 73 Fed. Reg. 43,654 (July 28, 2008). [↑](#footnote-ref-185)
185. The NPRM also included proposed changes to the following WH regulations: 29 C.F.R. §§4, 778, 779, 780, 785, 786, and 790. 29 C.F.R. §§531 and 533. [↑](#footnote-ref-186)
186. 73 Fed. Reg. at 43,654. [↑](#footnote-ref-187)
187. 816 F.3d 1080, 1085 (9th Cir. 2016). [↑](#footnote-ref-188)
188. *Id. See also* 76 Fed. Reg. at 18,840–42. [↑](#footnote-ref-189)
189. 76 Fed. Reg. at 18,840. [↑](#footnote-ref-190)
190. 29 C.F.R.§531.52. [↑](#footnote-ref-191)
191. 816 F.3d 1080 (9th Cir.), *reh’g en banc denied*, 2016 WL 4608148 (9th Cir. Sept. 6, 2016), *petition for cert*. *filed sub nom*. Cesarz v. Wynn Las Vegas, No. 16-163 (U.S. Aug. 1, 2016) (consolidated case). [↑](#footnote-ref-192)
192. 596 F.3d 577, 583 (9th Cir. 2010) (holding tip pooling arrangement did not violate §203(m) because statute is silent as to employers who do not take a tip credit). [↑](#footnote-ref-193)
193. 816 F.3d at 1086–89. [↑](#footnote-ref-194)
194. *Id*. (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)); see Chapter 2, Operations and Functions of the Department of Labor, §III.B [Judicial Deference to Agency Actions Taken by the Department of Labor’s Wage and Hour Division; *Chevron* Deference]. [↑](#footnote-ref-195)
195. 816 F.3d at 1086–90; *see also* Allison v. Dolich, 2016 WL 5539587 (D. Or. Sept. 28, 2016) (granting summary judgment for plaintiffs, following *Oregon Restaurant & Lodging Ass’n v*. *Perez,* 816 F.3d 1080 (9th Cir. 2016), and finding that plaintiffs’ tip contributions to invalid tip pool caused plaintiff’s effective hourly rate to go below federal minimum wage for at least one payroll period). [↑](#footnote-ref-196)
196. 795 F.3d 442 (4th Cir. 2015). [↑](#footnote-ref-197)
197. *Id*.at 448 (citation omitted). [↑](#footnote-ref-198)
198. *E*.*g*.,

     *Second Circuit:* Trinidad v. Pret a Manger (USA) Ltd., 2013 WL 3490815 (S.D.N.Y. July 11, 2013).

     *Fourth Circuit:* Mould v. NJG Food Serv., Inc., 2014 WL 2768635 (D. Md. June 17, 2014).

     *Tenth Circuit:* Marlow v. New Food Guy, Inc., 861 F.3d 1157, 1162 (10th Cir. 2017); Stephenson v. All Resort Coach, Inc., 2013 WL 4519781, at \*8 (D. Utah Aug. 26, 2013).

     *Eleventh Circuit:* Aguila v. Corporate Caterers II, Inc., 199 F. Supp. 3d 1358, 1359–61 (S.D. Fla. 2016); Malivuk v. Ameripark, LLC, 2016 WL 3999878, at \*2–5 (N.D. Ga. July 26, 2016). [↑](#footnote-ref-199)
199. Pub. L. No. 115-141, 138 Stat. 348 (2018). [↑](#footnote-ref-200)
200. *See* 29 U.S.C. §203(m)(2)(B). The CAA also amended §216(b) to provide that, in the event that an employer violated §203(m)(2)(B), it will be liable to the employee or employees affected “in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages.” [↑](#footnote-ref-201)
201. Williams v. Saki Hibachi Sushi & Bar, Inc., 574 F. Supp. 3d 395, 407–08 (N.D. Tex. 2021) (refusing to apply amendment retroactively); Collins v. Treasure Bay LLC, 2019 WL 7875053, at \*2 (S.D. Miss. Aug. 5, 2019) (“There is, however, no indication that the amendment applies retroactively.”); Samuels v. S&J Crazy Lizards Entm’t, LLC, 2018 WL 5851286, at \*4 n.1 (S.D. Fla. Aug. 3, 2018) (declining to give tip credit amendment retroactive effect). [↑](#footnote-ref-202)
202. 29 U.S.C. §203(m)(2). [↑](#footnote-ref-203)
203. *Id.* §203(t). [↑](#footnote-ref-204)
204. 29 C.F.R. §531.51. [↑](#footnote-ref-205)
205. *See id.* §§531.52, .53; WH Op., 1973 WL 36857 (Dec. 26, 1973); WH Op., 1975 WL 40945 (Apr. 30, 1975); *see also* Bingham v. Airport Limousine Serv., 314 F. Supp. 565, 572, 19 WH Cases 612, 617 (W.D. Ark. 1970). [↑](#footnote-ref-206)
206. 29 C.F.R. §531.52. [↑](#footnote-ref-207)
207. 845 F. Supp. 2d 353 (D. Me. 2012). [↑](#footnote-ref-208)
208. *Id.* at 378–80. [↑](#footnote-ref-209)
209. *Id.* at 361–62. [↑](#footnote-ref-210)
210. *Id.* at 378–79. [↑](#footnote-ref-211)
211. *Id.* at 379–90. [↑](#footnote-ref-212)
212. 29 C.F.R. §531.52. *See also* FOH §30d00(e)(2). [↑](#footnote-ref-213)
213. 29 C.F.R. §531.52. *See also* Barcellona v. Tiffany English Pub, 597 F.2d 464, 466–67, 24 WH Cases 201, 202 (5th Cir. 1979); WH Op., 1978 WL 51435 (Nov. 22, 1978). [↑](#footnote-ref-214)
214. *See* 29 C.F.R. §531.53. *See also* Ventura v. Bebo Foods, Inc., 738 F. Supp. 2d 8 (D.D.C. 2010) (employer who withheld accrued credit card tips and owed several employees thousands of dollars in outstanding credit card tips could not claim tip credit). [↑](#footnote-ref-215)
215. 29 C.F.R. §531.53. [↑](#footnote-ref-216)
216. 29 U.S.C. §203(m). [↑](#footnote-ref-217)
217. FOH §§30d00(e)(3), 30d01(b). *See also*

     *Second Circuit*: Inclan v. New York Hosp. Grp., Inc., 95 F. Supp. 3d 490, 498 (S.D.N.Y. 2015).

     *Third Circuit*: Hall v. Adelphia Three Corp., 2023 BL 35852, 2023 WL 1927386 (D.N.J. Jan. 31, 2023) (rejecting employer’s argument that no employee wages were below the requisite minimum wage as irrelevant considering employer’s failure to provide tip credit notice in advance of taking the credit); Reich v. Chez Robert, Inc., 28 F.3d 401, 403 (3d Cir. 1994).

     *Fifth Circuit*: Ettorre v. Russos Westheimer, Inc., 2022 BL 94195, 2022 WL 822181, at \*3 (5th Cir. Mar. 18, 2022); *Barcellona,* 597 F.2d at 467–68.

     *Sixth Circuit*: Bonham v. Copper Cellar Corp., 476 F. Supp. 98, 101–02 (E.D. Tenn. 1979). [↑](#footnote-ref-218)
218. 29 C.F.R. §531.59(b). [↑](#footnote-ref-219)
219. *Id*.§531.54. [↑](#footnote-ref-220)
220. *See id.* [↑](#footnote-ref-221)
221. Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348 (Mar. 23, 2018) (codified as amended at 29 U.S.C. 203(m)(2)(B)). [↑](#footnote-ref-222)
222. *Second Circuit:* Hwangbo v. Kimganae, 2023 BL 106591, 2023 WL 2710669, at \*10 (E.D.N.Y. Mar. 30, 2023) (finding improper notice where notices were in English, when employees’ primary language was Korean); Orellana v. One If By Land Rest. LLC, 2020 BL 370205, 2020 WL 5768433, at \*11 (S.D.N.Y. Sept.27, 2020) (granting summary judgment to plaintiffs where “Notice of Pay” forms provided by defendants to employees at start of their employment were incomplete and, among other things, did not include requisite provisions informing plaintiffs of FLSA sections permitting tip credits and there was no evidence that notices were provided in plaintiffs’ primary spoken language, which was Spanish.).

     *Third Circuit*: Sec’y U.S. Dep’t of Labor v. Mosluoglu, Inc., 2023 BL 322711, 2023 WL 5972044, at \*3 (3d Cir. 2023) (failure to inform workers of tip credit upon hire not ameliorated by passage of time or poster in restaurant kitchen containing minimum wage rates).

     *Fifth Circuit*: Ettorre v. Russos Westheimer, Inc., 2022 BL 94195, 2022 WL 822181, at \*3 (5th Cir. Mar. 18, 2022) (summary judgment in favor of plaintiffs affirmed where no evidence existed that defendant provided tip credit notice). [↑](#footnote-ref-223)
223. Wintjen v. Denny’s, Inc*.,* 2021 BL 67118, at \*6–7, 2021 WL 734230 (W.D. Pa. Feb. 25, 2021) (partial summary judgment granted to plaintiffs where it was undisputed that defendant failed to establish that it complied with fifth factor of 29 C.F.R. §531.59(b): “that the tip credit shall not apply to any employee who has not been informed of the requirements of this section”). [↑](#footnote-ref-224)
224. *First Circuit:* Martin v. Tango’s Rest., 969 F.2d 1319, 1322 (1st Cir. 1992).

     *Third Circuit:* *Chez Robert,* 28 F.3d at 403.

     *Fifth Circuit:* Gustavos v. Cazos, Inc., 774 F. Supp. 2d 856, 858 (S.D. Tex. 2011); Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714 (W.D. Tex. 2010); Bernal v. Vankar Enters., Inc., 579 F. Supp. 2d 804, 809 (W.D. Tex. 2008).

     *Sixth Circuit:* Solis v. Yang,345 F. App’x 35, 38 (6th Cir. 2009); Kilgore v. Outback Steakhouse of Fla., Inc., 160 F.3d 294, 298 (6th Cir. 1998).

     *Seventh Circuit:* Roberts v. Apple Sauce, Inc., 945 F. Supp. 2d 995, 1002 (N.D. Ind. 2013) (applying rule after issuance of 2011 regulations).

     *Cf.* Perez v. Lorraine Enters., Inc., 769 F.3d 23 (1st Cir. 2014) (employer has affirmative duty to provide notice and may not rely on employees’ constructive knowledge based on pay stubs or practice of “cashing out”). [↑](#footnote-ref-225)
225. 160 F.3d at 299–300. [↑](#footnote-ref-226)
226. *Id*. at 299. The written tip policy stated the following: “I understand that the practice of sharing tips is approved by Outback Steakhouse. Further, I understand that tips will be used as a credit against minimum wage as permitted by state and/or federal law.” *Id.* The court granted summary judgment in favor of Outback as to plaintiff Kilgore’s claim. *Id.* at 300. However, the court denied summary judgment as to three other employees’ claims because the court found that an issue of fact existed as to whether they received the notice Kilgore received. *Id.* [↑](#footnote-ref-227)
227. *Id.* at 298–99. [↑](#footnote-ref-228)
228. *First Circuit:* *Tango’s Restaurant*, 969 F.2d at 1322 (notice requirement not met where there was no evidence that “the minimum wage or tip credit” was ever mentioned to waiters).

     *Fifth Circuit:* *Gustavos*, 774 F. Supp. 2d at 858–59 (granting summary judgment to former nightclub servers and bartenders on employer’s “tip credit” defense, noting that while employer need not explain tip credit in detail, it must at a minimum inform employees that it intends to count tips toward satisfying minimum wage); *Pedigo*, 722 F. Supp. 2d at 714 (request by employees on job application for “$2.13 per hour plus tips” was not adequate notice; at best, it showed employees were familiar with common restaurant industry practice).

     *Sixth Circuit:* *Yang*, 345 F. App’x at 38 (“Although in this case Tasty Buffet informed its employees that their pay would consist almost exclusively of tips, it did not discuss the minimum-wage obligation or explain that it was applying the tip credit against the obligation. As a result, Tasty Buffet failed to meet the statutory notice required for the tip credit.”).

     *Seventh Circuit*: Hussein v. Jun-Yan, LLC, 502 F. Supp. 3d 1366 (E.D. Wis. 2020) (granting summary judgment to employees where defendant failed to provide evidence that they provided notice to tipped employees orally or in writing). [↑](#footnote-ref-229)
229. Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011) (finding display of DOL poster insufficient unless it clearly informed employees that employer would be applying tips toward its minimum wage obligation); Bonham v. Copper Cellar Corp., 476 F. Supp. 98, 101 n.6 (E.D. Tenn. 1979) (vague conversations about minimum wage plus single poster with “some or all of the relevant information” does not establish notice requirements of §203(m)). [↑](#footnote-ref-230)
230. Puerto v. Moreno*,* 2021 BL 79151,2021 WL 849095 (S.D. Fla. Mar. 5, 2021) (explaining that sufficient notice may come from providing employees with written materials explaining applicable tip credit policy, prominently displaying DOL poster explaining tip credit policy, or verbally explaining tip credit policy to employees); Pellon v. Business Representation Int’l, Inc., 528 F. Supp. 2d 1306 (S.D. Fla. 2007) (verbal notice to new hires that they would be paid $2.13 per hour, plus tips, and conspicuously posting two DOL posters, satisfied requirement to inform employees of requirements of §203(m)); Rudy v. Consolidated Rest. Cos., 2010 WL 3565418, at \*9 (N.D. Tex. 2010) (explaining that employee would make $2.15 per hour plus tips from participating in tip pool, along with posting of DOL notices, satisfied notice requirement). [↑](#footnote-ref-231)
231. Perez v. Lorraine Enters., Inc., 769 F.3d 23, 29–31 (1st Cir. 2014). [↑](#footnote-ref-232)
232. 29 C.F.R. §531.52. [↑](#footnote-ref-233)
233. *Id.* §531.55(b). [↑](#footnote-ref-234)
234. *Id.* §531.55(a); WH Op., 1975 WL 40930 (Jan. 15, 1975); WH Op., 1975 WL 40934 (Feb. 18, 1975); *Pellon,* 528 F. Supp. at 1315–16 ($2 baggage fee imposed by American Airlines was not tip), *aff’d*, 291 F. App’x 310 (11th Cir. 2008). [↑](#footnote-ref-235)
235. 980 F.3d 1027 (4th Cir. 2020). [↑](#footnote-ref-236)
236. *Id.* at 1038. [↑](#footnote-ref-237)
237. *Id.* [↑](#footnote-ref-238)
238. 28 F.4th 1180 (11th Cir. 2022). [↑](#footnote-ref-239)
239. *Id*. at 1186. *See also* Nelson v. MLB Hotel Manager, LLC, 2022 BL 242208, 2022 WL 2733720 (11th Cir. July 13, 2022) (holding mandatory service charge was not a tip because it was not discretionary to the customer). [↑](#footnote-ref-240)
240. 29 C.F.R. §531.55(b). *See also* Nascembeni v. Quayside Place Partners, 2010 WL 2351467 (S.D. Fla. June 11, 2010) (no minimum wage violation for banquet server because percentage of mandatory, nondiscretionary service charge (considered commission rather than tip), when added to hourly wage, exceeded minimum wage). [↑](#footnote-ref-241)
241. 29 C.F.R. §531.55(a). [↑](#footnote-ref-242)
242. *Id.;* Mechmet v. Four Seasons Hotels, 639 F. Supp. 330, 338, 27 WH Cases 1313, 1319–20 (N.D. Ill. 1986), *aff’d*, 825 F.2d 1173, 28 WH Cases 441 (7th Cir. 1987). [↑](#footnote-ref-243)
243. 354 F. Supp. 3d 1362 (N.D. Ga. 2019). [↑](#footnote-ref-244)
244. *Id.* at 1383. *See also* Henderson v. 1400 Northside Drive, Inc., 110 F. Supp. 3d 1318, 1322–23 (N.D. Ga. 2015) (holding that payments made to plaintiff male strippers by customers were “tips” and not “service charges,” as argued by defendant, and could not be used to offset defendant’s FLSA liability because most payments were made by customers, were not recorded in defendant’s gross receipts, and “service charges” must be distributed by employer to count toward wages). [↑](#footnote-ref-245)
245. WH Op. FLSA2005-31, 2005 WL 3308602 (Sept. 2, 2005). [↑](#footnote-ref-246)
246. *Id*. at 1. [↑](#footnote-ref-247)
247. *Id.* at 2. *See also* Pellon v. Business Representation Int’l, Inc., 528 F. Supp. 2d 1306, 1315–16 (S.D. Fla. 2007) ($2 baggage fee imposed by employer was not a tip, but additional nonimposed tips may still be credited to minimum wage). [↑](#footnote-ref-248)
248. *See* 29 U.S.C. §203(t) (as amended in 1977). In 1977, the FLSA was amended to increase the monthly tip amount in this provision from $20 to $30. *See* Pub. L. No. 95-151, §3a, 91 Stat. 1249 (1977). The DOL has not issued new regulations to reflect the 1977 amendment to the FLSA. *See* 29 C.F.R. §531.56. [↑](#footnote-ref-249)
249. *See* 29 C.F.R. §531.56(a). [↑](#footnote-ref-250)
250. *Id.* [↑](#footnote-ref-251)
251. *See* *id*. §521.56(b). [↑](#footnote-ref-252)
252. *Id.* §516.28. [↑](#footnote-ref-253)
253. *See* Bingham v. Airport Limousine Serv., 314 F. Supp. 565, 572, 19 WH Cases 612, 617 (W.D. Ark. 1970) (deeming limousine drivers who received tips from passengers not “tipped employees” because neither employer nor employee kept records of tips received and “it would therefore be purely speculative to determine” that employees received required minimum monthly tip amount). [↑](#footnote-ref-254)
254. 29 C.F.R. §531.57. [↑](#footnote-ref-255)
255. *Id*. [↑](#footnote-ref-256)
256. *Id*. [↑](#footnote-ref-257)
257. *Id*. [↑](#footnote-ref-258)
258. *Id*. [↑](#footnote-ref-259)
259. 29 C.F.R. §531.56(c). [↑](#footnote-ref-260)
260. *Id.* [↑](#footnote-ref-261)
261. *Id*. §531.58. [↑](#footnote-ref-262)
262. *Id.* [↑](#footnote-ref-263)
263. 29 C.F.R. §531.56(e). [↑](#footnote-ref-264)
264. *Id*.; Brown v. Metro Corral Partners, LLC, 2017 BL 536160, 2017 WL 10752792, at \*4–5 (N.D. Ga. Sept. 21, 2017), *report and recommendation adopted*, 2018 BL 526282, 2018 WL 7079994 (N.D. Ga. Mar. 8, 2018). [↑](#footnote-ref-265)
265. Rafferty v. Denny’s, Inc., 13 F.4th 1166, 1172–78 (11th Cir. 2021) (detailing changes to DOL’s guidance relating to tip credit and persons employed in dual jobs). [↑](#footnote-ref-266)
266. FOH §30d00(f); *Metro Corral Partners,* 2017 WL 10752792, at \*4–5. [↑](#footnote-ref-267)
267. *Second Circuit:* Flood v. Carlson Rests., Inc., 94 F. Supp. 3d 572 (S.D.N.Y. 2015) (collecting cases and accepting the 20% rule); Thomas v. Apple-Metro, Inc., 2015 WL 505384, at \*4 n.1 (S.D.N.Y. Feb. 5, 2015) (recognizing 20% rule); Hart v. Crab Addison, Inc., 2014 WL 5465480, at \*5 (W.D.N.Y. Oct. 28, 2014) (applying 20% rule in denying motion to dismiss); Menendez v. International Food House, Inc., 2014 WL 4276418, at \*3–5 (S.D.N.Y. Aug. 28, 2014) (applying 20% rule in bench trial); Chhab v. Darden Rest., Inc., 2013 WL 5308004, at \*3 (S.D.N.Y. Sept. 20, 2013) (applying 20% rule in granting in part motion for conditional certification).

     *Third Circuit:* McLamb v. High 5 Hosp., 197 F. Supp. 3d 656, 663 (D. Del. 2016) (recognizing 20% rule and finding it to be reasonable interpretation of dual-jobs regulation).

     *Fourth Circuit:* Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729 (D.S.C. 2015) (applying 20% rule).

     *Seventh Circuit:* Schaefer v. Walker Bros. Enters., Inc., 2014 WL 7375565, at \*3 (N.D. Ill. Dec. 17, 2014) (explaining that courts give deference to 20% rule in FOH), *aff’d*, 829 F.3d 551 (7th Cir. 2016).

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872 (8th Cir. 2011) (deferring to DOL’s 20% rule).

     *Ninth Circuit:* Marsh v. J. Alexander’s LLC, 905 F.3d 610 (9th Cir. 2018) (en banc) (applying *Auer* deference and upholding DOL’s 20% related duties benchmark).

     *Eleventh Circuit:* Ide v. Neighborhood Rest. Partners, LLC, 32 F. Supp. 3d 1285, 1293 (N.D. Ga. 2014) (citing *Fast* and applying 20% rule in analyzing motion for conditional certification); Schamis v. Josef’s Table, LLC, 2014 WL 1463494, at \*4 (S.D. Fla. Apr. 15, 2014) (applying 20% rule in deciding motion to dismiss).

     *See also* Romero v. Top-Tier Colo. LLC, 849 F.3d 1281, 1284 (10th Cir. 2017) (citing *Fast* and FOH provision and recognizing 20% rule in reversing district court’s grant of motion to dismiss); Driver v. AppleIllinois, LLC, 739 F.3d 1073, 1075 (7th Cir. 2014) (noting 20% rule in order on motion for leave to file interlocutory appeal); see Chapter 2, Operations and Functions of the Department of Labor, §III.C.1 [Judicial Deference to Agency Actions Taken by the Department of Labor’s Wage and Hour Division; *Auer* Deference and the *Kisor* Clarification; *Auer* Deference]. [↑](#footnote-ref-268)
268. Chavez v. T&B Mgmt., LLC, 2017 WL 2275013, at \*3–11 (M.D.N.C. May 24, 2017) (dismissing dual-jobs claim that relied on 20% rule because court found that 20% rule in FOH and DOL fact sheet not entitled to *Auer* deference) (citing Auer v. Robbins, 519 U.S. 452 (1997)); Pellon v. Business Representation Int’l, Inc., 528 F. Supp. 2d 1306, 1310 (S.D. Fla. 2007) (criticizing 20% rule because “a determination of whether 20% (or any other amount) of a skycap’s time is spent on non-tipped duties is infeasible,” but stating that such determination is unnecessary based on facts presented), *aff’d*, 291 F. App’x 310 (11th Cir. 2008). [↑](#footnote-ref-269)
269. 502 F. Supp. 2d 996 (W.D. Mo. 2007), *aff’d,* 638 F.3d 872 (8th Cir. 2011). [↑](#footnote-ref-270)
270. 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff’d,* 291 Fed. App’x 310 (11th Cir. 2008). [↑](#footnote-ref-271)
271. 528 F. Supp. 2d at 1314. *See also*

     *Third Circuit*: McLamb v. High 5 Hospitality, 197 F. Supp. 3d 656 (D. Del. 2016) (holding that plaintiff restaurant server pled sufficient facts to support dual-jobs claim by alleging that she swept parking lot, dusted, and opened and closed restaurant).

     *Sixth Circuit*: Harrison v. Rockne’s Inc., 274 F. Supp. 3d 706, 713 (N.D. Ohio 2017) (denying defendant’s summary judgment motion; servers spent more than 20% of time taking out trash, scrubbing walls, sweeping floors, cleaning booths, mopping, washing dishes, breaking down and cleaning expo line, and cleaning and restocking restrooms).

     *Seventh Circuit*: Schaefer v. Walker Bros. Enters., Inc., 829 F.3d 551 (7th Cir. 2016) (affirming summary judgment for employer and holding that restaurant servers were not employed in “dual job”; finding some duties (washing fruit and helping to prepare food and beverage items) were similar to defined “related duties” outlined in FOH, whereas other tasks (wiping down burners and woodwork and dusting) might not be related to tipped occupation but time spent on those non-tipped tasks was negligible); Knox v. Jones Grp., 201 F. Supp. 3d 951 (S.D. Ind. 2016) (holding that plaintiffs’ complaint alleging that they spent 50% of their time as servers on non-tipped work and 35–40% of their time as bartenders on non-tipped work stated dual-jobs claim); Soto v. Wings ’R Us Romeoville, Inc., 2016 WL 4701444 (N.D. Ill. Sept. 8, 2016) (servers stated dual-jobs claim where they alleged that they regularly performed “tasks unrelated to their tipped profession including cleaning bathrooms, dishwashing, general restaurant cleaning, and trash removal”).

     *Eighth Circuit*: Esry v. P.F. Chang’s Bistro, Inc., 2018 WL 2138533 (E.D. Ark. May 9, 2018) (allegation that more than 20% of time spent on non-tip-producing duties, such as opening and closing restaurant, stated a dual job claim); Fast v. Applebee’s Int’l, Inc., 2007 WL 1309680 (W.D. Mo. May 3, 2007) (denying employer’s motion for summary judgment on restaurant employee’s minimum wage claim where employee worked in both tipped and non-tipped positions because determination of which duties related to his tip-producing occupation was question of fact), *aff’d*, 638 F.3d 872 (8th Cir. 2011). [↑](#footnote-ref-272)
272. 29 C.F.R. §531.56(e); Driver v. AppleIllinois, LLC,739 F.3d 1073, 1075 (7th Cir. 2014); Fast v. Applebee’s Int’l, Inc., 638 F.3d 872, 876–77, 880–81 (8th Cir. 2011). [↑](#footnote-ref-273)
273. Kilgore v. Outback Steakhouse of Fla., Inc.,160 F.3d 294, 301–02 (6th Cir. 1998). [↑](#footnote-ref-274)
274. *Fast,* 638 F.3d at 877. [↑](#footnote-ref-275)
275. See the discussion earlier in this subsection. [↑](#footnote-ref-276)
276. *See, e.g.,*

     *Sixth Circuit*: Myers v. Copper Cellar Corp*.*, 192 F.3d 546, 551 (6th Cir. 1999); *Kilgore*, 160 F.3d at 301.

     *Seventh Circuit*: *Driver*, 739 F.3d at 1075.

     *Eighth Circuit*: *Fast*,638 F.3d at 877. [↑](#footnote-ref-277)
277. WH Op., 1980 WL 141336 (Mar. 28, 1980) (no clear dividing line where plaintiff performed various non-tipped tasks after restaurant closed, including cleaning salad bar, placing condiment crocks in cooler, cleaning and stocking waitress station, cleaning and resetting tables, and vacuuming floor, where other employees were not employed to perform such tasks); Roussell v. Brinker Int’l, 441 F. App’x 222, 233 (5th Cir. 2011) (finding clear division between quality assurance workers and servers); Pellon v. Business Representation Int’l, Inc., 528 F. Supp. 2d 1306, 1313 (S.D. Fla. 2007) (holding additional non-tipped duties skycaps performed to be incidental to their duties as skycaps where there was no “clear dividing line” between these duties and those that clearly were performed for tips); Dole v. Bishop, 740 F. Supp. 1221, 1228 (S.D. Miss. 1990) (“Because these cleaning duties and food preparation duties were not incidental to the waitress’ tipped duties, the waitresses were entitled to full minimum wage during these periods of time.”). [↑](#footnote-ref-278)
278. *Roussell,* 441 F. App’x at 233 (servers who also worked entire shifts as quality assurance workers were employed in dual jobs); *Myers*, 192 F.3d at 549–50 (servers who spent entire shift as salad preparers were employed in dual jobs). [↑](#footnote-ref-279)
279. *See, e.g.,*

     *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 638 F.3d 872, 880 (8th Cir. 2011) (“[W]here duties are performed intermittently and as part of the primary occupation, the duties are subject to the tip credit.”).

     *Tenth Circuit:* Townsend v. BG-Meridian, Inc., 2005 WL 2978899, at \*6–7 (W.D. Okla. 2005) (waitress who also worked cash register and took phone orders was tipped employee because these duties were “merely related duties incident to her waitress position”).

     *Eleventh Circuit:* *Pellon,* 528 F. Supp. 2d at 1313 (finding no dual jobs where “the tasks that were allegedly violating the minimum wage are intertwined with direct tip-producing duties throughout the day”), *aff’d*, 291 F. App’x 310 (11th Cir. 2008). [↑](#footnote-ref-280)
280. WH Op., 1980 WL 141336 (Mar. 28, 1980) (“Insofar as the after-hours clean-up you describe are assigned generally to the waitress/waiter staff, we believe that such duties constitute tipped employment within the meaning of the regulation. We might have a different opinion if the facts indicated that specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming.”). *See also* Roberts v. Apple Sauce, Inc., 945 F. Supp. 2d 995, 1002 (N.D. Ind. 2013) (“Putting aside the degree of deference owed to the Field Operations Handbook (which the Defendants dispute), the cases, together with the regulations and interpretive guidance, lend no merit to the Plaintiff’s proposition that duties like food preparation and general cleaning around the dining room cannot be incidental to the regular duties of a server and therefore must be compensated at minimum wage regardless of the percentage of time the employee spends on such duties or whether the duties are generally assigned to servers.”);Driver v. AppleIllinois, LLC, 890 F. Supp. 2d 1008, 1030, 1035 (N.D. Ill. 2012) (finding tipped employees were in “dual jobs” where non-tipped work they performed included cleaning and stocking duties performed by “Expediters” and other employees who held other non-tipped job positions). [↑](#footnote-ref-281)
281. WH Opinion Letter FLSA2018-27 (Nov. 8, 2018); U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2019-2 (Feb. 15, 2019); U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook §30d00(f) (2018-2019 guidance) [hereinafter FOH]. [↑](#footnote-ref-282)
282. *Third Circuit*: Reynolds v. Chesapeake & Del. Brewing Holdings, LLC, 2020 BL 177776, 2020 WL 2404904 (E.D. Pa. May 12, 2020) (declining to defer to DOL’s 2018 Opinion Letter, 2019 FOH revisions, and 2019 field assistance bulletins, which abandoned 80/20 test, and finding DOL’s new interpretation of regulation was unreasonable); Sicklesmith v. Hershey Entm’t & Resorts Co., 2020 WL 902544, at \*8 (M.D. Pa. Feb. 25, 2020); Belt v. P.F. Chang’s China Bistro, Inc., 401 F. Supp. 3d 512, 531–35 (E.D. Pa. 2019); Flores v. HMS Host Corp., 2019 WL 5454647, at \*7 (D. Md. Oct. 23, 2019).

     *Fourth Circuit*: Spencer v. Macado’s, Inc., 399 F. Supp. 3d 545, 552 (W.D. Va. 2019) (refusing to give opinion letter or FOH *Auer* or *Skidmore* deference).

     *Sixth Circuit*: Roberson v. Texas Roadhouse Mgmt. Corp., 2020 BL 481106, 2020 WL 7265860 (W.D. Ky. Dec. 9, 2020) (declining to give deference to DOL’s 2018 guidance and concluding that 20% is reasonable threshold to assess whether employee performs related work at a frequency greater than occasionally or part of the time by relying on plain meaning of “occasionally” and other temporal terms used in dual jobs regulation); Matusky v. Avalon Holdings Corp., 379 F. Supp. 3d 657, 668 (N.D. Ohio 2019) (refusing to afford deference and stating that “the Sixth Circuit has not afforded the FOH any type of deference or binding effect in relation to its interpretation of the FLSA”); Callaway v. Denone, LLC, 2019 WL 1090346, at \*6 (N.D. Ohio Mar. 8, 2019) (questioning whether DOL’s 2018 opinion letter warrants deference and stating that change appears to be matter of policy, not an effort to determine the meaning of the regulation).

     *Seventh Circuit:* Berger v. Perry’s Steakhouse of Ill., LLC, 430 F. Supp. 3d 397, 410–12 (N.D. Ill. 2019) (concluding that DOL’s new interpretation is due no deference).

     *Eighth Circuit*: Rorie v. WSP2, LLC, 485 F. Supp. 3d 1037 (W.D. Ark. 2020) (declining to give *Auer* deference to WH Op. FLSA2018-27 and explaining it was inconsistent with plain language of 29 C.F.R. §531.56(e) and did not reflect fair and considered judgment in reversing 30-year-old agency policy); Cope v. Let’s Eat Out, Inc., 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019) (holding WH Op. FLSA2018-27 not entitled to *Auer* or *Skidmore* deference); Esry, v. P.F. Chang’s China Bistro, Inc., 373 F. Supp. 3d 1205, 1211 (E.D. Ark. 2019) (refusing *Auer* deference).

     *Eleventh Circuit*: Rafferty v. Denny’s, Inc., 13 F.4th 1166, 1188 (11th Cir. 2021) (refusing to give *Auer* or *Skidmore* deference to DOL’s 2018 opinion letter because it was not reasonable interpretation of dual-jobs regulation and contradicted DOL’s long-standing prior interpretation of that rule.) [↑](#footnote-ref-283)
283. 354 F. Supp. 3d 976. [↑](#footnote-ref-284)
284. *Id*. at 986. [↑](#footnote-ref-285)
285. *Id.*; *see also* *Sicklesmith*, 2020 WL 902544, at \*9; Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729, 734 (D.S.C. 2015) (20% limitation on nontipped work is viable interpretation of dual jobs regulation independent of DOL’s view on the matter). [↑](#footnote-ref-286)
286. Shaffer v. Perry’s Rests., Ltd., 2019 WL 2117639, at \*5 (W.D. Tex. Apr. 3, 2019), *report & recommendation adopted*, 2019 WL 2098116 (W.D. Tex. Apr. 24, 2019) (citing *Auer* and accepting DOL’s 2018-2019 guidance on tip credit’s interpretation and application). [↑](#footnote-ref-287)
287. U.S. Dep’t of Labor, Wage & Hour Div., Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756, 86,771 (Dec. 30, 2020). On March 25, 2021, in a second NPRM, the Department proposed to further extend the effective date of certain portions of the 2020 Tip final rule to consider whether to withdraw and repropose the dual jobs portion of the 2020 Tip final rule. U.S. Dep’t of Labor, Wage & Hour Div., Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg. 15,811 (Mar. 25, 2021). The DOL also “propose[d] to withdraw and repropose: (1) The portion of the 2020 Tip final rule incorporating the CAA’s new provisions authorizing the assessment of CMPs [civil monetary penalties] for violations of section 3(m)(2)(B) of the Act; and (2) the portion of its CMP regulations addressing willful violations.” 86 Fed. Reg. at 15,817. The DOL also requested comment on whether to revise the portion of the 2020 Tip final rule that addresses the statutory term “managers or supervisors.” *Id.* On April 29, 2021, the DOL published a final rule confirming the delay as proposed and announcing that it would undertake a separate rulemaking on dual jobs. U.S. Dep’t of Labor, Wage & Hour Div., Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg, 22,597 (Apr. 29, 2021). [↑](#footnote-ref-288)
288. U.S. Dep’t of Labor, Wage & Hour Div., Notice of Proposed Rulemaking, Tip Reguls. Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (Dec. 30, 2020). [↑](#footnote-ref-289)
289. U.S. Dep’t of Labor, Wage & Hour Div., Notice of Proposed Rulemaking, Tip Regulations Under the Fair Labor Standards Act (FLSA), 86 Fed. Reg. 32, 818 (June 23, 2021). [↑](#footnote-ref-290)
290. 86 Fed. Reg. 60,114 (Oct. 29, 2021). [↑](#footnote-ref-291)
291. 86 Fed. Reg. 60,157 (codified at 29 C.F.R. §531.56(f)(1)). [↑](#footnote-ref-292)
292. *Id.* [↑](#footnote-ref-293)
293. *Id. See also* Restaurant L. Ctr. v. United States Dep’t of Lab., 2022 WL 526243, at \*2 (W.D. Tex. Feb. 22, 2022) (explaining procedural history and substance of regulation and rejecting motion to permanently enjoin rule). [↑](#footnote-ref-294)
294. Restaurant L. Ctr. v. United States Dep’t of Lab., 120 F.4th 163, 2024 BL 388392, 2024 WL 3911308 (5th Cir. Aug. 23, 2024). [↑](#footnote-ref-295)
295. *Id.* at \*1. [↑](#footnote-ref-296)
296. *Id.* at \*7 (emphasis in original). [↑](#footnote-ref-297)
297. *Id.* at \*11. [↑](#footnote-ref-298)
298. *Id.* at \*10. [↑](#footnote-ref-299)
299. 29 U.S.C. §203(m)(2). [↑](#footnote-ref-300)
300. 29 C.F.R. §531.54. [↑](#footnote-ref-301)
301. *Id*. [↑](#footnote-ref-302)
302. Pub. L. No. 115-141, Div. S., Tit. XII, §1201. [↑](#footnote-ref-303)
303. Id. [↑](#footnote-ref-304)
304. *Id.* [↑](#footnote-ref-305)
305. U.S. Dep’t of Labor, Notice of Proposed Rulemaking, Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53,956 (proposed Oct. 8, 2019). [↑](#footnote-ref-306)
306. *Id.* [↑](#footnote-ref-307)
307. 29 U.S.C. §203(m)(2). [↑](#footnote-ref-308)
308. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2018-3 (Apr. 6, 2018). [↑](#footnote-ref-309)
309. Field Assistance Bull. No. 2018-3 nn. 2 and 3. [↑](#footnote-ref-310)
310. 85 Fed. Reg. 86,756 (Dec. 30, 2020). [↑](#footnote-ref-311)
311. *Id.*  [↑](#footnote-ref-312)
312. *Id.*  [↑](#footnote-ref-313)
313. *Id*. [↑](#footnote-ref-314)
314. 29 U.S.C. §203(m)(2); *Tip Regulations Under the Fair Labor Standards Act (FLSA),* U.S. Dep’t of Labor, Wage & Hour Div.,<https://www.dol.gov/agencies/whd/flsa/tips> (last visited Aug. 17, 2021). [↑](#footnote-ref-315)
315. *Id.* [↑](#footnote-ref-316)
316. *Id.* [↑](#footnote-ref-317)
317. 85 Fed. Reg. 86,756 (Mar. 1, 2021). [↑](#footnote-ref-318)
318. 86 Fed. Reg. 52,973 (Sept. 24, 2021). [↑](#footnote-ref-319)
319. *Id.* at. 60,114. [↑](#footnote-ref-320)
320. 29 U.S.C. §203(m); 29 C.F.R. § 531.51; *see* WH Op., 1978 WL 51429 (Sept. 5, 1978); U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2018-3 (Apr. 6, 2018). [↑](#footnote-ref-321)
321. *See* Roussell v. Brinker Int’l, Inc. 441 F. App’x 222, 231 (5th Cir. 2011);Kilgore v. Outback Steakhouse of Fla., Inc.,160 F.3d 294, 301 (6th Cir. 1998) (hosts); Marshall v. Krystal Co., 467 F. Supp. 9, 13, 23 WH Cases 874, 877 (E.D. Tenn. 1978). [↑](#footnote-ref-322)
322. *See*

     *Fifth Circuit: Roussell*, 441 F. App’x at 231; Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714 (W.D. Tex. 2010) (dishwasher not permitted to participate in tip pool).

     *Sixth Circuit:* Myers v. Copper Cellar Corp., 192 F.3d 546, 550 (6th Cir. 1999) (salad preparers not tip-eligible).

     *Eleventh Circuit:* Rubio v. Fuji Sushi & Teppani, Inc., 2013 WL 230216, at \*3 (M.D. Fla. Jan. 22, 2013) (kitchen chefs ineligible for tip pool).

     *Opinion Letters:* WH Op., 1976 WL 41732 (Mar. 26, 1976).

     *Cf.* Garcia v. Palomino, Inc., 738 F. Supp. 2d 1171 (D. Kan. 2010) (participation of cooks, food preparers, and dishwashers in tip pool permissible for periods of time they performed activities similar to those usually performed by tipped employees). [↑](#footnote-ref-323)
323. *Second Circuit:* Garcia v. La Revise Assocs. LLC, 2011 WL 135009, at \*6–7 (S.D.N.Y. Jan. 13, 2011) (“banquet coordinator” properly included in tip pool where she had sufficient customer interaction).

     *Third Circuit*: Acosta v. Osaka Japan Rest., Inc., 2018 WL 3397337, at \*8 (E.D. Pa. July 12, 2018) (stating that §203(m) “is best read as prohibiting mandatory tip pools that include employees who do not typically receive tips directly from customers’” and thus inclusion of “kitchen chefs” in tip pool invalidated right to tip credit).

     *Fourth Circuit*: Tom v. Hospitality Ventures LLC,355 F. Supp. 3d 329, 348 (E.D.N.C. 2018) (applying following factors in assessing validity of the tip pool: (1) the employees “must have more than a ‘*de minimis* interaction with customers … ,’” (2) “they must perform some functions of their job in the ‘front-of-the-house’ where they are at least seen by customers,” and (3) “they must engage in ‘customer service functions’ as a part of their job”).

     *Fifth Circuit:* Montano v. Montrose Rest. Assocs., Inc., 800 F.3d 186, 193 (5th Cir. 2015) (“The common thread of the cases and DOL opinion letters is to require a tipped employee to have more than a de minimis interaction with the customers who leave undesignated tips. … [I]n determining whether an employee customarily and regularly receives tips, a court—or a factfinder—must consider the extent of customer interaction.”); *Roussell*, 441 F. App’x at 231 (workers who inspected and garnished food not tip-eligible, reasoning that direct customer interaction was “highly relevant” to tip pool eligibility); Barrera v. MTC, Inc., 2011 WL 3273196 (W.D. Tex. July 29, 2011) (analyzing legislative history, DOL guidance documents, and case law in concluding that while customer interaction is required, it does not necessarily need to be direct); *Pedigo*, 722 F. Supp. 2d at 714 (dishwasher lacked customer interaction and was not permitted to participate in tip pool).

     *Sixth Circuit:* *Myers*, 192 F.3d at 550 (salad preparers not tip-eligible where they did not have direct interaction with diners, worked entirely outside view of restaurant patrons, and solely performed duties traditionally classified as food preparation or kitchen support work); *Kilgore,* 160 F.3d at 301 (determining that restaurant hosts and hostesses were engaged in a tipped occupation because they had “more than de minimis interaction with the customers”).

     *Eighth Circuit:* Dole v. Continental Cuisine, 751 F. Supp. 799, 803 (E.D. Ark. 1990) (maître d’ who greeted and seated customers, described specials, and took food orders deemed tip-eligible).

     *Eleventh Circuit:* Soliman v. Sobe Miami, LLC, 312 F. Supp. 3d 1344, 1352–53 (S.D. Fla. 2018) (summary judgment denied; “In determining whether an employee is engaged in an occupation that ‘customarily and regularly’ receives tips, … the focus is properly drawn to the question of whether the employee performs important customer service functions, i.e. does the employee have more than *de minimis* service interaction with customers.”) (collecting cases); Howard v. Second Chance Jai Alai LLC, 2016 WL 7180243, at \*19 (M.D. Fla. Dec. 9, 2016) (after bench trial, finding poker room employees were properly included in tip pool because of significant customer interaction); *Rubio*, 2013 WL 230216, at \*3 (kitchen chefs who had minimal customer interaction ineligible for tip pool). Wajcman v. Investment Corp. of Palm Beach, 620 F. Supp. 2d 1353, 1355–59 (S.D. Fla. 2009) (floor supervisors who had only de minimis customer interaction ineligible for tip pool).

     *D.C. Circuit:* Arencibia v. 2401 Rest. Corp., 831 F. Supp. 2d 164, 178 (D.D.C. 2011) (director of sales had sufficient customer interaction to participate in tip pool). *But see* Palacios v. Hartman & Tyner, 2014 WL 7152745, at \*6–7 (S.D. Fla. Dec. 15, 2014) (granting summary judgment for employer and finding it unnecessary to examine extent of customer interaction where employee directly receives from customers sufficient tips to qualify as tipped employee: “Although courts have looked to employee-customer interaction to determine if the relationship is one that commonly leads to the conveyance of tips, where there is undisputed evidence that an employee directly received tips from patrons, the level of customer service provided may ultimately be irrelevant.”). [↑](#footnote-ref-324)
324. *See Montano*, 800 F.3d at 193 (“[T]he goal of the inquiry[ is] determining the customer’s intent.”); Wajcman, v. Investment Corp. of Palm Beach, 2009 WL 465071, at \*4 (Feb. 23, 2009) (“[I]t is the *customer’s* expectation and intent that provides the basis for determining who qualifies as a ‘tipped employee.’ ”) (emphasis in original). [↑](#footnote-ref-325)
325. *Roussell,* 441 F. App’x at 231 (jury properly permitted to consider evidence about similar positions at other restaurants). *But see Wajcman*, 620 F. Supp. 2d at 1353 (refusing to permit employer to offer testimony of industry custom regarding inclusion of floor supervisors in tip pools). [↑](#footnote-ref-326)
326. 29 C.F.R § 531.54(a); *see also* WH Op. FLSA2009-12, 2009 WL 649014 (Jan. 15, 2009) (“The amounts retained by the employees who actually receive the tips, and those given to other pool participants[,] are considered the tips of the individuals who retain them, in applying the provisions of sections 203(m) and 203(t).”) (emphasis omitted) . [↑](#footnote-ref-327)
327. WH Op. FLSA2009-12, 2009 WL 649014 (Jan. 15, 2009) (finding barbacks who assisted bartenders and worked in front of and around customers, and occasionally interacted with them, were eligible to participate in tip pool). [↑](#footnote-ref-328)
328. Montano v. Montrose Rest. Assocs., Inc., 800 F.3d 186, 189–90 (5th Cir. 2015) (“It would be circular to find that, because Tony’s required waiters to give the coffeeman tips, the coffeeman regularly and customarily received tips. This would allow the restaurant to designate any employee it wished as a tipped employee … .”). [↑](#footnote-ref-329)
329. *See* 29 U.S.C. §203(m)(2)(B); 29 C.F.R. §§531.50(c), 531.52(b)(2). [↑](#footnote-ref-330)
330. 29 C.F.R. § 531.52(a). This is consistent with prior DOL enforcement policy. See U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2018-3 (Apr. 6, 2018) (“[a]s an enforcement policy, WHD will use the duties test at 29 C.F.R. §541.100(a)(2)–(4) to determine whether an employee is a manager or supervisor for purposes of section 3(m)”). [↑](#footnote-ref-331)
331. Howard v. Second Chance Jai Alai LLC, 2016 WL 7180243, at \*20–21 (M.D. Fla. Dec. 9, 2016); Arencibia v. 2401 Rest. Corp., 831 F. Supp. 2d 164, 176 (D.D.C. 2011). See Chapter 3, The Employment Relationship, §II [The Economic Reality Test]. [↑](#footnote-ref-332)
332. Whited v. New Café at Greystone Gardens*,* 2020 BL 98517,2020 WL 1271681 (M.D. Pa. Mar. 17, 2020) (finding that manager who was also principal of company that owned restaurant illegally participated in tip pool; explaining that manager received benefit of a tip credit, which allowed him to pay his employees an hourly wage below minimum wage, and it was use of a tip pool that made this benefit possible); Gionfriddo v. Jason Zink, LLC, 769 F. Supp. 2d 880 (D. Md. 2011) (owner who tended bar not permitted to participate in tip pool); Chung v. New Silver Palace Rest., Inc., 246 F. Supp. 2d 220, 230 (S.D.N.Y. 2002) (tip pool invalid where managers who were part owners of restaurant participated in tip pool). [↑](#footnote-ref-333)
333. *See* Widjaja v. Kang Yue USA Corp., 2011 WL 4460642 (E.D.N.Y. Sept. 26, 2011) (sushi chef was employer because he had authority to hire and fire employees, made food purchasing decisions, set wages, and received salary; thus, participation invalidated tip pool); *Chung,* 246 F. Supp. 2d at 230 (tip pool invalid where managers who were part owners of restaurant participated in tip pool); Ayres v. 127 Rest. Corp., 12 F. Supp. 2d 305 (S.D.N.Y. 1998) (finding tip pool invalid as result of general manager’s participation); Dole v. Continental Cuisine, 751 F. Supp. 799 (E.D. Ark. 1990); *see generally* 29 C.F.R. §531.52(a) [↑](#footnote-ref-334)
334. *Fifth Circuit:* Rudy v. Consolidated Rest. Cos., 2010 WL 3565418, at \*7–8 (N.D. Tex. Aug. 18, 2010) (maître d’ with some managerial authority permitted to participate in tip pool).

     *Sixth Circuit:* Strange v. Wade, 2010 WL 3522410, at \*7 (S.D. Ohio Sept. 8, 2010) (genuine issue of fact as to whether manager who participated in tip pool was employer; conflicting evidence existed as to whether manager had “full authority to hire and fire workers and how much control [the manager] exercises at the restaurant”).

     *Seventh Circuit:* Morgan v. SpeakEasy, LLC, 625 F. Supp. 2d 632, 653 (N.D. Ill. 2007) (holding that senior servers who had some managerial and supervisory authority (one of whom had business card with title “Manager” on it) were “tipped employees” eligible to participate in tip pool); Davis v. B&S, Inc., 38 F. Supp. 2d 707, 716–17 (N.D. Ind. 1998) (issue of fact as to whether general manager was tipped employee eligible to participate in tip pool; “a reasonable inference that Butler was acting in his own interests, and not in the interests of his employer as required by the statute, when he accepted (and presumably retained) tips from customers and participated in a tip pool arrangement with Mr. Davis”).

     *Eighth Circuit:* *Continental Cuisine*, 751 F. Supp. at 803 (holding that maître d’ with some supervisory authority was not employer).

     *D.C. Circuit: Arencibia*, 831 F. Supp. 2d at 197 (applying economic reality test in concluding maître d’ was not “employer”). [↑](#footnote-ref-335)
335. *See* WH Op., 1989 WL 610348 (Oct. 26, 1989); WH Op., 1976 WL 41732 (Mar. 26, 1976). *See also* Kubiak v. S.W. Cowboy, Inc., 164 F. Supp. 3d 1344, 1360–64 (M.D. Fla. 2016) (recognizing that tipped employee may voluntarily choose to share tips with otherwise ineligible employee); Mould v. NJG Food Servs., Inc., 37 F. Supp. 3d 762 (D. Md. 2014) (recognizing that FLSA allows employees in tip pools to voluntarily share tips with non-tipped employees without nullifying tip credit, but finding that tip credit was not available where employer provided servers with “recommended contributions” to non-tipped employees and apportioned money in tip pool accordingly). [↑](#footnote-ref-336)
336. FOH §30d04c. [↑](#footnote-ref-337)
337. *Id.* §30d00(e). [↑](#footnote-ref-338)
338. Lopez v. Fun Eats & Drinks, LLC, 2021 BL 266985, 2021 WL 3502361, at \*7 (N.D. Tex. July 16, 2021), *report and recommendation adopted*, 2021 BL 298841, 2021 WL 3493496 (N.D. Tex. Aug. 9, 2021) (disallowing tip credit where employees were required to buy uniforms, pay for cash register shortages and unpaid tabs, and pay for meals above their actual cost, because expenditures reduced employee compensation below required minimum wage); Bernal v. Vankar Enters., Inc., 579 F. Supp. 2d 804, 810 (W.D. Tex. 2008) (“To the extent Plaintiffs were not permitted to retain their tips to pay for shortages and unpaid tabs, Defendants disqualified themselves from taking advantage of the FLSA’s tip credit provisions.”). [↑](#footnote-ref-339)
339. Myers v. Copper Cellar Corp., 192 F.3d 546, 553, 5 WH Cases2d 975 (6th Cir. 1999); Starr v. Chicago Cut Steakhouse, 75 F. Supp. 3d 859 (N.D. Ill. 2014) (denying plaintiffs’ motion for summary judgment where credit card processing fees deducted from servers’ tips rather than separate tip pool); Gillis v. Twenty Three E. Adams St. Corp., 2006 WL 573905, 11 WH Cases2d 766 (N.D. Ill. Mar. 6, 2006) (ruling that pub did not violate FLSA by deducting from tips received by server an amount no greater than necessary to reimburse pub for its expenses in processing credit card tip collections). Additionally, in an April, 19, 2001, opinion letter, a staff member of Office of Enforcement Policy found that an employer did not lose the right to claim a tip credit for amounts included in a customer’s credit card payment where the employee chose to have contributions to a §401(k) plan, payments for insurance, and federal and state tax withholdings deducted from the amounts in question. The staff member reasoned that because the tips were the property of the employee, the employee could voluntarily direct the tips as desired without destroying the employer’s right to a tip credit. WH Op., 2001 WL 1558958 (Apr. 19, 2001). [↑](#footnote-ref-340)
340. FOH §30d05(a) (citing WH Op. (Mar. 28, 1977)). [↑](#footnote-ref-341)
341. WH Op. FLSA2006-1, 2006 WL 236427 (Jan. 13, 2006). [↑](#footnote-ref-342)
342. *Id*. [↑](#footnote-ref-343)
343. *Id*. (observing that costs associated with actual liquidation of credit card tips into cash, but not charges for other administrative costs, could be deducted from employee’s tips in order to reimburse employer). *See also* Steele v. Leasing Enters., Ltd., 826 F.3d 237, 244–46 (5th Cir. 2016) (concluding that only costs associated with credit card issuer fees may be offset by keeping portion of employees’ tips; holding that defendant was not permitted to offset its costs related to having tips delivered to employees in cash or other costs incurred “as a result of ordinary operations only indirectly related to [the restaurant’s] tip policy”); Reich v. Priba Corp., 890 F. Supp. 586, 596 (N.D. Tex. 1995) (concluding that employer failed to satisfy its burden of proving that deductions from waitresses’ tips for credit card processing fees were reasonable; employer presented no documentation or records to support its contention that a percentage of the withholding covered reasonable costs of credit card processing); Gomez v. MLB Enters. Corp.,2018 WL 3019102, at \*4–5 (S.D.N.Y. June 5, 2018) (explaining that employer must prove, in the aggregate, that no more than the total cost to it was withheld in credit card fees and rejecting employer’s argument that 3% deduction for credit card fees was per seappropriate). [↑](#footnote-ref-344)
344. FOH §30d05(b). [↑](#footnote-ref-345)
345. *See* WH Op. (Feb. 23, 1983). [↑](#footnote-ref-346)
346. FOH §30d05(d). [↑](#footnote-ref-347)
347. *Id.* §30d05(c). [↑](#footnote-ref-348)
348. *Id*. §30d05(d) (“For example, the tipped employee contributed $20.00 in tips from a credit card transaction that ultimately is uncollected to the tip pool and received back from the tip pool 70 percent of the tips contributed to the pool. The tipped employee can only be required to reimburse the employer for the 70 percent of the $20.00 of the uncollected tip that the employee received from the tip pool ($20.00 × 0.70 = $14.00).”). [↑](#footnote-ref-349)
349. Widjaja v. Kang Yue USA Corp., 2011 WL 4460642, at \*4 (E.D.N.Y. Sept. 26, 2011). [↑](#footnote-ref-350)
350. *Id*.; *see also* 26 C.F.R. §31.3402(k)–1(a). [↑](#footnote-ref-351)
351. *Widjaja*, 2011 WL 4460642, at \*4. [↑](#footnote-ref-352)
352. *Id.* [↑](#footnote-ref-353)
353. FOH §30d08; Fiedler v. Starwood Hotels & Resorts Worldwide, Inc., 2007 WL 9700855, at \*5 (S.D. Fla. June 12, 2007). [↑](#footnote-ref-354)
354. 29 C.F.R. §531.59. *See also* FOH §30d06. [↑](#footnote-ref-355)
355. FOH §30d06(a). [↑](#footnote-ref-356)
356. FOH §32j18(e), (f), (g). [↑](#footnote-ref-357)
357. *Id*. §30d06. [↑](#footnote-ref-358)
358. *Id*. [↑](#footnote-ref-359)
359. Inclan v. New York Hosp. Grp., Inc., 95 F. Supp. 3d 490, 498 (S.D.N.Y. 2015) (citing 29 U.S.C. §203(m); 29 C.F.R. §531.60; FOH 32j18(f)). [↑](#footnote-ref-360)
360. 29 C.F.R. §531.60. *See also* FOH 32j18(e) (setting forth additional examples of how to calculate the regular rate for tipped employees). [↑](#footnote-ref-361)
361. *Id.* *See also* Ellis v. Common Wealth Worldwide Chauffeured Transp. of N.Y., LLC, 2012 WL 1004848 (E.D.N.Y. Mar. 23, 2012) (20% payment from customers not service fee but gratuity for which employer did not take “tip credit” and therefore need not include in the regular rate). [↑](#footnote-ref-362)
362. FOH §32j18(e). [↑](#footnote-ref-363)
363. *Id.* [↑](#footnote-ref-364)
364. *Id.* [↑](#footnote-ref-365)
365. Inclan v. New York Hosp. Grp., Inc., 95 F. Supp. 3d 490, 498–99 (S.D.N.Y. 2015). [↑](#footnote-ref-366)
366. *See* 29 C.F.R. §778.5. [↑](#footnote-ref-367)
367. FOH 32j18(f). [↑](#footnote-ref-368)
368. *Id.* [↑](#footnote-ref-369)
369. *Id.* [↑](#footnote-ref-370)
370. For guidance on averaging earnings over the workweek under various state laws, *see* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-371)
371. 29 U.S.C. §206(a)(1). [↑](#footnote-ref-372)
372. United States v. Rosenwasser, 323 U.S. 360, 363–64, 4 WH Cases 935 (1945); Overnight Motor Transp. Co. v. Misell, 316 U.S. 572, 580, 2 WH Cases 47, *reh’g denied*, 317 U.S. 706 (1942) (approving weekly pay divided by hours worked). [↑](#footnote-ref-373)
373. *Second Circuit:* United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 490 (2d Cir. 1960).

     *Fourth Circuit:* Blankenship v. Thurston Motor Lines, Inc., 415 F.2d 1193, 1198 (4th Cir. 1969).

     *Sixth Circuit:* U.S. Dep’t of Labor v. Cole Enters., Inc., 62 F.3d 775, 780 (6th Cir. 1995).

     *Eighth Circuit:* Hensley v. MacNillan Bloedel Containers, Inc., 786 F.2d 353, 357 (8th Cir. 1986).

     *D.C. Circuit:* Dove v. Coupe, 759 F.2d 167, 171 (D.C. Cir. 1985); Freeman v. MedStar Health, Inc., 185 F. Supp. 3d 30, 35 (D.C. Cir. 2016) (following *Dove*).

     *Opinion Letters*: WH Op. FLSA2019-28 (Dec. 21, 2018).

     The Ninth and Fifth Circuit have cited the rule in dicta. Albanil v. Coast 2 Coast, Inc., 444 F. App’x 788, 804 n.16 (5th Cir. 2011); Adair v. City of Kirkland, 185 F.3d 1055, 1062 n.6 (9th Cir. 1999). [↑](#footnote-ref-374)
374. *See, e.g.,*

     *Fourth Circuit:* Kuntze v. Josh Enters., Inc., 2019 WL 959598 (E.D. Va. Feb. 27, 2019) (stating that employer does not violate FLSA unless total weekly compensation divided by number of hours worked results in hourly rate that falls below statutory minimum wage).

     *Fifth Circuit:* Green v. Dallas Cnty. Schs., 2005 WL 1630032 (N.D. Tex. July 6, 2005) (granting summary judgment for employer where effective hourly rate for school bus monitor was well in excess of minimum wage even if school district routinely required her to work “unpaid” extracurricular activities, field trips, pre-trip inspections, training time, post-trip cleanup time, or monitoring time).

     *Sixth Circuit:* Athan v. United States Steel, 364 F. Supp. 3d 748, 752–53 (E.D. Mich. Feb. 14, 2019) (applying weekly method to calculate hourly rate paid); Sutton v. CHSPSC, LLC, 2018 WL 3318961 (W.D. Tenn. July 5, 2018) (same).

     *Seventh Circuit:* Hirst v. SkyWest, Inc., 910 F.3d 961, 966 (7th Cir. 2018) (affirming district court’s “thorough and detailed analysis” that in determining FLSA minimum wage violation, employee’s wage is calculated as average hourly wage across workweek); *see also* Ladegaard v. Hard Rock Concrete Cutters, Inc., 2004 WL 1882449, 9 WH Cases 2d 1550 (N.D. Ill. Aug. 18, 2004); O’Brien v. Encotech Constr. Servs., Inc., 2004 WL 609798, 9 WH Cases 2d 1628 (N.D. Ill. Mar. 23, 2004).

     *Ninth Circuit:* Cooper v. Thomason, 2007 WL 306311 (D. Or. Jan. 26, 2007) (concluding wages paid to waitress were high enough that even including hours worked during lunch and during uncompensated hours, employer paid at least FLSA minimum wage each week); McElmurry v. United States Bank Nat’l Ass’n, 2005 WL 2078334 (D. Or. Aug. 24, 2005) (granting defendant’s motion for summary judgment where minimum wage claims by employees alleged that employer’s time-keeping system rounded weekly time reports down when calculating compensation because lowest possible hourly rate still exceeded federal minimum wage). [↑](#footnote-ref-375)
375. 285 F.2d 487 (2d Cir. 1960). [↑](#footnote-ref-376)
376. Norceide v. Cambridge Health Alliance, 814 F. Supp. 2d 17 (D. Mass. 2011) (off-the-clock hours must be paid for individually and without averaging other earnings across such hours to meet minimum wage requirement); Douglas v. Xerox Bus. Servs., LLC, 2015 WL 10791972, at \*2–7 (W.D. Wash. Dec. 1, 2015) (following *Norceide* and rejecting *Klinghoffer* rule in determining that “the appropriate measure for FLSA compliance is whether an employee is paid minimum wage for every hour he or she worked”). [↑](#footnote-ref-377)
377. *Norceide,* 814 F. Supp. 2d 17. [↑](#footnote-ref-378)
378. D’Arezzo v. Providence Ctr., Inc., 142 F. Supp. 3d 224, 232–38 (D.R.I. 2015). [↑](#footnote-ref-379)
379. *Id.* at 237–38. [↑](#footnote-ref-380)
380. 29 C.F.R. §778.105; Dove v. Coupe, 759 F.2d 167, 168, 27 WH Cases 185 (D.C. Cir. 1985) (recognizing workweek as whole, rather than each individual hour within workweek, as relevant unit for determining compliance with minimum wage requirements); *see also* Marshall v. Sam Dell’s Dodge Corp., 451 F. Supp. 294, 302, 23 WH Cases 928, 934 (N.D.N.Y. 1978); Roland Elec. Co. v. Black, 163 F.2d 417, 420–21 (4th Cir. 1947). [↑](#footnote-ref-381)
381. *First Circuit:* McComb v. Rupert Weidner Assocs., 7 WH Cases 1034, 1035 (D.P.R. 1948) (concluding “plus and minus” plan fails to meet requirements that wages be free and clear of all encumbrances).

     *Sixth Circuit:* Luther v. Z. Wilson, Inc., 528 F. Supp. 1166, 1174 (S.D. Ohio 1981) (holding that, although parties are free to contract for any regular pay period, relevant pay period under FLSA is determined by actual pattern of payments of parties); Holland v. U.S. Bedding Co., 2 WH Cases 331, 333 (W.D. Tenn. 1942) (striking down “plus and minus” pay plans that average subminimum wages in one week with excess earnings in other weeks to meet minimum requirements of FLSA).

     *Seventh Circuit*: Knoll v. Titan Rest. Grp., LLC*,* 2020 BL 100679, 2020 WL 1285623 (S.D. Ind. Mar. 18, 2020) (explaining that defendant’s calculation of wages on biweekly basis did not violate FLSA because plaintiff was not actually paid less than minimum wage during any individual workweek).

     *Tenth Circuit:* Donovan v. Simmons Petroleum Corp., 25 WH Cases 220, 223 (D. Kan. 1981), *aff’d*, 725 F.2d 83, 26 WH Cases 936 (10th Cir. 1983).

     *Eleventh Circuit:* Olson v. Superior Pontiac-GMC, 765 F.2d 1570, 1578–79, 27 WH Cases 393, 395, *modified*, 776 F.2d 265, 27 WH Cases 691 (11th Cir. 1985) (holding that FLSA “clearly requires an employee to be *paid* the minimum wage for each hour worked during the pay period.”). [↑](#footnote-ref-382)
382. However, note that issues can still arise even when employees are paid on an hourly basis. For example, in a May 30, 2008, opinion letter, the DOL addressed whether an employer’s quadrennial adjustment to a single-pay-period length complied with §206. WH Op. FLSA2008-5, 2008 WL 5740102 (May 30, 2008). Specifically, an employer school district adjusted its pay date by one week an average of every four years to ensure only 26 pay periods each fiscal year, resulting in one pay period with three workweeks instead of the typical two. The DOL observed that, because the employee pay in this case still exceeded the minimum wage after dividing the biweekly pay amount by three weeks instead of two (and then again by 40 hours per week), the adjusted pay schedule complied with §206. *Id*. [↑](#footnote-ref-383)
383. 29 C.F.R. §778.113 (salary); WH Op. (Nov. 30, 1961) (commission); WH Op. (Sept. 4, 1977) (piece rate). [↑](#footnote-ref-384)
384. *Fifth Circuit:* Yadav v. Coleman Oldsmobile, Inc., 538 F.2d 1206, 1207 (5th Cir. 1976).

     *Eighth Circuit:* Keen v. Mid-Continent Petroleum Corp., 63 F. Supp. 120, 142, 5 WH Cases 618 (N.D. Iowa 1945), *aff’d*, 157 F.2d 310, 6 WH Cases 338 (8th Cir. 1945).

     *Tenth Circuit:* Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1349 n.5 (10th Cir. 1986); Triple “AAA” Co., Inc. v. Wirtz, 378 F.2d 884, 887 (10th Cir. 1967).

     *See also* 29 C.F.R. §778.113(b). [↑](#footnote-ref-385)
385. Aron v. City of Wichita, 54 F.3d 652, 656–57 (10th Cir. 1995); FOH §30b01b. [↑](#footnote-ref-386)
386. 29 C.F.R. §778.117. [↑](#footnote-ref-387)
387. *Id*. [↑](#footnote-ref-388)
388. *Id*. [↑](#footnote-ref-389)
389. WH Op. (Nov. 30, 1961). *See also* Holland v. Bynum & Sons Plumbing, Inc., 2014 WL 4542443 (N.D. Ga. Sept. 11, 2014) (ruling after bench trial that plumber paid on commission basis failed to prove minimum wage violation where plaintiff calculated his hourly rate by dividing his yearly compensation by hours he worked during entire year instead of calculating his hourly rate on workweek basis). [↑](#footnote-ref-390)
390. *Id*.; *see also* Olson v. Superior Pontiac-GMC, 765 F.2d 1570, 1578–79, 27 WH Cases 393, 395, *modified*, 776 F.2d 265, 27 WH Cases 691 (11th Cir. 1985). The *Olson* court found that

     excess commissions earned by salesmen during one pay period may be carried forward and applied to the minimum wage for the next period so long as the employee actually received the minimum wage for each hour worked within each separate pay period. This places a duty on the employer to ensure that the employee receives payment of the minimum wage. A mere alteration of the employer’s records that reflects excess commissions earned in the preceding period being applied toward the minimum wage for the current period will not suffice. The employee must actually receive the minimum wage each pay period.

     *Id.* [↑](#footnote-ref-391)
391. WH Op. (Aug. 7, 1962). [↑](#footnote-ref-392)
392. FOH §30b05(c) (explaining how requirements of regular pay period apply to employees paid on commission basis); *see also* Caci v. Wiz of Lake Grove, Inc., 267 F. Supp. 2d 297 (E.D.N.Y. 2003). [↑](#footnote-ref-393)
393. WH Op. (Mar. 1, 1951). [↑](#footnote-ref-394)
394. *Id*.; FOH §30b05(c)(3)(d). [↑](#footnote-ref-395)
395. *See* *Caci*, 267 F. Supp. 2d at 301 (rejecting former employee’s claim for minimum wages under pay plan that included commissions on sales minus guaranteed weekly “draw” of $8 per hour for work time spent on sales activities only and not other work activities, because actual hourly wage, including hours during which he could not make sales, always exceeded statutory minimum wage). [↑](#footnote-ref-396)
396. Birch v. Kim, 977 F. Supp. 926 (S.D. Ind. 1997). [↑](#footnote-ref-397)
397. WH Op. (Nov. 30, 1961); FOH §30b05(c). [↑](#footnote-ref-398)
398. *Id*. [↑](#footnote-ref-399)
399. 362 F. Supp. 2d 624 (D. Md. 2005). [↑](#footnote-ref-400)
400. *Id*. at 633. [↑](#footnote-ref-401)
401. *Id*. at 627. [↑](#footnote-ref-402)
402. *Id*. at 633. [↑](#footnote-ref-403)
403. *Id*. at 630. [↑](#footnote-ref-404)
404. Rogers v. Savings First Mortg., LLC, 362 F. Supp. 2d 624, 633 (D. Md. 2005). [↑](#footnote-ref-405)
405. *Id*. [↑](#footnote-ref-406)
406. *Id*. [↑](#footnote-ref-407)
407. *Supreme Court:* United States v. Rosenwasser, 323 U.S. 360, 362, 4 WH Cases 935, 936 (1945).

     *Ninth Circuit:* Shultz v. Sullivan, 20 WH Cases 146, 147 (C.D. Cal. 1969), *aff’d*, 20 WH Cases 147 (9th Cir. 1971); Wirtz v. Hutchens, 18 WH Cases 648, 650 (E.D. Cal. 1968).

     *Tenth Circuit:* Olivo v. Crawford Chevrolet, Inc., 799 F. Supp. 2d 1237 (D.N.M. 2011). [↑](#footnote-ref-408)
408. *Rosenwasser*, 323 U.S. at 362; Gaxiola v. Williams Seafood of Arapahoe, Inc., 776 F. Supp. 2d 117 (E.D.N.C. 2011) (finding defendant failed to pay crab pickers minimum wage where pay stubs evidenced such workers compensated at $1.90 per pound of crab and required to pick 3.5 pounds per hour). [↑](#footnote-ref-409)
409. WH Op. (Sept. 4, 1977). [↑](#footnote-ref-410)
410. WH Op. (Jan. 11, 1963). [↑](#footnote-ref-411)
411. *Id*. [↑](#footnote-ref-412)
412. *See* Hodgson v. Cactus Craft of Ariz., 481 F.2d 464, 466–67 (9th Cir. 1973). [↑](#footnote-ref-413)
413. WH Op. (Mar. 20, 1940). See, however, Chapter 2, Operations and Functions of the Department of Labor, §V [Special Certificates Allowing Subminimum Wage] for a discussion of exemptions from the minimum wage for certain employees such as apprentices, students, and learners. [↑](#footnote-ref-414)
414. Section 203(m) of the FLSA allows an employer to provide the reasonable cost of providing “board, lodging or other facilities” to an employee as part of wages. Sometimes these employer-furnished facilities are referred to as deductions because of the method used by the employer to count these amounts as wages. For an extensive discussion of how “board, lodging, or other facilities” are treated under §203(m), see §III [Non-Cash Wages Under Section 203(m): “Board, Lodging or Other Facilities”] of this chapter. [↑](#footnote-ref-415)
415. For guidance on the permissibility of deductions under the various state laws, *see* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-416)
416. *See* Donovan v. New Floridian Hotel, 676 F.2d 468, 474–76, 25 WH Cases 645 (11th Cir. 1982) (following holding in *Veterans Cleaning Service* that “the employer had the burden of segregating permissible deductions from impermissible ones”); Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1370 (5th Cir. 1973) (affirming district court imposition on employer of burden of segregating permissible deductions to recoup advances from impermissible ones for damages to company truck). [↑](#footnote-ref-417)
417. *New Floridian Hotel*, 676 F.2d at 474–76. [↑](#footnote-ref-418)
418. 29 C.F.R §531.38; Widjaja v. Kang Yue USA Corp., 2011 WL 4460642 (E.D.N.Y. Sept. 26, 2011) (employer must remit withheld taxes to taxing authority for deduction to be proper). [↑](#footnote-ref-419)
419. 29 C.F.R. §531.38. [↑](#footnote-ref-420)
420. *Id*. [↑](#footnote-ref-421)
421. *Id*. §531.39(a). [↑](#footnote-ref-422)
422. *Id*. §531.39(b) (citing Consumer Credit Protection Act, tit. III, §303(a), 15 U.S.C. §§1671 *et seq*.). [↑](#footnote-ref-423)
423. *Id*. §531.40(a); FOH §30c10(a). [↑](#footnote-ref-424)
424. 29 C.F.R. §531.40(c). [↑](#footnote-ref-425)
425. *Id.* [↑](#footnote-ref-426)
426. *Id.* [↑](#footnote-ref-427)
427. *Id.* [↑](#footnote-ref-428)
428. The special case of a credit union to which the employer has loaned capital is dealt with in a DOL opinion letter. *See* WH Op. (Aug. 5, 1942). [↑](#footnote-ref-429)
429. 29 C.F.R. §531.40(c). [↑](#footnote-ref-430)
430. WH Op. (Nov. 3, 1966). [↑](#footnote-ref-431)
431. 29 C.F.R. §531.40(a), (c). [↑](#footnote-ref-432)
432. WH Op. (Nov. 30, 1966) (allowing voluntary deductions for community chest contributions by minimum wage employees). [↑](#footnote-ref-433)
433. *Fourth Circuit*: Sellers v. Keller Unlimited LLC, 388 F. Supp. 3d 646 (D.S.C. 2019) (granting summary judgment to plaintiff servers for deducting from server wages any lost revenue caused by bar shortages, and rejecting defendant’s argument that plaintiffs under-reported their gross income to Internal Revenue Service and, therefore, it was impossible to accurately calculate whether beverage shortage deduction actually lowered plaintiffs’ total earnings to below statutory minimum wage).

     *Fifth Circuit:* Lopez v. Fun Eats & Drinks, LLC, 2021 BL 266985, 2021 WL 3502361, at \*7 (N.D. Tex. July 16, 2021), *report and recommendation adopted*, 2021 BL 298841, 2021 WL 3493496 (N.D. Tex. Aug. 9, 2021) (“summary judgment on the issue is appropriate because the unrebutted evidence establishes that [defendant] deducted losses due to cash register shortages and unpaid tabs”); Mayhue’s Super Liquor Stores v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972) (deductions for shortages not resulting from theft impermissible if they cause employee to receive less than minimum wage); Bernal v. Vankar Enters., Inc., 579 F. Supp. 2d 804, 810 (W.D. Tex. 2008) (deductions for shortages and unpaid tabs by customers not permitted for tipped employees paid with tip credit).

     *Sixth Circuit:* Marshall v. Krist Oil Co., 1979 WL 1906, 24 WH Cases 121, 123 (W.D. Mich. Apr. 23, 1979) (deductions for mistakes in making change, running pumps over, driveoffs, uncollectible credit cards, and undetected theft caused minimum wage violations); Hodgson v. Frisch Dixie, Inc., 20 WH Cases 167, 169 (W.D. Ky. 1971) (minimum wage violation found by employer for deducting shortages resulting from mathematical errors, customers’ walking out of or driving away from restaurant without paying their tickets, or other unaccountable circumstances); Wirtz v. Cas Walker’s Cash Stores, 18 WH Cases 296 (E.D. Tenn. 1968).

     *Tenth Circuit:* Donovan v. Hudson Stations, 1983 WL 2110, at \*4, 26 WH Cases 795, 799 (D. Kan. 1983) (deductions for mistakes in making change, running pumps over, driveoffs, uncollectible credit cards, and undetected theft caused minimum wage violations).

     *Eleventh Circuit:* Brock v. Phillips, 27 WH Cases 935, 936 (M.D. Fla. 1986) (impermissible deductions for cash shortages, bad or uncollectable customer credit card charges, and gasoline purchases resulted in minimum wage violations). [↑](#footnote-ref-434)
434. *Mayhue’s Super Liquor Stores*, 464 F.2d at 1198; WH Op., 1973 WL 36845 (Oct. 1, 1973) (“[I]n our enforcement of the Act we would not assert a violation of its monetary requirements where there is repayment of a debt which in fact resulted from theft or misappropriation of the employer’s funds.”). Some courts have held that deductions for employee theft may only be made when the employee has been convicted of misappropriating the employer’s funds. *See, e.g., Hudson Stations*, 1983 WL 2110, at \*4, 26 WH Cases at 799 (“Except when an employee is *convicted* of misappropriating funds, it is unlawful for an employer to require an employee to reimburse employer for cash register or inventory shortages, or to bear the risk that checks or credit card slips are collectible, if the deductions reduce the employee’s wages below minimum wage or result in failure to pay for overtime hours at one and one-half times the regular rate of pay required by the Act.”); *Krist Oil Co.,* 24 WH Cases at 123 (“Except where an employee is convicted of misappropriation of the employer’s funds … deductions are unlawful if designed to call upon any employee to make reimbursement for cash register shortages or to bear the risk that checks or credit card purchase slips accepted by him in the course of his employment are or may be uncollectible.”). [↑](#footnote-ref-435)
435. *Mayhue’s Super Liquor Stores*, 464 F.2d at 1199. [↑](#footnote-ref-436)
436. *Id*. [↑](#footnote-ref-437)
437. 29 C.F.R. §531.35. [↑](#footnote-ref-438)
438. WH Op. WH 834, 1984 WL 908322 (Oct. 11, 1984); FOH §30c10(b). [↑](#footnote-ref-439)
439. WH Op. (Feb. 3, 1965); FOH §30c10(b). [↑](#footnote-ref-440)
440. Davis v. Fletcher, 23 WH Cases 954, 956 (M.D. Fla. 1978) (holding that deductions made for principal and interest charges on employer’s loans to employees at usurious interest rate of 50% were unlawful as profit-making scheme). [↑](#footnote-ref-441)
441. 482 F.2d 1362, 21 WH Cases 218 (5th Cir. 1973). [↑](#footnote-ref-442)
442. *Id*. at 1369, 21 WH Cases at 223. [↑](#footnote-ref-443)
443. *Id*. [↑](#footnote-ref-444)
444. WH Op., FLSA2004-19NA, 2004 WL 5303047 (Oct. 8, 2004). [↑](#footnote-ref-445)
445. *Id.* [↑](#footnote-ref-446)
446. *Id.* [↑](#footnote-ref-447)
447. *Id.* [↑](#footnote-ref-448)
448. WH Op., FLSA2004-17NA, 2004 WL 5303045 (Oct. 6, 2004) (opining that employer may enforce employment agreement provision that tells employees that “the employer will deduct from their pay the cost of … vacation time if they leave the company prior to earning sufficient vacation time to eliminate the vacation deficit”); *see also* FOH §30c10(c); WH Op. (Mar. 20, 1998); WH Op. (Nov. 16, 1977). [↑](#footnote-ref-449)
449. WH Op., FLSA2004-17NA, 2004 WL 5303045 (Oct. 6, 2004). [↑](#footnote-ref-450)
450. 295 F.3d 777, 7 WH Cases2d 1665 (7th Cir. 2002). [↑](#footnote-ref-451)
451. 295 F.3d at 779. [↑](#footnote-ref-452)
452. Gordon v. City of Oakland, 627 F.3d 1092, 1095–96 (9th Cir. 2010) (holding employer could recoup police officer’s training costs per agreement so long as employee received at least minimum wage); Bland v. Edward D. Jones & Co., L.P., 2020 BL 118895, 2020 WL 1503574 (N.D. Ill. Mar. 30, 2020) (granting motion to dismiss because reimbursement of training costs did not violate FLSA where employer fulfilled its obligation of paying minimum wages and overtime pay to plaintiffs and did not actually withhold pay to recoup training costs); City of Oakland v. Hassey, 78 Cal. Rptr. 3d 621, 634–36 (Cal. Dist. Ct. App. 2008) (finding that withholding police officer’s final paycheck for training costs violated FLSA but recognizing that employer could withhold part of paycheck for reimbursement of training costs if employee is paid at least minimum wage). [↑](#footnote-ref-453)
453. Ketner v. Branch Banking & Tr. Co., 143 F. Supp. 3d 370 (M.D.N.C. 2015) (denying motion to dismiss and distinguishing *Heder* and *Gordon,* holding that plaintiffs sufficiently alleged plausible claim that amount defendant sought to collect from them for leadership development program constituted a kickback of compensation they received from defendant, which would violate FLSA’s minimum wage requirement). [↑](#footnote-ref-454)
454. WH Op. FLSA2005-18, 2005 WL 2086807 (May 31, 2005). [↑](#footnote-ref-455)
455. *Id.* at 1. [↑](#footnote-ref-456)
456. *See* 20 C.F.R. Part 655, Subpart B. [↑](#footnote-ref-457)
457. *See id.* §655.103(b). [↑](#footnote-ref-458)
458. 305 F.3d 1228 (11th Cir. 2002). [↑](#footnote-ref-459)
459. 29 C.F.R. §531.32(a). *See also* 29 C.F.R. §531.32(c) (“Transportation charges where such transportation is an incident of and necessary to the employment” [and] … are “primarily for the benefit or convenience of the employer.”). [↑](#footnote-ref-460)
460. 305 F.3d at 1245–46. [↑](#footnote-ref-461)
461. *Id.* [↑](#footnote-ref-462)
462. *Id.* [↑](#footnote-ref-463)
463. *Id*. at 1245–46 (concluding that under principles of agency law growers were not responsible for recruitment fees, noting that “we need not discuss whether the recruitment fees are ‘other facilities’”). [↑](#footnote-ref-464)
464. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees Under the H-2B Program (Apr. 2015), https://www.dol.gov/agencies/whd/fact-sheets/78f-h2b-fees. All the requirements listed in Fact Sheet #78F can be found in 20 C.F.R. Part 655, subpart A, and 29 C.F.R. Part 503. [↑](#footnote-ref-465)
465. Fact Sheet #78F. [↑](#footnote-ref-466)
466. *Id.* The employer can deduct the difference between the H-2B offered wage and the FLSA minimum wage multiplied by the number of hours worked per week, provided the deduction was properly disclosed to the worker in the job order. [↑](#footnote-ref-467)
467. *Id*. (emphasis added). [↑](#footnote-ref-468)
468. *Id.* [↑](#footnote-ref-469)
469. Arriaga v. Florida Pac. Farms, LLC, 305 F.3d 1228 (11th Cir. 2002). [↑](#footnote-ref-470)
470. *Second Circuit:* Salazar-Martinez v. Fowler Bros., 781 F. Supp. 2d 183, 195–96 (W.D.N.Y. 2011) (H-2A workers entitled to reimbursement for visa and travel expenses); Teoba v. Trugreen Landcare, LLC, 769 F. Supp. 2d 175, 184–85 (W.D.N.Y. 2011) (H-2B workers entitled to reimbursement).

     *Third Circuit:* Rivera v. The Brickman Grp., 2008 WL 81570, at \*11–13, 13 WH Cases 2d 275 (E.D. Pa. 2008) (H-2B workers entitled to reimbursement for travel and visa expenses but not for passport expenses because passports are for more “general use” for employee).

     *Fourth Circuit:* Moodie v. Kiawah Island Inn Co. LLC, 124 F. Supp. 3d 711, 716–20 (D.S.C. 2015) (H-2B workers entitled to reimbursement for transportation and visa expenses); Gaxiola v. Williams Seafood of Arapahoe, Inc., 776 F. Supp. 2d 117, 126–27 (E.D.N.C. 2011) (H-2B workers entitled to reimbursement for transportation and visa expenses); DeLuna-Guerrero v. North Carolina Grower’s Ass’n, 338 F. Supp. 2d 649, 662 (E.D.N.C. 2004) (H-2A workers entitled to reimbursement for travel and visa expenses).

     *Eighth Circuit:* Perez-Benites v. Candy Brand, LLC, 2011 WL 1978414, at \*13–14 (W.D. Ark. May 20, 2011) (H-2A workers entitled to reimbursement for transportation and visa expenses); Martinez–Bautista v. D & S Produce, 447 F. Supp. 2d 954, 963–64 (E.D. Ark. 2006) (H-2A workers entitled to reimbursement for travel and visa expenses).

     *Ninth Circuit:* Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013) (finding plaintiffs entitled to reimbursement during first week of employment for their inbound travel and immigration expenses to extent such expenses caused their earnings for first week of employment to fall below minimum wage).

     *Eleventh Circuit:* Morante-Navarro v. T & Y Pine Straw, Inc., 350 F.3d 1163, 1166 n.2 (11th Cir. 2003) (H-2B workers entitled to reimbursement for visa and travel expenses); Sejour v. Steven Davis Farms LLC, 28 F. Supp. 3d 1216 (N.D. Fla. 2014) (H-2A workers entitled to reimbursement for travel and visa expenses to extent expenses reduced plaintiffs’ earnings below minimum wage during first week of work); De Leon-Granados v. Eller & Sons Trees, Inc., 581 F. Supp. 2d 1295, 1315 (N.D. Ga. 2008) (H-2B guest-workers entitled to reimbursement for travel and visa expenses). [↑](#footnote-ref-471)
471. *See, e.g., Salazar-Martinez,* 781 F. Supp. 2d at 195–96; *Rivera*, 2008 WL 81570, at \*13. [↑](#footnote-ref-472)
472. U.S. Dep’t of Labor, Wage & Hour Div., Uniforms and Their Maintenance Under the FLSA, WH Publication 1428 (Mar. 1984). [↑](#footnote-ref-473)
473. 29 C.F.R. §531.3(d)(2), .32(c); FOH §30c12a. [↑](#footnote-ref-474)
474. FOH §30c12a. [↑](#footnote-ref-475)
475. WH Op. (Mar. 23, 1983). [↑](#footnote-ref-476)
476. *See* WH Op. (Apr. 1, 1985); WH Op. (Apr. 18, 1983). [↑](#footnote-ref-477)
477. Uniforms and Their Maintenance Under the FLSA ¶9(Q)(A). [↑](#footnote-ref-478)
478. WH Op. (Apr. 1, 1985); *see also* WH Op., 2004 WL 2146928 (Mar. 30, 2004) (opining logo-free khaki shorts or trousers and navy blue golf shirts not uniforms). *But see* Ayres v. 127 Rest. Corp., 12 F. Supp. 2d 305, 4 WH Cases2d 1255 (S.D.N.Y. 1998) (denying summary judgment because determination of whether white shirt, khaki pants, black socks, and black shoes constituted uniform was question of fact). [↑](#footnote-ref-479)
479. WH Op. (Apr. 1, 1985). [↑](#footnote-ref-480)
480. WH Op., 1974 WL 38713 (June 7, 1974). [↑](#footnote-ref-481)
481. *See* WH Op. (July 31, 1981); WH Op., 1978 WL 51404 (July 28, 1978); WH Op., 1974 WL 38713 (June 7, 1974). [↑](#footnote-ref-482)
482. *See* WH Op., 1978 WL 51404 (July 28, 1978); *see also* Reich v. Priba Corp., 890 F. Supp. 586, 596–97, 2 WH Cases2d 1096, 1103–04 (N.D. Tex. 1995); Marshall v. SF of Ohio, 25 WH Cases 227, 229 (S.D. Ohio 1981). [↑](#footnote-ref-483)
483. WH Op. FLSA2006-21, 2006 WL 1910966 (June 9, 2006). [↑](#footnote-ref-484)
484. *See* Marshall v. Root’s Rest., Inc., 667 F.2d 559, 560 (6th Cir. 1982). [↑](#footnote-ref-485)
485. *See* WH Op., 1974 WL 38713 (June 7, 1974). [↑](#footnote-ref-486)
486. *Id*. [↑](#footnote-ref-487)
487. *Id*.; *Marshall*, 667 F.2d at 560. [↑](#footnote-ref-488)
488. U.S. Dep’t of Labor, Wage & Hour Div., Uniforms and Their Maintenance Under the FLSA, WH Publication 1428 (Mar. 1984). [↑](#footnote-ref-489)
489. *Id*. ¶4(Q)(A). [↑](#footnote-ref-490)
490. *Id*. ¶6(Q)(A). [↑](#footnote-ref-491)
491. *See* 29 C.F.R. §531.3(d)(2), .32(c), .35; WH Op., 1974 WL 38713 (June 7, 1974); WH Op., 1975 WL 40942 (Apr. 17, 1975); WH Op., 1976 WL 41745 (Aug. 20, 1976).

     *See also*

     *Second Circuit:* Donovan v. K.F.C. Serv., 547 F. Supp. 503, 505–06, 25 WH Cases 1229, 1231 (E.D.N.Y. 1982).

     *Fourth Circuit:* Donovan v. Captain Bill’s, 26 WH Cases 497, 500 (E.D.N.C. 1983).

     *Fifth Circuit:* Ettorre v. Russos Westheimer, Inc., 2022 BL 94195, 2022 WL 822181, at \*3 (5th Cir. Mar. 18, 2022) (finding employer’s “linen fee” deduction for laundering employees’ aprons unreasonable because unsubstantiated); Reich v. Priba Corp., 890 F. Supp. 586, 596–97 (N.D. Tex. 1995).*Eleventh Circuit*: Marshall v. Newport Motel, 24 WH Cases 497, 502 (S.D. Fla. 1979). [↑](#footnote-ref-492)
492. *See* 29 C.F.R. §531.3(d)(2)(iii); WH Op., 1980 WL 141341 (Dec. 31, 1980); *see also Captain Bill’s*, 26 WH Cases at 500; Marshall v. Krystal Co., 467 F. Supp. 9, 13, 23 WH Cases 874, 877 (E.D. Tenn. 1978). [↑](#footnote-ref-493)
493. Brennan v. Mormarlor Enters., 74 Lab. Cas. (CCH) ¶33,109 (W.D. Tex. 1974). [↑](#footnote-ref-494)
494. 29 C.F.R. §4.168(b)(1)(ii). The regulation has not yet been revised to reflect the current minimum wage. *See* WH Op., 1975 WL 40942 (Apr. 17, 1975); Marshall v. SF of Ohio, 25 WH Cases 227, 228 (S.D. Ohio 1981); *Newport Motel*, 24 WH Cases at 502. [↑](#footnote-ref-495)
495. 29 C.F.R. §4.168(b)(1)(ii). [↑](#footnote-ref-496)
496. *Id*. §4.168(b)(2). [↑](#footnote-ref-497)
497. *Id*. [↑](#footnote-ref-498)
498. WH Op. FLSA2006-21, 2006 WL 1910966 (June 9, 2006). [↑](#footnote-ref-499)
499. WH Op. FLSA2008-10, 2008 WL 5483046 (Oct. 24, 2008). [↑](#footnote-ref-500)
500. *Id*. [↑](#footnote-ref-501)
501. *See*

     *Second Circuit:* Donovan v. K.F.C. Servs., 547 F. Supp. 503, 506, 25 WH Cases 1229, 1231 (E.D.N.Y. 1982).

     *Fourth Circuit:* Masters v. Maryland Mgmt. Co., 493 F.2d 1329, 1334, 21 WH Cases 604, 606 (4th Cir. 1974).

     *Fifth Circuit:* Reich v. Priba Corp., 890 F. Supp. 586, 596–97 (N.D. Tex. 1995).

     *Eighth Circuit:* Bingham v. Airport Limousine Serv., 314 F. Supp. 565, 572, 19 WH Cases 612, 617 (W.D. Ark. 1970). [↑](#footnote-ref-502)
502. 29 U.S.C. §213(a)(7). [↑](#footnote-ref-503)
503. *Id*. §214. [↑](#footnote-ref-504)
504. Pub. L. No. 104-188, 110 Stat. 1755 (Aug. 20, 1996). [↑](#footnote-ref-505)
505. *Id.* §2105(c) (codified as amended at 29 U.S.C. §206(g)). [↑](#footnote-ref-506)
506. 29 U.S.C. §206(g)(1) and (g)(4). [↑](#footnote-ref-507)
507. *Id*. §206(g)(2). [↑](#footnote-ref-508)
508. *Id*. According to the statute, violations of subsection (g) are considered violations of 29 U.S.C. §215(a)(3). *See* 29 U.S.C. §206(g)(3). Violations of §215 are treated in detail in Chapter 13, Retaliation. *See* 29 U.S.C. §206(g)(2) and (5) for application to Puerto Rico. [↑](#footnote-ref-509)
509. Act of June 25, 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §203(c)). [↑](#footnote-ref-510)
510. *See* William G. Whittaker, Cong. Research Serv., RL30235, Minimum Wage in the Territories and Possessions of the United States: Application of the Fair Labor Standards Act (updated Mar. 12, 2008) 6 [hereinafter Whittaker]. [↑](#footnote-ref-511)
511. *Id.* [↑](#footnote-ref-512)
512. *Id.* [↑](#footnote-ref-513)
513. Pub. L. No. 85-231 (1957). In 1959, the first compliance officer was dispatched to Guam by the Wage and Hour Division. *See* Whittaker, at 7–8. [↑](#footnote-ref-514)
514. For more information on minimum wages in the territories, *see* Whittaker, *supra.* [↑](#footnote-ref-515)
515. *See* 86 Cong. Rec. 2632–33 app. (May 2, 1940). [↑](#footnote-ref-516)
516. Whitaker, at Summary. [↑](#footnote-ref-517)
517. *Id.* [↑](#footnote-ref-518)
518. Homeworkers in Puerto Rico and the Virgin Islands, however, may be paid a minimum piece rate prescribed by regulation or order. *See* 29 U.S.C. §206(a)(2). [↑](#footnote-ref-519)
519. Whitaker, at 8. [↑](#footnote-ref-520)
520. *Id.* [↑](#footnote-ref-521)
521. Pub. L. No. 84-1023 (1956). Although it was conceded that the FLSA minimum wage applied to Samoa, industry employers sought and were successful in securing amnesty for the past practice of not having paid the minimum wage. *Id.* [↑](#footnote-ref-522)
522. Gerald Mayer et al., Cong. Research Serv., R42713, The Fair Labor Standards Act (FLSA): An Overview 6–7 (Nov. 6, 2013). [↑](#footnote-ref-523)
523. Pub. L. No. 110-28, 121 Stat. 112 (May 25, 2007). [↑](#footnote-ref-524)
524. *Id.* §8103(a), (b). [↑](#footnote-ref-525)
525. Act of Sept. 30, 2010, Pub. L. No. 111-244, 124 Stat. 2618 (2010). [↑](#footnote-ref-526)
526. Pub. L. No. 112-149, 126 Stat. 1144 (July 26, 2012). [↑](#footnote-ref-527)
527. Pub. L. No. 114-61, 129 Stat. 545 (Oct. 7, 2015). The bill also requires the Government Accountability Office (GAO) to assess the impact of minimum wage increases in American Samoa and to report on alternative ways of increasing the minimum wage in American Samoa to keep pace with the cost of living and eventually equal the minimum wage for the United States. *See id.* The report, due by April 1, 2020, was not publicly available at the time of publication. [↑](#footnote-ref-528)
528. The Northern Mariana Islands passed to the United States by conquest at the close of World War II. In 1947, following the establishment of the United Nations, the Marianas were placed under U.S. control as part of the Trust Territory of the Pacific Islands. [↑](#footnote-ref-529)
529. The Covenant of Association between the Mariana Islands and the United States established the Islands’ current commonwealth status. [↑](#footnote-ref-530)
530. *See* Pub. L. No. 110-28 §8103(a), (b), 121 Stat. 112 (May 25, 2007). [↑](#footnote-ref-531)
531. Act of Sept. 30, 2010, Pub. L. No. 111-244, 124 Stat. 2618 (2010). [↑](#footnote-ref-532)