



UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
Washington, DC 20210



February 15, 2019

FIELD ASSISTANCE BULLETIN No. 2019-2

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

FROM: Keith E. Sonderling  
Acting Administrator

SUBJECT: Dual jobs and related duties under Section 3(m) of the Fair Labor Standards Act (FLSA)

This Field Assistance Bulletin (FAB) provides guidance on a recent change to Field Operations Handbook (FOH) 30d00(f), which contains the Wage and Hour Division's (WHD) interpretation concerning whether tipped employees are working "dual jobs." Specifically, this FAB explains that, consistent with [WHD Opinion Letter FLSA2018-27 \(Nov. 8, 2018\)](#), WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties. Employers remain prohibited from keeping tips received by their employees, regardless of whether the employer takes a tip credit under the FLSA. In addition, employers electing to use the tip credit provision must ensure tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employee's direct (or cash) wages do not equal the minimum hourly wage of \$7.25 per hour, the employer must continue to make up the difference. WHD has updated FOH 30d00(f) accordingly.

## Background

The FLSA generally requires covered employers to pay employees at least a federal minimum wage, which is currently \$7.25 per hour. *See* 29 U.S.C. § 206(a)(1). Under Section 3(m) of the Act, an employer may pay a tipped employee<sup>1</sup> a lower direct cash wage and count a limited amount of the employee's tips as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage (known as a "tip credit"). *See* 29 U.S.C. § 203(m)(2)(A).

When an employer employs a worker in both a tipped and non-tipped occupation, such as a server job and a maintenance job, the tip credit is available only for the hours the employee works in the tipped occupation. In this dual job scenario, the employer may take a tip credit for the time that the tipped

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<sup>1</sup> The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." 29 U.S.C. § 203(t).



employee spends performing duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a server who also cleans and sets tables, makes coffee, and occasionally washes dishes or glasses is engaged in duties related to a tipped occupation, even though the server is not tipped for these related duties. *See* 29 C.F.R. § 531.56(e).

### Revisions to FOH 30d00(f)

Section 531.56(e), and 29 U.S.C. § 203(m), which it interprets, allow employers to take a tip credit based on whether the employee’s “job” or “occupation” is tipped. However, WHD’s previous interpretation of § 531.56(e) in FOH 30d00(f) focused on whether the employee’s “duties” were tipped. The previous FOH 30d00(f) excluded from the tip credit any time that an employee in a tipped occupation spent performing related, non-tipped duties in excess of 20 percent in the workweek. This prior interpretation created confusion for the public about whether § 531.56(e) requires certain related, non-tipped duties to be excluded from the tip credit. In fact, § 531.56(e) includes non-tipped duties in the tip credit unless they are unrelated to the tipped occupation or part of a separate, non-tipped occupation in a “dual job” scenario.

Accordingly, an employer may take a tip credit for any duties that an employee performs in a tipped occupation that are related to that occupation and either performed contemporaneous with the tip-producing activities or for a reasonable time immediately before or after the tipped activities. To clarify this, the Department has issued WHD Opinion Letter FLSA2018-27—formally rescinding its previous interpretation setting a 20 percent limit on related, non-tipped duties—and revised FOH 30d00(f) to reflect WHD’s interpretation of 29 C.F.R. § 531.56(e) as provided in the opinion letter.

Under the revised FOH 30d00(f), WHD staff will determine whether a tipped employee’s non-tipped duties are related to the tipped occupation by using the following principles:

- Non-tipped duties listed as examples in 29 C.F.R. § 531.56(e), and non-tipped duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O\*NET) [<https://www.onetonline.org/>], are related duties.<sup>2</sup>

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<sup>2</sup> Some newly emerging occupations will qualify as tipped occupations under the Act but will not have an O\*NET description. *See, e.g.,* [WHD Opinion Letter FLSA2008-18 \(Dec. 19, 2008\)](#) (itamae-sushi chefs and teppanyaki chefs). For such occupations, duties usually and customarily performed by employees are “related duties” as long as they are included in the list of duties performed in similar O\*NET occupations. For example, in the case of teppanyaki chefs, related duties would be those duties included in O\*NET’s list of core and supplemental tasks for counter attendants in the restaurant industry.



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- An employer may take a tip credit for any amount of time that an employee spends on related, non-tipped duties performed contemporaneously with the tipped duties—or for a reasonable time immediately before or after performing the tipped duties—regardless whether those duties involve direct customer service.<sup>3</sup>
- Employers may not take a tip credit for time spent performing any tasks that are not contained in 29 C.F.R. 531.56(e), or in the O\*NET task list for the employee’s tipped occupation, or—for a new occupation without an O\*NET description—in the O\*NET task list for a similar occupation. We note, however, that some of the time that a tipped employee spends performing these tasks—which are unrelated to the employee’s tipped occupation—may be subject to the *de minimis* rule in 29 C.F.R. § 785.47.

The revised FOH 30d00(f) incorporates these principles. WHD staff should apply them in investigations involving non-tipped duties performed by tipped employees on or after November 8, 2018. As a matter of enforcement policy, WHD staff should also follow the revised guidance in FOH 30d00(f) in any open or new investigation concerning work performed prior to the issuance of WHD Opinion Letter FLSA2018-27 on November 8, 2018.<sup>4</sup>

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<sup>3</sup> See WHD Opinion Letter WH-502 (Mar. 28, 1980) (concluding that a server’s time spent performing related duties (e.g., vacuuming) after restaurant closing is subject to the tip credit).

<sup>4</sup> WHD will update its website and other materials to reflect the information above. Questions should be directed to the Division of Enforcement Policy and Procedures, FLSA / Child Labor Branch, through regular channels.