

# THE TIPPING POINT: NETWORK EFFECTS OF TIPPING QUICK-SERVICE RESTAURANT CASHIERS

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## INTRODUCTION

You shall not oppress a hired servant who is poor and needy, whether he is one of your countrymen or one of your aliens who is in your land in your towns. You shall give him his wages on his day before the sun sets, for he is poor and sets his heart on it; so that he will not cry against you to the LORD and it become sin in you.<sup>1</sup>

For centuries, human cultures have recognized the exchange of goods for work. Though the currency has not always been in the form of money, workers now expect to earn something of value for the loss of their time. The gospel of Luke writes that a “labourer [sic] is worthy of his hire.”<sup>2</sup> This message that someone should be properly recompensed for their efforts was further emphasized in fifteenth century English poetry.<sup>3</sup> Since 1948, the Universal Declaration of Human Rights has recognized that all employees have the right to just and favorable remuneration to ensure an existence worthy of human dignity.<sup>4</sup>

While federal and state labor laws have promulgated wage floors for nearly a decade, employers in certain sectors rarely cover these costs. Instead, in the restaurant industry since 1966, “customers have been responsible for paying a substantial portion of tipped workers’ wages—a portion that has grown to account for over seventy percent of the minimum hourly wage.”<sup>5</sup> The Fair

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1. *Deuteronomy* 24:14–15 (New American Standard Bible 1995).

2. *Luke* 10:7 (King James).

3. See GEOFFREY CHAUCER, *The Summoner’s Tale*, in *THE CANTERBURY TALES*, at 240 (A. S. Kline ed., Poetry in Translation 2007) (c.1343–1400) (“You would have all our labour [sic] for naught. The great God, who all this world has wrought, Says that the workman’s worthy of his hire.”).

4. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

5. FOOD RESEARCH CENTER, INTERNATIONAL HUMAN RIGHTS LAW CLINIC, & RESTAURANT OPPORTUNITIES CENTERS UNITED, *WORKING BELOW THE LINE 8* (2015). See also 29 U.S.C. § 203(i).

Labor Standards Act (FLSA), administered by the Department of Labor (DOL), became law in 1938.<sup>6</sup> The Act set a minimum wage of twenty-five cents per hour and a maximum workweek of forty hours to be phased in by 1940 for most workers in manufacturing.<sup>7</sup> Today, the FLSA requires employers to pay all employees the federal minimum wage of \$7.25 per hour—with one exception. Tipped employees, defined as any employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips, may receive an hourly base wage that is lower than minimum wage.<sup>8</sup>

The rise of payment processing platforms in the restaurant industry is increasing which types of occupations are customarily and regularly tipped. Automatic prompts on screens now frequently rise as high as thirty percent in establishments where tips were previously never considered. This creates wage ambiguity over whether cashiers and baristas can—and should—be paid a tipped employee wage. Continuing to tip employees in these environments can counteractively allow employers to pay their workers less, which calls into question the effectiveness of tipping.

This Note focuses on the need to reconsider tipped employee wage laws and regulations in the wake of increased digital tipping prompts in the food service industry. This Note proceeds in five parts. Part I will focus on the history of American tipping culture and its role within the restaurant industry. Part II will address the evolution of wage regulations for tipped employees. Part III will briefly discuss recent legislation and case law regarding tipped wages for cashiers. Then, it will analyze the quick-service cashier “problem” that exists in light of new technological advancements. Part IV will advance the position that (1) a national, industry-specific standard for tipping is needed; and (2) the tipped employee minimum wage does not serve the purpose of protecting workers from underpay. Part V will expand on future issues that may arise from the current definition of tipped employees, including job automation, the gig economy, and franchise law.

## I. AMERICAN TIPPING CULTURE

### A. *History of Tipping*

While a tip is a payment from a customer to a service provider, it differs from other economic transactions in significant ways.<sup>9</sup> Tipping involves “poorly specified obligations that are enforced by social norms and . . . individual conscience.”<sup>10</sup> Rather than a fixed price, a tip allows

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6. See Fair Labor Standards Act, Pub. L. No. 75-718 (1938) (codified at 29 U.S.C. § 201 (1938)).

7. Chapter 3: *The Department in the New Deal and World War II, 1933-1945*, U.S. DEP’T LAB., <https://www.dol.gov/general/aboutdol/history/dolchp03> (last visited Mar. 26, 2023).

8. See 29 C.F.R. § 531.56.

9. Ofer H. Azar, *The Economics of Tipping*, 34 J. ECON. PERSPS. 215, 215 (2020).

10. Michael Lynn, George M. Zinkhan & Judy Harris, *Consumer Tipping: A Cross-Country Study*, 20 J. CONSUMER RSCH. 478, 478 (1993).

customers to pay whatever they please for services that were already rendered.<sup>11</sup> “Failure to tip an amount that conforms with social norms results only in social disapproval and . . . pangs of guilt.”<sup>12</sup> Tip levels are discretionary, and amounts vary widely between customers, occasions, industries, and cultures.<sup>13</sup>

The precise origins of tipping are unclear.<sup>14</sup> However, it is thought that the practice arrived in the United States from Europe when high-income Americans who traveled in Europe in the nineteenth century began tipping on their return to the United States to show their familiarity with European customs.<sup>15</sup> The average tip in European restaurants by 1895 was five percent of the bill, while in the United States a common tip was ten percent.<sup>16</sup> It is estimated that during the early 1910s, five million workers in the United States had tip-taking occupations.<sup>17</sup> This amounted to more than ten percent of the labor force.<sup>18</sup> However, “employers both in Europe and the United States sometimes tried to take these economic rents from the workers either by taking the tips, or by charging employees for the right to work and earn tips.”<sup>19</sup>

There were early attempts to abolish the “new” tipping culture that had arrived in the United States. “Some saw tipping as creating a servants’ class, part of a society where the tippers looked down upon the service providers.”<sup>20</sup> Tipping was also described as “offensively un-American, because it was contrary to the spirit of American life of working for wages rather than fawning for favors.”<sup>21</sup> While a few states passed laws against tipping, these were

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11. *Id.*

12. *Id.*

13. *See* Azar, *supra* note 9, at 215. For example, in areas where tipping occurs, workers in only some service occupations are tipped. Taxi drivers are customarily tipped, but not bus drivers. *See id.*

14. *Id.* at 216. “Hemenway . . . suggests that tipping dates as far back as the Roman era and is probably even older.” *Id.* (quoting DAVID HEMENWAY, *PRICES & CHOICES: MICROECONOMIC VIGNETTES* (1993)). “Segrave . . . claims that tipping may have begun in the late Middle Ages when a master or lord of the manor could give a little extra money to a servant or laborer, whether from appreciation of a good deed or from compassion. *Id.* (quoting KERRY SEGRAVE, *TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES* (1998)). “Brenner . . . attributes the tipping origins to sixteenth century England, where brass urns with the inscription ‘To Insure Promptitude’ were placed first in coffeehouses and later in local pubs.” *Id.* (quoting MARK L. BRENNER, *TIPPING FOR SUCCESS: SECRETS FOR HOW TO GET IN AND GET GREAT SERVICE* (2001)). Brenner, Schein, Jablonski, and Wohlfahrt “suggest that ‘tip’ comes from the first three letters of ‘To Insure Promptitude.’” *Id.* *See* JOHN E. SCHEIN, EDWIN F. JABLONSKI & BARBARA R. WOHLFAHRT, *THE ART OF TIPPING: CUSTOMS & CONTROVERSIES* (1984). However, “Hemenway . . . argues that ‘tip’ may come from stipend, a version of the Latin ‘stips.’” Azar, *supra* note 9, at 216.

15. Azar, *supra* note 9, at 216. *See also* SCHEIN, JABLONSKI & WOHLFAHRT, *supra* note 14.

16. Azar, *supra* note 9, at 216.

17. *Id.* *See also* SEGRAVE, *supra* note 14.

18. Azar, *supra* note 9, at 216–17.

19. *Id.* at 217.

20. *Id.*

21. *Id.* *See also* George Gunton, *Economic Effects of Tipping*, in 11 GUNTON’S MAG. 13–19 (1896).

repealed within a number of years.<sup>22</sup> Today, forty-three percent of diners nationally favor the elimination of tipping.<sup>23</sup>

The percentage of a typical tip in the United States has not always been so significant. The norm of ten percent established in restaurants in the late nineteenth century remained for several decades, but eventually increased to fifteen percent.<sup>24</sup> Tipping norms differ around the globe, and tourist guidebooks often provide advice about the tipping norms in each country.<sup>25</sup> While tipping has international origins, its practice abroad is far less dramatic or frequent as it is in the United States.<sup>26</sup>

Pinpointing why and when customers are most likely to tip can be challenging. Results from a study on the economic behaviors on tipping show that tipping prevalence is negatively correlated with the worker's pre-tip income and positively correlated with the customer's income.<sup>27</sup> This suggests tipping may serve "as a redistributive norm: it happens more in occupations where it transfers money from high-income individuals to low-income ones."<sup>28</sup> Additionally, "tipping prevalence is positively affected by the closeness established during the service between the worker and the customer."<sup>29</sup>

Tipping can also be viewed as a "marketing phenomenon."<sup>30</sup> Businesses that "encourage tipping allow their customers to set the prices of at least a portion of the service offerings of the business."<sup>31</sup> By giving customers agency, this may foster a more positive relationship between them and the business—and more importantly, it encourages continued transactions.

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22. See, e.g., Azar, *supra* note 9, at 217. Washington State passed a law against the practice of tipping in 1909 which was subsequently abolished in 1913. See Crystal Paul, *The Past, Present and Future of Tipping and Tipped Workers in Seattle*, SEATTLE TIMES (Sept. 3, 2022, 12:54 PM), <https://www.seattletimes.com/life/the-past-present-and-future-of-tipping-and-tipped-workers-in-seattle/>.

23. See Richard K. Miller & Kelli Washington, *Restaurant, Food & Beverage Market Research Handbook 2020-2021*, RKMA MKT. RSCH. HANDBOOK SERIES 42 (18th ed. 2021). See also Azar, *supra* note 9, at 233. Critics of tipping have argued that its practice "enforces archaic and undesirable social distinctions and that it facilitates discrimination in who holds what jobs in a restaurant, as well as encouraging sexual harassment." *Id.* Multiple scholars have expressed a negative attitude toward tipping or even called to abolish it. *Id.* "Some restaurant owners strongly believe that replacing tipping with a fixed service charge, distributed among both servers and kitchen help, led to a better quality of food, improved team spirit, and ultimately resulted in a higher level of professionalism and better service—even if some previously high-tipped servers experienced a fall in income." *Id.*

24. Azar, *supra* note 9, at 217.

25. *Id.* See also Jenny Horowitz, *Tipping Around the World: A Global Gratuity Guide*, WESTERN UNION (July 31, 2017), <https://www.westernunion.com/blog/en/global-tipping-guide/>.

26. Azar, *supra* note 9, at 217.

27. *Id.* at 221.

28. *Id.*

29. *Id.*

30. Lynn, Zinkhan & Harris, *supra* note 10, at 478–88.

31. *Id.* at 478.

*B. The Role of Tipping in the Restaurant Industry*

Sales in the food services industry nearly doubled in a decade.<sup>32</sup> American adults dine out for lunch or dinner 4.9 times per week on average.<sup>33</sup> There are nearly one million restaurant and foodservice locations in the United States, and the restaurant industry employed 15,300,000 people in 2019.<sup>34</sup> While tipping is relatively common for numerous service professions including delivery drivers, bartenders, and cosmetologists, the practice is the most prominent in restaurants and bars.<sup>35</sup> Within solely the United States food industry, annual tips are estimated to exceed \$47 billion.<sup>36</sup> Many American workers within this sector rely on tips to supplement their income.<sup>37</sup> The Fair Labor Standards Act (FLSA) established basic labor protections for workers in 1938 “such as a forty-hour workweek, overtime protection, and a national minimum wage”; however, restaurant and other service workers were excluded from this legislation.<sup>38</sup>

The restaurant industry is “the nation’s training ground,” with the majority of adults having worked in one.<sup>39</sup> “The typical restaurant worker in the United States earns approximately \$15,000 per year, or one-third of what the average American worker earns.”<sup>40</sup> In particular, tipped restaurant workers “live in poverty at nearly three times the rate of the total employed [United States] population.”<sup>41</sup> Additionally, women’s wages are concentrated in the bottom of the restaurant industry with approximately two-thirds of women in this sector earning the subminimum wage.<sup>42</sup> In 2016, roughly one-and-a-half million American employees had wages below the federal minimum.<sup>43</sup> In the same year, two-thirds of workers earning minimum wage or below were employed in food preparation and serving related jobs.<sup>44</sup>

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32. Miller & Washington, *supra* note 23, at 23. Sales for all food services and drinking establishments increased from \$456.4 billion in 2008 to \$717.0 billion in 2018. *Id.*

33. *Id.* at 40.

34. *Id.* at 25 (“The restaurant share of the food dollar is approximately fifty-one percent.”).

35. See Azar, *supra* note 9, at 215.

36. *Id.*

37. *Id.* There are over 2.6 million servers and 610,000 bartenders in the United States, and tips are a significant source of income in both occupations. *Id.* See also Walter J. Wessels, *Minimum Wages and Tipped Servers*, 35 *ECON. INQUIRY* 334–49 (1997). For servers in full-course restaurants, the income share that comes from tips is fifty-eight percent. Azar, *supra* note 9, at 215. This rises to sixty-one percent for workers in counter restaurants. *Id.* at 216. These shares are further underestimated because tips are often underreported. *Id.*

38. See Working Below the Line, *supra* note 5, at 11.

39. *National Statistics*, NAT’L REST. ASS’N, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/> (last visited Apr. 5, 2023).

40. Working Below the Line, *supra* note 5, at 14.

41. *Id.*

42. *Id.*

43. *Characteristics of Minimum Wage Workers 2016*, tbl.4, U.S. BUREAU LAB. STATS., <https://www.bls.gov/opub/reports/minimum-wage/2016/home.htm> (last visited Mar. 26, 2023).

44. *Id.*

## II. WAGE REGULATIONS FOR TIPPED EMPLOYEES

A. *Tipped Employees under the Fair Labor Standards Act*

The goal of the Fair Labor Standards Act of 1938 (FLSA) was to protect workers from “the evil of ‘overwork’ as well as ‘underpay.’”<sup>45</sup> In codified form, the FLSA provides a statutory wage floor which ensures states and municipalities do not create a minimum wage lower than the federal minimum, although they are still permitted to establish wage rates that exceed the federal minimum wage.<sup>46</sup> The original language of the FLSA did not expressly mention service-generated tips, but employers commonly applied tips toward their employee’s minimum wage in positions where tipping was customary.<sup>47</sup> In *Williams v. Jacksonville Terminal Co.*, the Court recognized early in the FLSA’s existence that tips are capable of being included as part of wages.<sup>48</sup>

Tipping practices were addressed by Congress in 1966 when it amended the FLSA to establish the “tip credit” system.<sup>49</sup> Employers utilizing this system may pay a reduced hourly wage to “tipped employees.”<sup>50</sup> A tip credit “is the amount of employee tips an employer may count against its FLSA-mandated minimum wage.”<sup>51</sup> To properly implement the FLSA tip credit system, employers must ensure employees receive a sufficient amount of tips to make up the difference between the direct hourly wage paid by the employer and the applicable minimum wage.<sup>52</sup> Congress clarified in 1974 that “employers cannot use employees’ tips to satisfy more than fifty percent of the minimum wage requirement” and “tipped employees must be allowed to retain one hundred percent of their tips.”<sup>53</sup> Additionally, Congress added language to section 203(m), recognizing the concept of “tip pooling,” which allows employees to reach an agreement for the “pooling of tips among employees who customarily and regularly receive tips.”<sup>54</sup>

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45. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942).

46. Ashley Weis, *Tip Jars in Need of Change: The Case for Reforming Employee Tip Regulations in the Fair Labor Standards Act*, 50 U. TOL. L. REV. 575, 577 (2019).

47. *Id.*

48. *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942).

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

50. *Id.*

51. *Id.*

52. *Id.* at 390–91.

53. *Id.* at 391. *See also* Weis, *supra* note 46, at 577 (A 1974 amendment broadened the authority of the Department of Labor by granting it the power to “‘prescribe necessary rules, regulations, and orders’ to carry out the provisions of the FLSA”). *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) (interpreting authorizing language in amendments made to the FLSA in 1974 as “provid[ing] the Department with the power to fill . . . gaps through rules and regulations.”)

54. Eisenberg & Williams, *supra* note 49, at 391. (citing Fair Labor Standards Amendments of 1974, Pub. L. No. 93–259, § 13(b)(8), 88 Stat. 55, 64–65 (codified at 29 U.S.C. § 203(m) (2012))).

“Employers are responsible for paying the difference in wages for any week in which the combination of an employee’s direct wages and tips does not reach the FLSA’s minimum wage.”<sup>55</sup> In 1996, Congress amended the FLSA to shift the tipped employer’s obligation to a fixed dollar amount rather than a percentage of the minimum wage.<sup>56</sup> The current federally required direct wage employers must pay tipped employees is \$2.13 per hour—as long as the employees’ tips are “sufficient to bridge the gap between the employer’s direct wage and the FLSA’s generally applicable minimum wage.”<sup>57</sup> Therefore, “[w]hen Congress increases the federal minimum wage, the maximum permissible tip credit also increases if the direct wage for tipped employees remains unaltered.”<sup>58</sup> “If the tip credit continues to be set . . . to a fixed dollar amount, rather than as a percentage of the minimum wage rate, the tip credit percentage of the guaranteed minimum wage will continue to increase and the employer cash wage percentage will continue to decrease if and when the federal minimum wage increases.”<sup>59</sup>

A tip must be received by an employee free from the employer’s control. The Department of Labor defines a tip as “a sum presented by a customer as a gift or gratuity in recognition of some service performed for him” and is distinguishable from service charges.<sup>60</sup> To qualify as a tip, a payment must have been “determined solely at the customer’s discretion and the payment must become the property of the employee in recognition of whose service it is presented by the customer.”<sup>61</sup> Service charges are not considered tips because their amount is under the control of the employer.<sup>62</sup> Further, only cash or its equivalent equate to a tip; special gifts in nonmonetary form do not factor into employee tips for the purpose of employers taking a tip credit.<sup>63</sup>

The maximum hourly tip credit against the federal minimum wage is \$5.12, which when combined with the minimum cash wage for tipped

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55. *Id.*

56. DAVID H. BRADLEY, CONG. RSCH. SERV., R43445, THE TIP CREDIT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA): IN BRIEF (2015). *See* Weis, *supra* note 46, at 577–78.

57. Eisenberg & Williams, *supra* note 49, at 391–92.

58. *Id.* at 392.

59. *See* Bradley, *supra* note 56, at 2. For example, the current federal minimum wage of \$7.25 provides a tip credit level of seventy-one percent. Employers are only required to pay twenty-nine percent of federal minimum wages to employees who earn a minimum cash wage with tips. *Id.* at 1. With a federal minimum wage of \$15.00, this tip credit level would increase to eighty-five percent.

60. LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW § 7:8, Westlaw (database updated April 2024).

61. *Id.*

62. *Id.* For example, some employers require that restaurant customers with large parties pay a fixed gratuity. Wage and Hour has asserted these service charges are not considered a tip. It also became more common for restaurants to charge service charges during the pandemic. *See also* Priya Krishna, *The Restaurant Service Charge Isn’t Going Anywhere*, N.Y. TIMES (May 15, 2023), <https://www.nytimes.com/2023/05/15/dining/restaurant-service-charges.html> (“A service charge belongs to the employer, who can choose how to spend it . . .”).

63. SCHNEIDER & STINE, *supra* note 60.

employees yields the federal minimum wage.<sup>64</sup> In sixteen states, the state minimum cash wage payment is the same as that required under FLSA—\$2.13.<sup>65</sup> Twenty-eight states require employers to pay tipped employees a minimum cash wage above \$2.13, but still below the state’s minimum wage.<sup>66</sup> Further, seven states require employers to pay tipped employees full state minimum wage before tips.<sup>67</sup>

State laws concerning tipped employee wages span numerous enforcement methods, adding continued confusion for employers in the service industry. For example, Minnesota has different minimum cash wages for large employers and small employers.<sup>68</sup> Nevada historically required a higher minimum wage for tipped employees who were not offered health insurance by their employer.<sup>69</sup> In multiple states, including New York, tipped workers’ minimum wage rates vary by region.<sup>70</sup> Vermont specifies that the tipped employee wage only covers “[a]n employee of a hotel, motel, tourist place, or restaurant who customarily and regularly receives more than \$120.00 per month in tips for direct and personal customer service.”<sup>71</sup> Five states do not have any minimum wage laws, and employers in those jurisdictions must pay employees covered by the FLSA at least the federal minimum wage.<sup>72</sup>

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64. *Minimum Wages for Tipped Employees*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped#foot1> (last visited Mar. 26, 2023).

65. *Id.* The states where the minimum cash wage payment is the same as that required under the FLSA include Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. This is also the law in American Samoa, Commonwealth of the Northern Mariana Islands, and Puerto Rico.

66. *Id.* States that require employers to pay tipped employees a minimum wage above the minimum cash wage required under the FLSA, but below their state minimum wage, include Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and West Virginia. This is also the law in the District of Columbia and the U.S. Virgin Islands.

67. *Id.* Some states require employers to pay tipped employees the full state minimum wage before tips, thereby negating the tip credit system in such jurisdictions. These states include Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. This is also the law in Guam.

68. *Id.* For purposes of calculating the state minimum wage in Minnesota, “[a] large employer means an enterprise whose annual gross revenue is not less than \$500,000,” and “[a] small employer means an enterprise whose annual gross revenue is less than \$500,000.” *Id.* at n.2. Large employers must pay \$10.85 while the minimum wage for small employers is \$8.85. *Minimum Wages for Tipped Employees*, *supra* note 64.

69. *Id.* The Nevada minimum wage will increase on July 1, 2024 to \$12.00 for all employees. *Id.* at n.10.

70. *Minimum Wages for Tipped Employees*, *supra* note 64. Tipped workers’ minimum wage rates vary by region in both New York and Oregon. *Id.*

71. *Id.*

72. *Id.* Alabama, Louisiana, Mississippi, South Carolina, and Tennessee do not have state minimum wage laws. *Id.* at n.9. “Georgia has a state minimum wage law, but it does not apply to tipped employees.” *Id.*



An employee may be considered a tipped employee within the meaning of the FLSA “when, in the occupation in which he is engaged, the amounts he receives as tips customarily and regularly total ‘more than \$30 a month.’”<sup>73</sup> “The phrase ‘customarily and regularly’ signifies a frequency which must be greater than occasional, but which may be less than constant.”<sup>74</sup> In order to take advantage of a tip credit system, employers must inform tipped employees (1) of the cash wage they will be paying as their employer; (2) of the additional amount they may claim as a tip credit, which is currently federally limited to \$5.12 per hour; (3) that the tip credit cannot exceed the tips the employee actually receives; (4) that employees must be allowed to keep all tips they receive except for a valid tip pooling arrangement limited to participation by employees who customarily and regularly receive tips; (5) that an employer cannot keep employee tips for any purpose; and (6) that the tip credit does not apply to any tipped employee unless the employee has been informed of these tip credit provisions.<sup>75</sup>

### III. CONFUSION REMAINS: ARE QUICK-SERVICE CASHIERS TIPPED EMPLOYEES?

#### A. Recent Legislation Concerning Tipped Employees

The Department of Labor (DOL) first introduced the 80/20 rule in a 1988 update to its Field Operations Handbook.<sup>76</sup> Tipped employees occasionally have a dual job in which they perform two roles as part of their employment—one tipped and one non-tipped.<sup>77</sup> However, if a tipped employee in a dual job performs[s] non-tipped duties for more than twenty percent of their total hours worked, the DOL does not consider them to be tipped employees.<sup>78</sup> The DOL takes the position that the tip credit will be lost for each work week where an employee spends more than twenty percent of their time performing side work. In these situations, the employer has to pay the employee the full minimum

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73. 29 C.F.R. § 531.56 (2021).

74. 29 C.F.R. § 531.57 (2012). “If an employee is in an occupation in which he normally and recurrently receives more than \$30 a month in tips, he will be considered a tipped employee even though occasionally because of sickness, vacation, seasonal fluctuations or the like, he fails to receive more than \$30 in tips in a particular month.” *Id.*

75. 29 U.S.C. § 203(m)(2)(A)–(B). The notice an employer provides to an employee of these tip credit provisions does not need to be in writing, but the Department of Labor encourages this practice. See *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa> (last visited Mar. 23, 2024). See also *Pellon v. Bus. Representation Int’l*, 528 F. Supp. 2d 1306, 1310 (S.D. Fla. 2007), *aff’d*, 291 F. App’x 310 (11th Cir. 2008) (employer properly informed or notified employees that it intended to take tip credit against their wages).

76. U.S. DEP’T LAB., FIELD OPERATIONS HANDBOOK (2016), <https://www.dol.gov/agencies/whd/field-operations-handbook>. See, e.g., *Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 619 (9th Cir. 2018) (discussing the history of the dual jobs guidance in the Field Operations Handbook).

77. Weis, *supra* note 46, at 578.

78. *Id.* at 578–79.

wage. However, understanding what kinds of work falls under the classification of tipped work has resulted in confusion and years of litigation for employers.

In 2018 and 2019, the DOL “issued new subregulatory guidance providing that the Department would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, non-tipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties.”<sup>79</sup> “The 2020 Tip final rule amended [section] 531.56(e) to largely reflect the Department’s guidance issued in 2018 and 2019 that addressed whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation.”<sup>80</sup> This would have applied a more workable standard for employers to take the tip credit for duties performed “for a reasonable time immediately before or after” a tipped duty.<sup>81</sup> While the 2020 Tip final rule was pending in January of 2021, Attorneys General from eight states and the District of Columbia “filed a complaint in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the 2020 Tip final rule.”<sup>82</sup>

“On February 26, 2021, the DOL delayed the effective date of the 2020 Tip final rule until April 30, 2021, to provide the Department additional opportunity to review and consider the questions of law, policy, and fact raised by the rule.”<sup>83</sup> “On October 28, 2021, the [DOL] issued a Final Rule establishing limits on the amount of time tipped employees can spend performing work that is not ‘tip-producing work’ and still be paid at the reduced cash wage applicable to tipped employees.”<sup>84</sup>

The Final Rule in effect defines work that is part of a tipped occupation to encompass tip-producing work and “work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.”<sup>85</sup> Tip-producing work is “any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips.”<sup>86</sup> The Final Rule also defined the term “directly supports,” which

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79. Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60114–15 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531).

80. *Id.* See also Tip Regulation Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86756, 86771 (Dec. 30, 2020).

81. Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60114–15 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531).

82. *Id.* at 60118.

83. *Id.* at 60119.

84. Justin R. Barnes & Jeffrey W. Brecher, *DOL Formally Reinstates ‘20%’ Rule, Adds ‘30-Minute’ Rule Setting Limits on Tip Credit Use*, JACKSON LEWIS, <https://www.jacksonlewis.com/publication/dol-formally-reinstates-20-rule-adds-30-minute-rule-setting-limits-tip-credit-use> (last visited Mar. 26, 2023).

85. Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60124 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531).

86. *Id.* at 60115.

is work “that assists a tipped employee to perform the work for which the employee receives tips.”<sup>87</sup> Work that is not part of the tipped occupation is defined as “any work that does not generate tips and does not directly support tip-producing work.”<sup>88</sup> While this rule and its new classifications aimed to provide more clarity for employers, it failed to do so.<sup>89</sup>

### B. *Tipped Occupations and the Cashier Ambiguity*

Congress delegated the authority to the DOL to define what it means to be “engaged in an occupation” in which an employee customarily and regularly receives tips within the meaning of the FLSA.<sup>90</sup> “Tipped employee” for whom an employer may take a tip credit was defined in section 3(t), but Congress left the terms “occupation” and “engaged in an occupation” undefined for many years.<sup>91</sup> Section 531.56(f) adopted in the 2021 Final Rule affects only the conditions of whether and when an employer may take a tip credit against its minimum wage obligations for an employee performing non-tipped work.<sup>92</sup> Importantly, “the provision does not impact long-established understandings of what occupations are and are not ‘customarily and regularly’ tipped occupations.”<sup>93</sup>

The legislative history accompanying the 1974 amendments to the FLSA’s tip provisions identified tipped occupations to include “waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc.”<sup>94</sup> Alternatively, the legislative history identified “janitors, dishwashers, chefs, [and] laundry room attendants” as occupations in which employees do not customarily and regularly receive tips within the definition of tipped employees.<sup>95</sup>

There has been little case law in the subject area of whether a cashier amounts to a tipped employee. In *Kilgore v. Outback Steakhouse of Florida, Inc.*, the court addressed the issue.<sup>96</sup> There, the court held that, “[i]n

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87. *Id.*

88. *Id.* at 60130.

89. *But see* News Release 21–1022–NAT, *US Department of Labor Announces Proposed Rulemaking to Protect Tipped Workers; Clarify Use of The Tip Credit*, U.S. DEP’T LAB., (June 21, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210621>. Wage and Hour Division Principal Deputy Administrator Jessica Looman claimed, “this proposed rule provides more clarity and certainty for employers while better protecting workers. It helps ensure that tipped workers are treated with dignity and respect, and that they receive wages appropriate for the work they perform.” *Id.*

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

91. *Id.* at 60116.

92. *Id.* at 60121.

93. *Id.* at 60121. *See, e.g.*, S. REP. NO. 93-690, at 43 (1974); U.S. DEP’T LAB., FIELD OPERATIONS HANDBOOK ch. 30d04(b) (2016), <https://www.dol.gov/agencies/whd/field-operations-handbook>.

94. S. REP. NO. 93-690, at 43 (1974).

95. *Id.*

96. *Kilgore v. Outback Steakhouse Fla., Inc.*, 160 F.3d 294 (6th Cir. 1998).

determining whether an employee is engaged in an occupation that ‘customarily and regularly’ receives tips for purposes of § 203(t), 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.”<sup>97</sup>

In *Palacios v. Hartman & Tyner, Inc.*, plaintiffs asserted “that cashiers are ‘human ATM machines’ who provide little to no customer service function, but simply sit in a locked cage all day.”<sup>98</sup> There, the court was not persuaded that it is impossible for cashiers to have customer interaction, and held that “[t]he terminal inquiry is whether the employee is engaged in a position where he or she customarily receives compensation in the form of tips that meets the minimum monetary threshold of \$30 per month.”<sup>99</sup> Later, the same court in *Manning v. St. Petersburg Kennel Club, Inc.*, wrote that “in some circumstances, an inquiry into the quality and quantity of an employee’s customer interaction is warranted.”<sup>100</sup>

Under the current law, an employee who customarily and regularly earns more than \$30 a month while providing service to customers meets the criteria for a tipped employee. Therefore, cashiers who exceed this amount in monthly tips could be eligible for a tipped minimum wage. As tipping is undergoing a momentous cultural shift in the quick-service restaurant industry, this could have lasting implications for employers and employees.

### C. Quick-Service Restaurants and Payment Processing Platforms

A quick-service restaurant (QSR) is similar to what the public may call a “fast food” restaurant.<sup>101</sup> Their “environments are centered around functionality, with efficiency . . . [as their] primary goal.”<sup>102</sup> Popular examples of QSRs include McDonald’s, KFC, Burger King, Subway, Wendy’s, and Taco Bell.<sup>103</sup> Similarly, “fast casual,” a relatively new concept in the restaurant industry, blends more casual dining with fast food dining.<sup>104</sup> Some of the

97. *Palacios v. Hartman & Tyner, Inc.*, No. 13–CIV–61541, 2014 WL 7152745, at \*5 (S.D. Fla. Dec. 15, 2014) (quoting *Wajcman v. Investment Corp. of Palm Beach*, No. 07–80912–CIV, 2008 WL 783741, at \*3 (S.D. Fla. Mar. 20, 2008)).

98. *Id.* at \*7.

99. *Id.*

100. *Manning v. St. Petersburg Kennel Club, Inc.*, No. 8:13–CV–3060–T–36MAP, 2015 WL 477364, at \*3 (M.D. Fla. Feb. 5, 2015).

101. *What Does QSR Mean?*, PANDORA CLOUDCOVER, <https://cloudcovermusic.com/blog/qsr-meaning/> (last visited Apr. 5, 2023). See generally Miller & Washington, *supra* note 23.

102. *What Does QSR Mean?*, *supra* note 101. Quick-Service Restaurants usually share one or more of the following attributes: (1) limited menu items; (2) high percentage of takeout or drive-through orders; (3) comparatively low-price points; (4) inexpensive interior decorating; and (5) limited or no table service. *Id.*

103. *Id.* The top Quick-Service Restaurant chains in the United States in terms of size are: (1) Subway, (2) McDonald’s, (3) Starbucks, (4) KFC, (5) Burger King, (6) Domino’s Pizza, and (7) Pizza Hut. *Id.*

104. *Id.*

leading “fast casual” chains, which borrow attributes from both fast food and casual dining, include Five Guys, Chipotle, Panera Bread, and Jimmy John’s.<sup>105</sup> Most “fast casual” restaurants still fall under the umbrella of quick-service restaurants for the purposes of this Note. There are an estimated 338,536 QSRs.<sup>106</sup>

“Thirty-seven percent of adults eat fast food on an average day.”<sup>107</sup> The most frequent consumers of QSRs are adults ages eighteen-to-twenty-four.<sup>108</sup> “Twenty-seven percent . . . of men eat fast-food three or more times per week, compared to nineteen percent for women.”<sup>109</sup> “African-Americans are among the heaviest consumers, with thirty-one percent eating at a QSR . . . three or more times in a typical week, a figure that is thirty-four percent higher than the national average.”<sup>110</sup> At QSRs, eat-in dining comprises thirty percent of visits.<sup>111</sup>

Roughly forty-eight percent of “quick-service restaurants . . . now give customers the option to tip . . .”<sup>112</sup> This has increased from thirty-eight percent in 2020.<sup>113</sup> “Customers and workers today are confronted with a radically different tipping culture compared to just a few years ago—without any clear norms.”<sup>114</sup> While customers are familiar with the practice of tipping waiters, the practice of tipping a cashier or barista is a novel phenomenon.<sup>115</sup> This change in tipping practices is “driven in large part by changes in technology that have enabled business owners to more easily shift the costs of compensating

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105. *Id.*

106. Miller & Washington, *supra* note 23, at 29.

107. *Id.* at 225.

108. *Id.* at 66. “Among this age demographic, 31.2 percent consume fast-food three or more times in a typical week. Adults ages twenty-five to thirty-four represent the second largest fast-food consumer group, with twenty-eight percent eating at QSR restaurants three or more times in a typical week.” *Id.*

109. *Id.*

110. *Id.* Further, “[a]mong households with children living at home, those who have children between the ages of thirteen and seventeen are the heaviest consumers of fast-food. Twenty-seven percent of households with teenagers eat fast-food three or more times per week, a figure that is eighteen percent higher than the national average.” *Id.*

111. *Id.* at 225. Traffic by meal occasion at QSRs is distributed as follows: morning meal, twenty percent; lunch, thirty-seven percent; supper, twenty-nine percent; evening snack, fourteen percent. *Id.*

112. Nathaniel Meyersohn, *It’s Not Just Your Imagination. More Places Are Asking You to Tip*, WESH 2 NEWS (Mar. 25, 2023, 3:48 PM), <https://www.wesh.com/article/more-places-are-asking-you-to-tip/43416012>.

113. *Id.*

114. Nathaniel Meyersohn, ‘*Out of Control*’: *No One Knows How Much to Tip*, CNN (Dec. 17, 2022, 9:49 AM), <https://www.cnn.com/2022/12/17/business/tips-coffee-ice-cream-touch-screens-ctrp/index.html>.

115. *Id.*

workers directly to customers.”<sup>116</sup> Two of the largest players in this market include Toast and Square.

“Toast and Square are payment processing platforms for small businesses, offering a range [of] tools, including restaurant point-of-sale (POS) systems, mobile payments, online ordering, integration with delivery systems and inventory management.”<sup>117</sup> While Toast offers a suite of restaurant-specific features, Square extends its services to several business types and particularly excels for small business.<sup>118</sup> Toast’s “in-house ordering system is also commission-free, unlike Square, which charges [operators] \$0.50 on every order.”<sup>119</sup>

Touch screen POS systems have taken over quick-service restaurants. What may have been a foreign experience for customers only ten years ago, selecting a suggested tip amount—or no tip at all—has become common practice when purchasing a meal at a counter.<sup>120</sup> What is less clear, however, is what amount is customary for these transactions. In these hurried interactions, customers may face societal pressure from the employee or other patrons in line observing their selected tip.

“New automated technologies (e.g., iPads, tipping apps, online ordering) are changing the sequence of tip requests.”<sup>121</sup> Customers have traditionally been prompted for a tip after a service is completed, such as when they receive the bill in table service restaurants.<sup>122</sup> Now, “[w]ith increasing frequency, firms prompt customers to provide a tip at the start of the service encounter, before any service has been performed.”<sup>123</sup>

People report feeling “overwhelmed with the number of places that give them the option to tip with a card on an iPad, leading people to be less generous.”<sup>124</sup> However, “[d]espite reports of tipping fatigue among consumers, new data indicates that people are actually tipping more at restaurants.”<sup>125</sup>

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116. *Id.* The pandemic was another contributing factor to the increase in tipped service professions. “[C]ustomers were encouraged to tip generously . . . to help keep restaurants and stores afloat . . .” *Id.*

117. Christiana Jolaoso & Kelly Main, *Toast Vs. Square (2024 Comparison)*, FORBES ADVISOR, <https://www.forbes.com/advisor/business/toast-vs-square/> (last updated Jan. 5, 2024, 4:01 PM).

118. *Id.*

119. *Id.*

120. Meyersohn, *supra* note 114.

121. Nathan Warren et al., *Feeling Manipulated: How Tip Request Sequence Impacts Customers and Service Providers?*, 24 J. SERV. RSCH. 66, 66 (2021).

122. *Id.* at 66.

123. *Id.* “For example, online delivery orders by both Jimmy John’s sandwiches and Papa John’s pizza now request tips as part of the ordering and payment process, before the food is made and delivered.” *Id.*

124. Meyersohn, *supra* note 114.

125. Bailey Schulz & Amanda Pérez Pintado, *Inflation Has Americans Tired of Tipping, but Tips Are Actually Growing. What’s Happening?*, USA TODAY (Feb. 10, 2023, 4:09 PM), <https://www.usatoday.com/story/money/personalfinance/2023/02/06/tipping-fatigue-restaurants->

Compared to a year ago, tips at quick-service restaurants in the fourth quarter were up nearly sixteen percent.<sup>126</sup> Further, “[n]early one in five Americans are tipping a wider range of services” and occupations.<sup>127</sup> In a study of more than one thousand people in the United States, roughly “half [said] they tipped when they normally wouldn’t because an iPad asked them to . . . .”<sup>128</sup> The increase in tipping prompts has been particularly insulting to customers as prices have skyrocketed due to inflation.<sup>129</sup>

While tipping screens are practically no different from tip jars, the action of selecting “no tip” can be troubling for some patrons.<sup>130</sup> The guilt associated with the conscious recognition of not leaving a tip in spaces where other customers are is affecting consumer behavior.<sup>131</sup> The automatic prompts on the screen often rise as high as thirty percent—at places where tips were never a consideration years ago.<sup>132</sup> This abrupt change in the market has a large implication for considering who is a tipped employee, and what wage they should receive.

#### IV. A NATIONAL STANDARD IS NEEDED

##### A. Eradicating Tipping Confusion

[T]ipping is no longer just a socioeconomic and ethical issue about the livelihoods of service workers. It has also become a tech problem that is rapidly spiraling out of control, thanks to the proliferation of digital payment products from companies like Square and Toast. Since payment apps and touch screens make it simple for merchants to preset gratuity amounts, many businesses that didn’t ordinarily ask for tips now do.<sup>133</sup>

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strong/11178598002/. *But see* Jessica Dickler, *30% of Americans Say ‘Tipping Culture Is Out of Control,’ As Some Businesses Agree to Scrap Tip Prompts*, CNBC (July 5, 2023, 2:49 PM), <https://www.cnbc.com/2023/07/05/tipping-culture-is-out-of-control-even-some-businesses-agree.html> (“[R]ecent surveys show shoppers are experiencing ‘tip fatigue’ and starting to tip less—while resenting tipping prompts even more.”).

126. Schulz & Pérez Pintado, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See generally* Brigid Kennedy, *The Rise of ‘Tip Creep’*, THE WEEK (May 19, 2023), <https://theweek.com/talking-point/1023394/the-tipping-point> (“[T]he awkwardness of that screen-tilting, eye-averting moment is less about ‘our desire to compensate for service’ and more about the ‘cultural, socioeconomic and political’ implications of the practice. ‘Often underpaid’ and ‘exhausted’ service workers just worked through a ‘global health crisis,’ and maybe we feel guilty not leaving an extra \$1 because we were lucky enough to clock in every day from home.”).

132. *Id.*

133. Brian X. Chen, *Tech is Allowing Businesses to Overcharge You in Tips*, SEATTLE TIMES (Mar. 2, 2023, 9:24 AM), <https://www.seattletimes.com/business/technology/tech-is-allowing-businesses-to-overcharge-you-in-tips/> (“Tipping practices may become part of a broad government crackdown on so-called junk fees, extra costs that businesses tack on to products and

According to the U.S. Department of Agriculture, households allocate twenty-seven percent of their spending for food on quick-service restaurants.<sup>134</sup> This is more than any other category. As the number of establishments prompting customers to pay a tip continues to grow, it is no puzzle as to why food spending across the nation is rapidly increasing. In fact, restaurant prices increased by 7.7% from 2021 to 2022.<sup>135</sup> In February of 2023, prices for food-away-from-home were 8.4% higher than they were in February 2022.<sup>136</sup> These changes are far from minor, especially when salaries fail to keep pace with inflation.

Consumers are confused by this new “tipping mania.” With roughly half of QSRs accepting tips, Americans are left wondering the true meaning of a “price.”<sup>137</sup> While in the past, it was understood that employee wages were paid from sales in these industries, this assumption is now murky. As discussed earlier in this Note, employees “customarily and regularly” receiving more than \$30 in tips each month while performing tip—producing work can be classified as tipped employees under FLSA guidance. In these instances, employers may take the requisite tip credit allowed in their state and pay their workers the tipped employee minimum wage. Reaching \$30 a month in tips is a low threshold to pass when customers are flashed with the option to tip during each encounter at a cash register. Workers who average merely one dollar an hour in tips or more while working just eight hours each *week* would still meet this criterion. Essentially, many cashiers and baristas working in quick—service restaurants may now be paid a tipped employee wage.

While paying employees a tipped wage does not prevent workers from taking home at least the federal minimum wage, it does shift the burden of labor costs from employers to customers. Diners at full—service restaurants are accustomed to this phenomenon, and this affects the norms in which servers are tipped. However, when customers are unaware of whether an employee is being paid what they deem is a fair wage by their employer, this may cause inefficient tipping.

“Customarily and regularly” receiving more than \$30 in tips each month now essentially includes within its scope of tipped employees, any profession where tips are allowed to be collected. The new rule,<sup>138</sup> in attempt to provide

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services while adding little to no value. The Federal Trade Commission, which announced an investigation into the practices . . . said people could experience ‘junk fee shock’ when companies used deceptive tech designs to inflate costs at the end of a purchase.”)

134. Miller & Washington, *supra* note 23, at 43. Households allocate twenty-seven percent of their spending for food on QSR, twenty-three percent on full-service restaurants, eighteen percent on complex ingredients, eighteen percent on ready-to-eat food, eight percent on ready-to-cook food, and five percent on basic ingredients. *Id.*

135. *Food Price Outlook, 2023*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/> (last visited Apr. 5, 2023).

136. *Id.*

137. Meyersohn, *supra* note 112.

138. *See* Tip Regulations Under the Fair Labor Standards Act (FLSA), 86 Fed. Reg. 60114 (Oct. 29, 2021) (to be codified at 29 C.F.R. pt. 531).



enhanced clarification, suggests all directly tip—producing work counts toward this amount. Supplementary guidance for employees is needed to know who should be paid a tipped employee wage under this changing labor landscape. A standard will also alert customers as to whether it is normative to supplement workers' wages within any given industry.

Gratuity screens are not considered deceptive when the “custom tip” and “no tip” buttons are roughly the same size as the tipping buttons.<sup>139</sup> “If the opt-out buttons were extremely difficult to find, this would be an abusive practice known as ‘dark patterns.’”<sup>140</sup> Still, unfair pressure on consumers to tip in situations where gratuities have been historically unnecessary should be examined through a regulatory lens.<sup>141</sup>

### B. Abolishing the Tipped Employee Wage

More regulation does not mean better protection. In this instance, the interests of employees in quick—service restaurants now and in the future necessitate an overhaul of the FLSA tipped employee legislation. Without any preventative measures, cashiers and baristas appear eligible for a tipped employee federal minimum wage of \$2.13 per hour. Whether employers will begin paying this is a different question. In today's labor market, this practice is unlikely. In order to recruit and retain workers, current wages in the restaurant industry are outpacing minimum wage.<sup>142</sup> Still, the intent of the FLSA in 1938 was not to shift the burden of wage labor costs to consumers. It is questionable whether a tipped employee wage remains necessary or functional in today's society. If keeping a tipped employee minimum wage law is still reasonable, the cashier ambiguity may have lasting implications in the event that the federal minimum wage is raised or market conditions shift wages downward.

When a worker provides brief and impersonal service, consumers generally do not feel obligated to tip when they know workers are being paid a reasonable wage. Many Starbucks aficionados were disappointed when the company rolled out digital tipping.<sup>143</sup> Since the summer of 2022, minimum wage at Starbucks has been \$15.00—more than double the federal minimum wage.<sup>144</sup> Tipping a barista earning this wage and tipping a server earning the tipped minimum wage of \$2.13 does not lead to equitable wages. Perhaps the

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139. Chen, *supra* note 133.

140. *Id.*

141. *Id.*

142. See *Occupational Employment and Wages, May 2021*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/oes/2021/may/oes353023.htm> (last visited Apr. 5, 2023). The mean hourly wage for fast food and counter workers in May 2021 was \$ 12.53. *Id.*

143. See, e.g., Fortesa Latifi, *I Work at Starbucks and the Tip Screens Have Changed Everything—But I Won't Hate You if You Don't Tip*, BUS. INSIDER (May 25, 2023, 4:52 PM), <https://www.businessinsider.com/starbucks-worker-feels-strange-asking-for-tips-2023-5>.

144. Ronnie Koenig, *Starbucks Is Raising Its Minimum Wage Across the Country to \$15 an Hour*, TODAY (Oct. 27, 2021, 4:36 PM), <https://www.today.com/food/starbucks-raising-minimum-wage-15-hour-across-us-t36279>.

collective knowledge of comparatively high wages at Starbucks is what infuriated customers over its new tipping system. Now, however, consumers have no idea what cashiers are being paid—whether it is a tipped minimum wage, full minimum wage, or higher salary; not to mention, they also do not know how much the customers before and after them felt inclined to tip. With employers and customers setting employee wages in tandem, often significantly higher than minimum wage, the tipped employee minimum wage found within 29 C.F.R. § 531.56<sup>145</sup> serves little purpose beyond administrative headache. By “tipping” the employer of the restaurant establishment via the tip credit system, consumers are essentially just agreeing to pay more for the item.<sup>146</sup>

With an uptick in occupations where tips are customarily received, also known as “tip creep” the FLSA regulations provide little assistance.<sup>147</sup> Employees and employers ultimately enter into the wage structure arrangement that is ideal for them, whether their business “employs” independent contractors, employees with tipped wages, or workers who make the full minimum wage with or without tips. Market forces heavily influence these arrangements. In remembering one of the key goals of the FLSA when it was enacted in 1938—Congress sought to protect workers from underpay—it has been ineffective in treating all workers equally in this protection.<sup>148</sup> Without regard to the effectiveness or necessity of a federal minimum wage, the current practice of a tipped minimum wage is obsolete. With or without a tipped minimum wage, employees still receive at least the federal minimum wage. Employers who choose not to pay their workers a living wage should not be subsidized in doing so.

## V. LOOKING FORWARD: TIPPED CASHIERS AT QUICK-SERVICE RESTAURANTS

### A. *Future Concerns Regarding Quick-Service Restaurant Tipping*

While paying restaurant cashiers or baristas a tipped wage may not yet be common in today’s labor market, clearer guidance could help protect employees in future economic downturns. The pandemic exacerbated the food industry labor shortage. With this came innovative technologies, and the addition of robots to fast-food restaurant chains.<sup>149</sup> In fact, up to eighty-two percent of

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145. “More than \$30 a month in tips.” 29 C.F.R. § 531.56.

146. See Bobby Ghosh, *New Tipping Trend Hurts Those Who Need Gratuities Most*, BLOOMBERG (Aug. 29, 2023, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2023-08-29/new-tipping-trend-hurts-those-who-need-gratuities-most>. Beyond taking a tip credit, some restaurant owners now partake in “tip theft” by pocketing a proportion, or even all of the gratuities intended for their employees. *Id.*

147. *Id.* See also Kennedy, *supra* note 131.

148. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942).

149. Shawn Baldwin, *How Robots Are Helping Address the Fast-food Labor Shortage*, CNBC (Jan. 20, 2023, 8:00 AM), <https://www.cnbc.com/2023/01/20/how-fast-food-robots-are-helping-address-the-labor-shortage.html>.

restaurant positions could be replaced by robots.<sup>150</sup> This “[a]utomation could save U.S. fast-food restaurants more than \$12 billion in annual wages.”<sup>151</sup> In the future, the tables could easily turn—in the fast food industry, millions could soon be desperate for a job.<sup>152</sup> When this occurs, custom and a lack of legislative guidance directing otherwise may allow employers to slash worker salaries by taking a tip credit from quick-service cashier wages. Therefore, the current floating of “higher wages to attract employees is not a long-term solution.”<sup>153</sup>

The majority of restaurants “operate on razor-thin margins” and are “plagued by high employee turnover.”<sup>154</sup> For these reasons, “[a] ready supply of low-cost labor, typically in the form of young and unskilled workers, is a vital ingredient in the fast-food industry’s recipe for success.”<sup>155</sup> Unfortunately for workers, their own demand and lack of supply has allowed companies to invest in “machines to fill roles that were once exclusively the domain of humans.”<sup>156</sup>

New technology platforms have driven the increase in tipping at quick-service restaurants, and they have additionally impacted the manner in which workers are paid. A growing number of employees are now paid with a payroll card. This functions similarly to an ATM or debit card and allows employees to “access their earnings with a swipe of the card rather than depositing or cashing a payroll check.”<sup>157</sup> This makes employer distributions of tips easier, faster, and traceable. For years, the Internal Revenue Service (IRS) has compiled tipping data “to determine what income should look like from tipped employees depending on a variety of factors, including not only industry and geography, but also the days of week and hours worked.”<sup>158</sup> Tips are subject to income and payroll taxes, and employees are supposed to report all of their tips to their employer who can withhold the proper tax.<sup>159</sup> However, with tips traditionally being paid in cash, compliance has always been low. The IRS estimates that it receives “ninety-nine percent of what its due on regular wages,

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150. *Id.*

151. *Id.*

152. Michael Joseph, *Rise of the (Fast Food) Robots: How Labor Shortages Are Accelerating Automation*, FORTUNE (Nov. 29, 2021, 6:56 AM), <https://fortune.com/2021/11/29/fast-food-robots-labor-shortage-automation-pandemic/>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. CSBJ Web Admin, *Payroll Cards Offer a Better Way to Pay*, COLO. SPRINGS BUS. J. (Jan. 16, 2023), [https://www.csbj.com/premier/businessnews/payroll-cards-offer-a-better-way-to-pay/article\\_c6649302-d954-57ca-a228-bf4c465f7d63.html](https://www.csbj.com/premier/businessnews/payroll-cards-offer-a-better-way-to-pay/article_c6649302-d954-57ca-a228-bf4c465f7d63.html).

158. Kelly Phillips Erb, *Americans Are Tipping More—and More Often. The IRS Wants Its Cut.*, FORBES, (Mar. 5, 2023, 6:30 AM), <https://www.forbes.com/sites/kellyphillipserb/2023/03/05/americans-are-tipping-more-and-more-often-the-irs-wants-its-cut/?sh=3a1a1a012a50>.

159. *Id.*

where taxes are withheld and reported to both the IRS and the taxpayer on a W-2, but just fifty-five percent of what it's owed on tips."<sup>160</sup>

The IRS now "hopes to modernize its data collection, and more effectively shift the burden for reporting tips to employers by using POS, time and attendance systems, and electronic payments data collected by employers."<sup>161</sup> In February of 2023, the IRS issued Notice 2023-13, "which contains a proposed revenue procedure that would establish the Service Industry Tip Compliance Agreement (SITCA) program, a voluntary tip reporting program between the IRS and employers in various service industries."<sup>162</sup> This program would take advantage of the increase in point-of-sale, time and attendance systems, and electronic payment settlement methods to improve tip reporting compliance.<sup>163</sup>

The increase in both automated technology and the custom of tipped wages in quick-service restaurants paves the way for a unique question: who keeps the tips when there is no human working? Under the FLSA, employers are not allowed to keep employee tips.<sup>164</sup> However, their apportionment is unclear when they never belonged to an employee to begin with. While legislation prevents an employer from requiring an employee to give their tips to the employer, an issue that must be considered in the future is whether employers who solicit tips for automated functions may retain them.<sup>165</sup>

### B. Other Professions Impacted

The "gig economy" has also shifted trends in working conditions and wages. "Gig work" can be defined loosely as "work done by individuals who are classified as self-employed, freelancers, or independent contractors."<sup>166</sup> "While the concept of nontraditional, short-term, and contract work has been around since well before the digital age, it wasn't until the 2010s that digital

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160. *Id.* Relying on industry norms, the IRS can typically match a worker's anticipated tip income with reported income. If the IRS audits a tipped worker and finds they've underreported, it can demand the employee and employer pay back taxes.

161. *Id.*

162. Press Release, *IRS Introduces New Service Industry Tip Reporting Program*, IRS (Feb. 6, 2023), <https://www.irs.gov/newsroom/irs-introduces-new-service-industry-tip-reporting-program>.

163. *Id.*

164. 29 U.S.C. § 203 (m)(2)(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." *Id.*

165. See Rachel Wolfe, *Tipping at Self-Checkout has Customers Crying 'Emotional Blackmail'*, WALL ST. J. (May 9, 2023 10:02 AM), <https://www.wsj.com/articles/tipping-self-checkout-restaurants-airports-c3e09f7> ("Some tipping researchers say that tips given to a machine may not reach human employees, because protections to tipped workers in the federal Fair Labor Standards Act don't extend to machines.").

166. BEN ZIPPERER ET AL., ECON. POL'Y INST., NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY 1 (2022), <https://files.epi.org/uploads/250647.pdf>.

platform companies like Uber, DoorDash, Instacart, and TaskRabbit began to rise to prominence and shape” the current state of gig work.<sup>167</sup> In recent years, gig work “has become synonymous with working for digital platform companies, including driving for ride-share apps, making deliveries for restaurants, shopping or delivering groceries, and performing errands or household tasks.”<sup>168</sup>

“Digital platform companies have constructed a business model on the premise that they do not employ their workforce.”<sup>169</sup> Workers who perform services for these companies are treated as independent contractors rather than employees. This classification deprives workers of numerous “fundamental rights under federal and state labor and employment laws, including wage and hour protections, anti-discrimination protection, workers’ compensation, unemployment benefits, and the right to organize and collectively bargain.”<sup>170</sup>

Independent contractors are left in a far more vulnerable status, as compared with employees, when it comes to basic rights and protections on the job.<sup>171</sup> The term “gig work” is a “misnomer,” as it conveys the myth that workers have increased independence and control over their work by selecting their own “gigs.”<sup>172</sup> While digital platforms who contract with workers to provide these services claim their workforce benefits from this distinction in the form of flexibility and higher pay, data “reveals that these workers often are paid low wages, in some instances less than the minimum wage; they face economic insecurity at high rates; and they routinely report losing earnings because of technical difficulties with digital platforms.”<sup>173</sup> Ultimately, “[t]he determination of whether an individual providing services to an employer is an employee or an independent contractor carries significant consequences for both the individual and the employer in terms of job protections, tax obligations, and eligibility for employment-based benefits and protections.”<sup>174</sup>

The gig economy has also changed tipping norms. A 2019 study from the Massachusetts Institute of Technology found that “customers are less likely to tip when workers have autonomy over whether and when to work.”<sup>175</sup> Further,

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 2. “[I]ndividuals who are classified as independent contractors are not covered by federal or state wage and hour, anti-discrimination, health and safety, collective bargaining, or other worker protection laws.” *Id.* These workers also do not “receive employment-based health insurance or retirement benefits, and they do not qualify for paid sick or family leave in places where those benefits are statutorily prescribed.” *Id.* Further, independent contractors are ineligible for “unemployment insurance when temporarily unemployed, or workers’ compensation when injured on the job.” *Id.*

175. Meyersohn, *supra* note 114. See also MIT Sloan Office of Media Relations, *Study Helps to Explain the Decline of Tipping Norms in the Gig Economy*, MIT SLOAN SCH. MGMT. (Aug. 26, 2019), <https://mitsloan.mit.edu/press/study-helps-to-explain-decline-tipping-norms-gig->

a study from the same year at the University of Chicago discovered that “sixty percent of Uber customers never tip, while only about one percent always tip.”<sup>176</sup> Beyond the protections within the FLSA denied to these independent contractors, their tips are often lower than workers in quick-service restaurants who have traditionally received full wages.

Confusion over tipping is not only affecting the food industry. Hidden fees packed into cruise line prices are now bewildering passengers. For some cruise lines, automatic gratuity charges can run as high as \$23 per day, per person.<sup>177</sup> This “tip” is automatically added to passenger bills and cruise lines claim it will be passed on to crew members in recognition of their service.<sup>178</sup> Companies claim this added gratuity charge serves as a convenience to passengers, rather than “tipping crew members who give them great service one by one.”<sup>179</sup>

However, many passengers find tipping is a personal matter that in its very essence is discretionary. The charges can be seen as yet another corporate disguised “method for cruise lines to push the responsibility for paying crew members to their customers.”<sup>180</sup> In fact, “some lines now pay housekeeping and dining department workers on ships as little as [two dollars] per day in base wages, relying on the automatic gratuity to provide the bulk of their compensation.”<sup>181</sup> In general, cruise ship service charges have increased by more than twenty-five percent in the past three years.<sup>182</sup> Stemming from these passenger concerns, a growing number of cruise lines have started to eliminate the automatic gratuity charge or to include gratuities for crew members in their base fares. This is indirectly creating a wide wage gap for customer service workers on cruise lines.

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economy. Erik Duhaime, a PhD graduate of the MIT Sloan School of Management, wrote “[w]hile the gig economy may make things more efficient, it also seems to be changing preexisting social norms and expectations, and once those norms deteriorate, it is very difficult to re-establish them.” *Id.*

176. Meyersohn, *supra* note 114.

177. Gene Sloan, *USA TODAY's Guide to Cruise Ship Service Charges and Gratuity Fees*, USA TODAY (Jan. 29, 2019, 10:01 AM), <https://www.usatoday.com/story/travel/cruises/2018/10/16/cruise-ship-service-charges-gratuity-fees-every-line/1600311002/>. Large cruise lines, including Carnival, Princess, and Norwegian, add automatic gratuity charges up to \$23 per person, per day. *Id.*

178. *Id.*

179. *Id.* The automatic gratuity charges are also shared with “behind-the-scenes crew members who play an important role in the passenger experience but otherwise might go unrewarded.” *Id.*

180. *Id.*

181. *Id.* “As much as ninety-five percent pay for some cruise ship workers now comes from automatic gratuities. . . .” *Id.*

182. *Id.*

### C. Equity Concerns Among Employers and Employees

“U.S. adults leave an average gratuity of 18.1% on their restaurant bill.”<sup>183</sup> Typically, as the guest experience increases, so does the tip.<sup>184</sup> However, there is no guaranteed tip amount, which makes estimating employee take-home pay challenging. Tipping can be especially problematic when restaurant workers who are relatively low-skilled earn significantly more than other workers of similar skill levels.<sup>185</sup> For example, large gaps in compensation drive many cooks to switch to a tipped, server position—even though they have invested money and time into culinary education.<sup>186</sup>

Seventy percent of restaurants are single-unit operations, and operators manage wages and operations for their individual establishments.<sup>187</sup> Even across units of the same chains, franchise operators are often responsible for setting wages. In states without wage transparency laws, achieving pay equity is already a challenging feat. Pay equity involves compensating employees with similar job functions with comparable pay. In opposition to this goal, the evolving opportunity to pay QSR workers a tipped minimum wage is widening wage ranges. In fact, cashiers with the same position and duties at any given chain—just miles apart from one another—could be earning vastly different incomes. This range in pay will only widen as tipping becomes more customary, and employers have the option of taking a tip credit.

No-poaching agreements in franchisor-franchisee contracts also drive wages down and prevent transparency. The practice has historically been prevalent in the quick-service restaurant industry “with thirty-two out of forty fast food restaurant chains—or 70,000 fast food restaurants around the country—including a no-poaching provision in their franchise agreements” in 2017.<sup>188</sup> These agreements are detrimental to the labor market’s competition for workers and suppress restaurant employee’s job opportunities, wages, and benefits.<sup>189</sup>

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183. Miller & Washington, *supra* note 23, at 42. The cities with the most generous average tippers include Philadelphia, PA (20.3%); Denver, CO (19.5%); Washington, D.C. (19.2%); Boston, MA (19.0%); and Chicago, IL (19.0%).

184. *Id.* at 85. Highly satisfied restaurant customers tipped an average of 19.7%, neutral customers tipped an average of 17.3%, and highly dissatisfied customers tipped an average of 16.2%. *Id.*

185. Azar, *supra* note 9, at 226.

186. *Characteristics of Minimum Wage Workers 2016*, *supra* note 43.

187. *National Statistics*, *supra* note 39 (stating “nine in ten restaurants have fewer than fifty employees”); see also *Characteristics of Minimum Wage Workers 2016*, *supra* note 43.

188. John A. Capobianco, *In Restraint of Wages: The Implications of “No-Poaching” Agreements*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 419, 419 (2019).

189. Gregg Gerlach, *Restaurant No-poaching Pledges May Not Be All They Are Cracked Up to Be*, LINKEDIN (June 6, 2019), <https://www.linkedin.com/pulse/restaurant-no-poaching-pledges-may-all-cracked-up-gregg-gerlach/>.

Supporters of pay transparency laws believe the increase in legislation will play a critical role in eliminating pay inequity in the workforce.<sup>190</sup> Critics argue that this legislation will be costly to employers by increasing the administrative burden associated with employee compensation decisions and preventing the use of compensation as a tool to reward and motivate outstanding performers.<sup>191</sup> Regardless, tipped employees, who often live below the poverty line, do not benefit from these laws in the same way that other workers would. Their final wages are dependent on day-to-day customer choices.<sup>192</sup>

#### CONCLUSION

*Gratuity* derives from *gratia*, the Latin word for “grace.”<sup>193</sup> It is no act of grace for employers to rake in profit while patrons pay their worker’s wages. Consumers presently know very little about the wages their cashiers are paid. As tipping becomes customary in quick-service restaurants and other industries, employers will have the discretion to take a tip credit from their employees. While this does not change the minimum wage workers receive including tips, it heavily impacts the dynamics of the restaurant industry. With tipping customs rapidly outpacing FLSA legislation, more congressional guidance is needed to standardize which occupations in the restaurant industry are eligible for tipped wages.

Consumers who do not pay tips when prompted at quick-service restaurants may feel brief pangs of guilt. Those who do, however, would benefit from knowing their tip is contributing to a long-term problem in the labor environment, rather than just creating short-term solutions for individual workers. After the software company takes its cut, employers may take a tip credit. Customers, by continuing to tip, are paying the wages owed to employees by their employers.

Regardless of restaurant cashiers’ income, the dual-wage structure codified within the FLSA should be reconsidered. The purpose of the FLSA—to protect workers from overwork and underpay—is not realized by customers subsidizing employee wages. Instead, employers should be liable for compensating each laborer for his or her efforts.

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190. Lisa Wallace, *Four Predictions for Pay Transparency Laws in 2023*, FORBES (Feb. 1, 2023), <https://www.forbes.com/sites/forbeseq/2023/02/01/four-predictions-for-pay-transparency-laws-in-2023/?sh=2d7d66d17b72>.

191. *Id.*

192. *Id.*

193. *Grace*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/grace>, (last visited Apr. 5, 2023).