November 16, 2021

ATTORNEY GENERAL RAOUL RESOLVES FEDERAL LAWSUIT IN WIN FOR TIPPED WORKERS

Chicago — Attorney General Kwame Raoul, along with Pennsylvania Attorney General Josh Shapiro, today led a coalition of nine states in praising the U.S. Department of Labor's (DOL) new tip regulation, dismissing the states' lawsuit and ending the fight to overturn the harmful rule.

"All employees have a right to receive a fair living wage for the work they perform, which includes receiving fair compensation for any hours they work," Raoul said. "I am pleased that the Department of Labor overturned its harmful rule, and I will continue to defend against any effort to eliminate protections for workers from unfair employment practices."

Under the Fair Labor Standards Act (FLSA), employers are required to pay their employees the federal minimum wage – currently $7.25 per hour. However, employers may claim a tip credit and pay employees engaged in a tipped occupation a lower wage of no less than $2.83 per hour, as long as this lower wage and the tips earned by the workers equal at least $7.25 per hour. For over 30 years, the DOL dual jobs regulation capped the amount of non-tip producing work that employees can perform while still receiving the lower tipped minimum wage at 20%. This protected workers from being forced to perform large amounts of non-tipped work while receiving only the lower tipped minimum wage. However, in 2019 the DOL sought to implement a rule that would have removed that cap, resulting in lower pay for tipped workers nationwide.

In January 2020, Raoul and Shapiro led the coalition in filing a lawsuit challenging the DOL rule that unlawfully sought to remove the limit on non-tipped work a tipped worker may complete and still receive only the tipped minimum wage.

As Raoul and the coalition advocated, the new rule restores the 20% cap and imposes an additional limit of 30 consecutive minutes of non-tipped work. In addition, it provides helpful, clarifying definitions for tipped work, non-tipped work, and work that does not generate tips itself but directly supports tipped work. As a result, tipped workers can only be paid the tipped minimum wage when the vast majority of their work generates tips, helping to protect them from exploitation and wage theft.

Today's announcement builds on Attorney General Raoul's effort to fight unlawful employment practices. In January 2020, a law initiated by Raoul went into effect, formally establishing the Worker Protection Unit within the Attorney General's Office to better protect Illinois workers from wage theft and other unlawful employment practices. The law also created the Worker Protection Unit Task Force, which issued a report in November 2020, highlighting the problems Illinois workers face and detailing recommendations to further protect workers' rights.

Attorney General Raoul encourages workers who have concerns about wage and hour violations or potentially unsafe working conditions to call his Workplace Rights Hotline at 1-844-740-5076 or to file a complaint online.

Joining Raoul and Shapiro in this effort were the attorneys general of Delaware, the District of Columbia, Maryland, Massachusetts, Michigan, New Jersey and New York.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, DANA NESSEL, *on behalf of the People of Michigan*, STATE OF NEW JERSEY, AND STATE OF NEW YORK, Plaintiffs, v. MARTIN J. WALSH,[1] *in his official capacity as Secretary of the United States Department of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants.	**No. 2:21-cv-258**

JOINT STIPULATION OF DISMISSAL

The Parties hereby submit the following Joint Stipulation of Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii):

1. Plaintiffs filed this lawsuit on January 19, 2021, to challenge the following DOL regulation: *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 85 Fed. Reg. 86,756 (Dec. 30, 2020) (to be codified at 29 C.F.R. §§ 10, 516, 531, 578-80) ("2020 Tip Rule"). Plaintiffs brought their claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(2)(C), (2)(A). Compl., Doc. No. 1, ¶¶ 8, 176-85.

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Secretary of Labor Martin J. Walsh is automatically substituted as a Defendant sued in his official capacity for Former Acting Secretary of Labor Milton Al Stewart and the originally named Former Secretary of Labor, Eugene Scalia.

2. On January 20, 2021, due to the change of administration, new leadership assumed responsibility for the U.S. Department of Labor ("DOL").

3. The effective date of the 2020 Tip Rule originally was March 1, 2021. However, on February 24, 2021, DOL issued a final rule that delayed the effective date of the 2020 Tip Rule by 60-days, to April 30, 2021, to give new leadership at DOL additional time to review issues of law, policy, and fact raised by the 2020 Tip Rule before it goes into effect. *Tip Regulations Under the Fair Labor Standards Act (FLSA): Delay of Effective Date*, 86 Fed. Reg. 11632-01 (published on February 26, 2021) ("Initial Delay Final Rule").[2] Thereafter, DOL sought a stay in this action to allow the new administration the time needed to consider the 2020 Tip Rule. ECF No. 23.

4. On March 19, 2021, the Court placed this matter in suspense and directed DOL to file a status report every sixty days. Ahead of this joint stipulation of dismissal, DOL has filed three status reports (ECF Nos. 25, 26, and 31), and the parties have submitted one joint status report (ECF No. 32).

5. On April 29, 2021, after notice and comment, DOL issued a final rule that further delayed the effective date of the three portions of the 2020 Tip Rule that Plaintiffs challenged in this action by another eight months, until December 31, 2021. *Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date*, 86 Fed. Reg. 22,597-01 (published on April 29, 2021) ("Partial Delay Final Rule"). Specifically, the three portions that were further delayed are: (1) the portion that addressed the assessment of civil monetary penalties for

[2] This delay was consistent with a January 20, 2021 Presidential Memorandum to Heads of Executive Departments and Agencies to consider delaying effective dates for certain regulations, such as the Tip Rule, to allow the incoming administration to review new or pending rules. *See* Regulatory Freeze Memorandum, 86 Fed. Reg. 7424 (published on January 28, 2021).

violations of section 3(m)(2)(B) of the FLSA, see 29 CFR 578.3(a)-(b), 578.4, 579.1, 580.2, 580.3, 580.12, and 580.18(b)(3); (2) the portion that amended the Department's CMP regulations, see 29 CFR 578.3(c) and 579.2, to address when a violation of the FLSA is "willful"; and (3) the portion that amended the "dual jobs" regulations, see, e.g., 29 CFR 53156(e).

6. DOL did not delay the effective date of the remaining portions of the 2020 Tip Rule. Accordingly, those portions went into effect on April 30, 2021.

7. As noted in the Partial Delay Final Rule, DOL reviewed legal, policy, and factual issues raised by the three portions of the 2020 Tip Rule identified above and, in part, DOL's review included consideration of the issues raised by this litigation.

8. On September 24, 2021, after notice and comment, DOL issued a final rule withdrawing two of the three portions (identified as nos. 1-2, above) of the 2020 Tip Rule that had not yet gone into effect, finalizing proposed changes to those portions of the rule, and modifying regulatory provisions adopted by the 2020 Tip final rule addressing managers and supervisors. *Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal*, 86 Fed. Reg. 52,973 (published on Sept. 24, 2021) ("Partial Withdrawal Final Rule").

9. On October 29, 2021, after notice and comment, DOL issued a final rule withdrawing the third and final portion (identified as no. 3, above) of the 2020 Tip Rule that had not yet gone into effect, finalizing proposed changes to that portion of the rule, and modifying regulatory provisions adopted by the 2020 Tip final rule addressing the "dual jobs" regulations, which address when a tipped employee is engaged in a tipped occupation and may still be paid using a partial credit, known as the tip credit, toward the employer's minimum wage obligation.

Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (published on Oct. 29, 2021) ("Second Partial Withdrawal Final Rule").

10. Plaintiffs have reviewed the Partial Withdrawal Final Rule issued on September 24, 2021, and the Second Partial Withdrawal Final Rule issued on October 29, 2021, and determined that they resolve the Parties' dispute in this case related to the challenged portions of the 2020 Tip Rule.

11. Accordingly, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the Parties stipulate to the voluntary dismissal of this case with prejudice, each party to bear their own attorneys' fees and costs.

DATED: November 15, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, DANA NESSEL, *on behalf of the People of Michigan*, STATE OF NEW JERSEY, AND STATE OF NEW YORK, Plaintiffs, v. MARTIN J. WALSH, *in his official capacity as Secretary of the United States Department of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants.	**No. 2:21-cv-258**

CERTIFICATE OF SERVICE

I, Ryan B. Smith, hereby certify that the foregoing Joint Stipulation of Dismissal has been filed electronically on November 15, 2021 and is available for viewing and downloading from the Court's Electronic Case Filing system by all counsel of record.

Date: November 15, 2021

By: */s/ Ryan B. Smith*

Ryan B. Smith
Deputy Attorney General

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, DANA NESSEL, *on behalf of the People of Michigan*, STATE OF NEW JERSEY, AND STATE OF NEW YORK, Plaintiffs, v. EUGENE SCALIA, *in his official capacity as Secretary of the United States Department of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants.	**No. _____________**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Commonwealth of Pennsylvania, by and through Attorney General Josh Shapiro, the State of Illinois, by and through Attorney General Kwame Raoul, the State of Delaware, by and through Attorney General Kathleen Jennings, the District of Columbia, by and through Attorney General Karl A. Racine, the State of Maryland, by and through Attorney General Brian E. Frosh, the Commonwealth of Massachusetts, by and through Attorney General Maura Healey, Dana Nessel, on behalf of the People of Michigan, the State of New Jersey, by and through Attorney General Gurbir S. Grewal, and the State of New York, by and through Attorney General Letitia James, hereby file this Complaint against Defendants Eugene Scalia, in his official capacity as Secretary of the United States Department of Labor, the United States Department of Labor, and

the United States of America (collectively, "Defendants") and, in support thereof, state the following:

INTRODUCTION

1. This lawsuit challenges a new U.S. Department of Labor regulation on the payment of wages to tipped employees. *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 85 Fed. Reg. 86,756 (Dec. 30, 2020) (to be codified at 29 C.F.R. §§ 10, 516, 531, 578-80) ("Final Rule"). The Department's Final Rule unlawfully removes the cap on the amount of time a tipped worker may spend on non-tipped, related duties and still receive only the tipped, sub-minimum wage, in contravention of the Fair Labor Standards Act ("FLSA" or "Act"). The Final Rule also adopts an overbroad test to determine whether employees are managers or supervisors (who are ineligible to participate in mandatory tip pools) that will exclude certain low wage workers from access to tip pools. The Final Rule will significantly reduce tipped workers' wages, thereby exacerbating the impact the COVID-19 pandemic has had on millions of tipped workers nationwide. The Final Rule will harm Plaintiff States' economic and quasi-sovereign interests.

2. The FLSA was passed to ensure a fair day's pay for a fair day's work and was amended to provide a credit against the minimum wage for employers of tipped workers. To take advantage of the tip credit, employers must notify employees of their decision to take the credit and track their employees' time and tips to ensure that employees earn at least the mandated minimum wage rate for all hours worked over an individual workweek. In addition, the employee must be in an occupation that regularly produces tips. The tip credit may not be taken for work that is unrelated to a tipped occupation, such as when a server picks up a shift as a dishwasher or cook. That is, the employee must be paid the full minimum wage for all time spent washing dishes, regardless of their tip earnings that week as a server. The Department has

addressed the contours of the tip credit and how it applies to dual jobs and other, non-tipped tasks through rulemaking and sub-regulatory guidance.

3. For over thirty years, the FLSA and the Department's "Dual Jobs" regulation, 29 C.F.R. § 531.56(e), have been interpreted by the Department and the courts to impose a twenty percent limit on the amount of time tipped workers may spend on duties that are related to their tipped occupation, but are not tip-producing themselves, such as a restaurant server rolling silverware into napkins before or after waiting tables. This sub-regulatory guidance is known as the "80/20 rule." The 80/20 rule ensures that an employer may only assign non-tipped duties for twenty percent or less of the tipped employee's work time in order to benefit from the tip credit against its minimum wage obligations.

4. The Department's stated impetus for its Final Rule is to address the 2018 amendments to section 3(m) of the FLSA, which were enacted in the Consolidated Appropriations Act of 2018. Pub. L. 115-141, 132 Stat. 348 (2018) ("2018 CAA"). These amendments prohibit employers, including managers and supervisors, from keeping employees' tips. The amendments also authorize employers to establish mandatory tip pools between tipped and non-tipped employees as long as the employer pays the full minimum wage to all employees without taking a tip credit. This is particularly significant in the restaurant industry where "back of the house" workers like line cooks can now participate in tip pools with "front of the house" workers like bartenders and wait staff. The Department's abandonment of the 80/20 rule, however, has nothing to do with the 2018 amendments to the FLSA.

5. The Department's Final Rule reverses decades of policy and practice by removing the twenty percent bright-line cap on non-tipped, related duties an employee may perform while receiving the sub-minimum wage. In its place, the Department imposes a vague standard that

contains no limitation on the non-tipped duties a tipped employee may be required to perform. The Final Rule states: "An employer may take a tip credit for *any hours* that an employee performs related, non-tipped duties *contemporaneously with* his or her tipped duties, or *for a reasonable time immediately before or after* performing the tipped duties." Final Rule at § 531.56(e)(2) (emphasis added). Without any analysis, the Final Rule also significantly expands the universe of duties that are considered "related, non-tipped duties." The Final Rule will require tipped workers to perform more work for less pay, transferring wages to their employer– but the Department provided no estimate of its effect on workers.

6. In the Final Rule, the Department imports the duties test from the FLSA's executive employee exemption regulation to determine which individuals are managers or supervisors who may not keep tips under section 3(m)(2)(B). 29 CFR 541.100(a)(2)–(4). However, the Department fails to incorporate the executive exemption's salary test. *Id*. Without a salary test such as that used by the Department to identify bona fide managerial employees exempt from the FLSA's overtime requirements, the Final Rule's duties test is too broad and is likely to result in non-managerial employees being excluded from tip pools, which will reduce wages for these workers.

7. And while Congress did not impose a requirement that violations of the prohibition against keeping workers' tips be "willful" in order to subject violators to civil money penalties, the Final Rule nonetheless includes a willfulness requirement. Moreover, under the guise of implementing the 2018 Consolidated Appropriations Act's amendments to the FLSA relating to tipped employees, the Department redefines its definition of willfulness to weaken the deterrent effect of civil money penalties for any type of violation, not just those relating to tipped employees. Specifically, the Final Rule redefines willfulness by eliminating provisions that

deemed a violation willful when the Department provides advice to an employer that it chooses not to follow and that required employers to inquire into their legal obligations in some circumstances.

8. Plaintiffs, the Commonwealth of Pennsylvania, the State of Illinois, the State of Delaware, the District of Columbia, the State of Maryland, the Commonwealth of Massachusetts, Dana Nessel, on behalf of the People of Michigan, the State of New Jersey, and the State of New York, bring this action to vacate the Final Rule and enjoin its implementation because it is contrary to Defendants' statutory jurisdiction, authority, and limitations in violation of the APA, 5 U.S.C. § 706(2)(C), and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A).

JURISDICTION AND VENUE

9. This action arises under 5 U.S.C. § 702. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

10. In addition, this Court has the authority to issue the declaratory relief sought pursuant to 5 U.S.C. §§ 705, 706 and 28 U.S.C. §§ 2201, 2202.

11. Venue is proper in this Court because a defendant resides in this district, Plaintiff Commonwealth of Pennsylvania resides in this district, a substantial part of the events giving rise to this action occurred in this district, and no real property is involved. *See* 28 U.S.C. § 1391(b)(2) and (e)(1).

THE PARTIES

12. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1.

13. Plaintiff the State of Illinois, represented by and through its Attorney General, Kwame Raoul, is a sovereign state of the United States of America. The Attorney General is the chief legal officer of the State, Ill. Const. 1970, art. V, § 15, and is authorized to pursue this action under 15 ILCS 205/4.

14. Plaintiff the State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings, the "chief law officer of the State." *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). Attorney General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority. Del. Code Ann. tit. 29, § 2504.

15. Plaintiff the District of Columbia ("District") is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code. § 1-301.81.

16. Plaintiff the State of Maryland is a sovereign state of the United States of America. Maryland is represented by and through Attorney General Brian E. Frosh, its chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General's powers and duties include acting on behalf of the State and the people of Maryland in the federal courts on matters of public concern. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file

suit to challenge action by the federal government that threatens the public interest and the welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, Joint Resolution 1.

17. Plaintiff the Commonwealth of Massachusetts is represented by Attorney General Maura Healey, its chief law officer, who is granted traditional common law duties to represent the Commonwealth and broad statutory authority to act in the public interest. M.G.L. c. 12, § 3; *Feeney v. Commonwealth*, 373 Mass. 359, 366, 366 N.E. 2d 1262, 1266 (1977).

18. Plaintiff Dana Nessel, on behalf of the People of Michigan, is the Attorney General. Dana Nessel is Michigan's chief law enforcement officer and is authorized to pursue this action by Mich. Const. art. V, § 3 and Mich. Comp. Laws § 14.28.

19. Plaintiff the State of New Jersey is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State's chief legal officer. N.J. Stat. Ann. § 52:17A-4(e), (g).

20. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized to pursue this action pursuant to N.Y. Executive Law § 63.

21. Plaintiffs are aggrieved by Defendants' actions and have standing to bring this action because the Final Rule harms their quasi-sovereign and proprietary interests and will continue to cause injury unless and until the Final Rule is vacated.

22. Defendant Eugene Scalia is the Secretary of the United States Department of Labor and is sued in his official capacity. His official address is 200 Constitution Avenue NW, Washington, D.C. 20210.

23. Defendant United States Department of Labor ("DOL" or "Department") is a cabinet agency within the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). The Department promulgated the Final Rule and is responsible for its enforcement. Its principal address is 200 Constitution Avenue NW, Washington, D.C. 20210.

24. Defendant the United States of America is sued as allowed by 5 U.S.C. § 702.

BACKGROUND

The Fair Labor Standards Act and the Tip Credit

25. The FLSA was passed in 1938 to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[.]" 29 U.S.C. § 202. It requires employers to pay a minimum hourly wage, but the original Act omitted restaurant and hotel workers. 29 U.S.C. § 206(a)(1)(C).

26. Since its enactment, the FLSA has been amended several times to delineate its applicability to tipped workers. These amendments chart the history of the tip credit provision and demonstrate Congress's continued interest in protecting tipped workers while allowing employers to benefit from tips they receive. Over time, the Department has also conducted rulemakings to clarify this congressional purpose.

27. The FLSA's provisions relating to tipped workers were first amended in 1966, extending the law's protections to restaurant and hotel workers. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830. The 1966 amendments also altered the definition of the term "wage" to create a "tip credit," thus permitting employers to utilize tips collected and retained by customarily tipped workers as an offset against a portion of the employer's minimum wage obligation. *Id.*; 29 U.S.C. § 203(m). A "tipped employee" is defined

as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *Id.*; 29 U.S.C. § 203(t).

28. The FLSA was again amended in 1974 to preserve the tip credit. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 55. At that time, the Senate Committee on Labor and Public Welfare considered reducing the tip credit but "was impressed by the extent to which customer tips contributed to the earnings of some hotel and restaurant employees[.]" Staff of S. Comm. on Labor and Public Welfare, 94th Cong., Legislative History of the Fair Labor Standards Amendments of 1974, Vol. 1 at 682-83 (Comm. Print 1976).

29. After reviewing the estimates of tip earnings in a March 1970 study, "the Committee was persuaded that the tip allowance should not be reduced . . . *but that the tipped employee should have stronger protection to ensure the fair operation of [the tip credit] provision.*" *Id*. (emphasis added).

30. To accomplish its goal of ensuring the fair operation of the tip credit provision, Congress prohibited employers from utilizing the tip credit unless their employees were first informed of the provisions of section 3(m). Congress further declared all tips property of employees who received them, except that tip pools may be established among employees who "customarily and regularly receive tips." Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 15.

31. Thus, the clear purpose of the 1974 amendments to the tip credit provision was to strengthen protections for tipped workers while maintaining the tip credit.

32. In 1996, Congress again amended the FLSA to streamline the calculation of the tip credit. Small Business Job Protection Act of 1996, Pub. L. 104-188, 110 Stat. 1755. Starting in August 1996, the new amendments allowed employers to take a tip credit of the difference

between the current non-tipped minimum wage, now $7.25 per hour, and the tipped minimum wage in effect as of August 20, 1996, or $2.13 per hour, for a maximum credit of $5.12 per hour. *Id.*

33. Following the 1996 amendments, the tip credit provision remained unchanged until 2018, when Congress amended the FLSA to prohibit employers, including managers and supervisors, from keeping employees' tips. 2018 CAA; 29 U.S.C. § 203(m)(2)(B). The amendments also authorize employers to establish mandatory tip pools between tipped and non-tipped employees as long as the employer pays the full minimum wage to employees without taking a tip credit. *Id.*

34. Currently, the FLSA permits employers to pay a sub-minimum wage, now $2.13 per hour under federal law, by taking a credit for tips employees receive "which amount is equal to the difference between" the tipped minimum wage and the non-tipped minimum wage, currently $7.25 per hour. 29 U.S.C. § 203(m)(2)(A)(ii). Thus, an employer may take a tip credit of up to $5.12 per hour, so long as the worker actually earns that amount in tips. But it is a core tenet of the FLSA that workers be compensated fairly for their work and must be paid at least the full minimum wage when not engaged in tipped work.

35. While allowing employers to reduce their obligation as a result of employee tips, the FLSA "was designed to extend the frontiers of social progress by insuring to all our able[-]bodied working men and women a fair day's pay for a fair day's work." *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 538 (E.D. Pa. 2019) (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)). "A 'fair day's pay for a fair day's work' can be guaranteed only if employers' ability to take the tip credit is limited to when their employees are actually 'engaged in a tipped occupation.'" *Id.* The tip credit is not without its limits.

The Dual Jobs Regulation and the 80/20 Rule

36. To implement the tip credit provisions of the FLSA, the Department promulgated the "Dual Jobs" regulation, among others. 32 Fed. Reg. 13,575, 13,580-81 (Sept. 28, 1967) (29 C.F.R. 531.56(e)).

37. The Dual Jobs regulation explains that, when an employee works in both a tipped and non-tipped position, such as a hotel maintenance worker who also works as a server, "no tip credit can be taken for [the] hours of employment in [the] occupation of maintenance [worker]." *Id.* at 13,581. That is, the employer must pay the full minimum wage for every hour an employee works as a maintenance person but may take the tip credit for hours that employee works as a server.

38. However, with respect to an employee who "occasionally" or "part of [the] time" performs "related duties in an occupation that is a tipped occupation" but are "not by themselves . . . directed toward producing tips," the employer may take advantage of the tip credit. For example, a server who rolls silverware or refills condiments for a few minutes may still be paid the tipped minimum wage for that time.

39. Since 1988, the Department has interpreted the "occasionally" or "part of [the] time" language of the Dual Jobs regulation to cap the amount of time a worker may spend on related, non-tipped duties at twenty percent of the time in the workweek—the "80/20 rule." *See* U.S. Dep't of Labor, Field Operations Handbook, § 30d00(f)(1)-(4) (rev. Dec. 15, 2016).

40. Except for a brief period in 2009, the 80/20 rule remained the Department's position until 2018, when the Department issued an Opinion Letter, amended the Field Operations Handbook, and issued a Field Assistance Bulletin, abandoning the 80/20 rule in favor of a new rule permitting the tip credit for "any time" an employee spends on related, non-tipped duties. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-27 (Nov. 8, 2018),

2018 WL 5921455; U.S. Dep't of Labor, Field Operations Handbook, § 30d00(f)(1)-(4) (rev. Feb. 15, 2019); U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019). The sub-regulatory guidance provides:

> 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.

41. The Department's attempt to eliminate the 80/20 rule through sub-regulatory guidance failed to accomplish its aim as courts have found the interpretation unreasonable. The 80/20 rule "was consistently awarded *Auer* deference by the federal courts." *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 534 (E.D. Pa. 2019) (finding the Dual Jobs regulation reasonable, the Department's attempt to eliminate the 80/20 rule "unreasonable," affording no deference to it, and listing other contexts in which the Department has drawn a line at twenty percent of time). The *Belt* court noted that the Department's interpretation is unreasonable and does not reflect fair and considered judgment. First, the regulation was internally inconsistent—"is there some limit on the amount of related and untipped work a tipped employee can perform before he or she become[s] engaged in 'dual jobs,' or is there no limit?" *Id.* at 533. Second, the "contemporaneously" limitation "leads to an absurd result," apparently envisioning "an employee who is performing tipped work, such as taking a customer's order, while at the exact same time performing untipped related work, such as filling salt shakers." *Id.* Finally, the "reasonable amount of time before or after" limitation "could be a permissible construction," if limited to twenty percent of the employee's time. *Id.* at 533, 536-37.

<u>The Department's Ongoing Attempts to Transfer Tips to Employers</u>

42. In December 2017, the Department issued a Notice of Proposed Rule Making ("NPRM") that sought to amend its tip regulations to give employers complete freedom over

how tips are distributed. *Tip Regulations Under the Fair Labor Standards Act*, 82 Fed. Reg. 57,395 (Dec. 5, 2017) (withdrawn Oct. 8, 2019) ("2017 NPRM").

43. Under the 2017 NPRM, employers would not only have been free to mandate tip sharing with "back of the house employees" like line cooks, but they would have been free to mandate tip sharing with managers and supervisors. As part of its 2017 Proposed Rule, the Department proposed rescinding 29 C.F.R. § 531 Part D, the provisions governing employers of tipped employees, to the extent that they apply to employers that do not avail themselves of the tip credit. *Id.* at 57,401. In contravention of the FLSA, the 2017 Proposed Rule would have permitted employers to keep employee tips in order to "make capital improvements" or "lower menu prices" if they so desired, so long as they paid tipped employees the full minimum wage. *Id.* at 57,407-08.

44. The Department's 2017 Proposed Rule provoked congressional action to amend the FLSA to prevent employers, including managers and supervisors, from taking employees' tips. 2018 CAA. Rather than abandon the rulemaking, the Department pressed on, issuing the 2019 Proposed Rule which withdrew the 2017 proposal. Now, the Department has finalized its proposal just weeks after the Office of Inspector General determined it followed an unsound process in the 2017 proposal, which served as the genesis of the Final Rule.

The Unsound 2017 Rulemaking Process

45. On December 11, 2020, the Department's Office of Inspector General ("OIG") published a report finding that the Department did not conduct a sound rulemaking process in issuing the 2017 proposed rule. The OIG was particularly concerned with the Department's efforts to bury data quantifying the cost of the 2017 Proposed Rule on tipped workers while claiming in the NPRM that it lacked the data to quantify such costs.

46. The Department did not release any estimate of the 2017 Proposed Rule's impact on workers, claiming that it lacked the necessary data to determine the 2017 Proposed Rule's impact on employee earnings. *Id.* at 57,396; 57,408.

47. Following news reports that the Department did, in fact, conduct an analysis of the 2017 Proposed Rule's impact on employee earnings, OIG opened an investigation into the Department's rulemaking process in issuing the 2017 Proposed Rule. U.S. Dep't of Labor, Office of Inspector Gen., Office of Audit, Report No. 17-21-001-15-001, *DOL Did Not Demonstrate It Followed A Sound Process In Promulgating the 2017 Tip Rule Notice of Proposed Rulemaking* (Dec. 11, 2020) ("OIG Report").[1]

48. The OIG Report found that the Department did not follow a sound rulemaking process; instead, among other things, it found that the Department did not adequately support its decision to exclude an economic impact analysis in the 2017 Proposed Rule and that the Department of Justice, Office of Solicitor General ("DOJ-OSG") influenced the rulemaking process. *Id.* at 5-9.

49. OIG confirmed that the Department was aware of the requirement that agencies conduct economic impact analyses for all regulatory actions deemed economically significant and conducted an analysis to determine the potential transfers from tipped workers to non-tipped workers and employers that could result from the 2017 Proposed Rule. *Id*. at 11.

50. However, the Department ultimately did not release the results of its economic impact analysis after "pressure" from DOJ-OSG and, instead, stated falsely that it "lack[ed] data to quantify possible reallocations of tips through newly expanded tip pools." *Id.* at 12; 2017 NPRM at 57,396.

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[1] https://www.oig.dol.gov/public/reports/oa/2021/17-21-001-15-001.pdf

51. The OIG Report stated that the Department was not able to identify flaws in its data sets or transfer calculations that the agency believed would render its economic impact analysis insufficient to estimate the impact of the 2017 Proposed Rule. *Id.* at 12-13.

52. The Department was also aware that agencies are required to determine whether a regulatory action will affect the disposable income or poverty of families and children, and whether the proposed benefits of the action justify the financial impact on families. *Id.* at 14-16.

53. The Department failed entirely to conduct an analysis of the impact of the 2017 Proposed Rule on families because it "decided an individual tipped employee did not meet the definition of [a] family," *id.* at 14-15, ignoring that many tipped individuals may be the primary wage-earners in households with families or contribute to household income, *id.* at 15-16.

54. The Department did not disclose this decision in the 2017 Proposed Rule but merely stated that it would not have a significant impact on families. *Id.* at 16.

55. According to news reports, the Department estimated that the 2017 Proposed Rule would have cost workers billions of dollars in lost tips. Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, Bloomberg Law Daily Labor Report Feb. 1, 2018.[2]

56. Instead of modifying its rulemaking process to correct the practices highlighted by the OIG Inspector's Report, the Department proceeded to issue sub-regulatory guidance, a 2019 NPRM, and the Final Rule that all bear the same deficiencies as the 2017 NPRM and will result in the transfer of millions of dollars from tipped workers to employers without any reasoned analysis.

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[2] https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses

Congress Responded to the 2017 NPRM by Amending the FLSA in 2018

57. In 2018, Congress amended the Act to make clear that employers may not keep employee tips for any purpose, rejecting the 2017 NPRM. Consolidated Appropriations Act 2018, Pub. L. 115-141, 132 Stat. 348; 29 U.S.C. § 203(m)(2)(B).

58. Congress once again signaled its support for protecting tipped workers—this time by amending the FLSA to explicitly forbid employers from keeping employees' tips "for any purposes, including allowing managers or supervisors to keep any portion of employees' tips," even if the employer does not make use of the tip credit. *Id.*

59. Congress also provided for civil money penalties for employers that illegally keep employee tips. Consolidated Appropriations Act 2018, Pub. L. 115-141, 132 Stat. 348; 29 U.S.C. § 216(e)(2).

The 2019 Proposed Rule

60. Prompted by Congress's 2018 amendments to the FLSA, the Department issued the proposed rule, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 84 Fed. Reg. 53,956 (Oct. 8, 2019) ("2019 NPRM"). The 2019 NPRM ostensibly implemented Congress's mandate by clarifying when employers may impose mandatory tip pools and which employees may participate, but, in actuality, it reached far beyond the scope of the 2018 FLSA amendments and issued the provisions challenged in this suit. *See* 2019 NPRM at 53,956. The 2019 NPRM withdrew the 2017 NPRM. *Id.*

61. The Department proposed to replace the twenty percent cap on related, non-tipped duties that tipped employees can be required to perform while employers take the tip credit, with amorphous, undefined terms. The Department's proposal provided: "An employer may take a tip credit for *any amount of time* that an employee performs related, non-tipped duties *contemporaneously with* his or her tipped duties, or for a *reasonable time immediately before or*

after performing the tipped duties." 2019 NPRM at § 531.56(e)(2). The Department's proposal failed to define the terms a "reasonable time" and "contemporaneous with." *See* 2019 NPRM at 53,975.

62. Relying on its own recent sub-regulatory guidance—the 2018 Opinion Letter, 2019 Field Assistance Bulletin, and 2019 Field Operations Handbook—the Department explained that "[t]he proposed regulation would *clarify* that an employer may take a tip credit for *any amount of time* that an employee performs related, non-tipped duties *contemporaneously with* his or her tipped duties, or for a *reasonable time immediately before or after* performing the tipped duties." *Id.* at 53,964 (emphasis added). "Clarify" here means changing the rule by removing the cap.

63. The 2019 NPRM also proposed to expand dramatically the universe of duties that may be considered "related, non-tipped duties" to include tasks that the Department has long deemed unrelated to the tipped occupation and requiring payment of the full minimum wage without taking the tip credit. Specifically, the 2019 NPRM also proposed using the Occupational Information Network ("O*NET") to determine whether specific non-tipped duties are related to a tipped occupation. O*NET is an online database containing hundreds of standardized and occupation-specific descriptors for almost 1,000 occupations. These descriptions of workers' duties are obtained through randomized surveys of employers and workers.[3] Therefore, O*NET contains tasks workers and employers in service occupations—industries with a high incidence of wage violations report in certain occupations—regardless of whether those duties are related to their tipped occupation. O*NET was not created to demonstrate whether the job duties reported by tipped workers are related or unrelated to tipped work. Nonetheless, any duties

[3] https://www.onetcenter.org/dataCollection.html

appearing on this database now, or in the future, will be presumed related to the tipped occupation.

64. Conspicuously, the 2019 NPRM contained no estimate of the number of workers it would affect or its effect on their wages. The Department claimed it "lack[ed] data to quantify any potential costs, benefits, or transfers which may be associated with the implementation of this policy," as it did with the 2017 NPRM—despite actually having data that contradicted its position. *Id.* at 53,967.

65. The 2019 NPRM admits, however, that "employment of . . . dishwashers and cooks[] may fall" as a result of the regulation because tipped workers may perform more of those non-tipped duties. *Id.*at 53,972.

66. In addition, the 2019 NPRM admits that "tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage." *Id.*

67. The Department provided an example in which a worker earned $12 per hour in tips with the twenty percent limit:

> With no 20 percent limit on the performance of related, non-tipped duties, an employee might spend more than 12 minutes per hour performing related, non-tipped duties, as long as they still receive enough tips to earn at least $7.25 per hour for the shift. Thus, if an employee now spends 20 minutes performing non-tipped work (i.e., 33 percent of their shift) and 40 minutes interacting with customers, *they would be expected to lose $2 per hour in tips*, a decrease accounting for eight fewer minutes per hour spent performing tip-generating work (i.e., 8 minutes × $0.25 per minute).

Id. (emphasis added). Thus, the Department's own estimate is that the Final Rule would result in a *fourteen percent reduction in income* for the hypothetical tipped worker.

68. The 2019 NPRM contains no analysis of a regulatory alternative to the rescission of the 80/20 rule, such as combining the "reasonable time" standard with a hard cap. *Id.* at 53,973.

69. As noted above, the Department's 2017 NPRM was criticized by the OIG Report for claiming, without analysis, that the proposed rule would not adversely impact the well-being of families. OIG Report at 15. The Department's 2019 NPRM, nonetheless, did not mention—let alone provide an analysis of—how the proposed benefits of the 2019 NPRM justified the potential financial impact on families, as required by Section 654 of the Treasury and General Government Appropriations Act, 1999.

70. Additionally, the 2019 NPRM proposed a willfulness requirement for civil money penalties for violations of § 203(m)(2)(B) despite the absence of statutory language requiring a willful violation for the imposition of civil money penalties for violations of this section. 2019 NPRM at 53,964. The 2019 NPRM amended the Department's definition of willful violations across the board for any violations of the Act.

71. Finally, the 2019 NPRM also proposed to use a duties test but no salary threshold to determine which employees are managers or supervisors that may not participate in tip pools. 2019 NPRM at 53,961-62.

72. The Department received 466 comments in response to its 2019 NPRM. Multiple commentators raised concerns about the Department's failure to justify its departure from the thirty-year-old 80/20 rule and the Department's failure to provide any detailed analysis or consideration to the impact of its proposed rule on workers, the confusion it would create for employers, and the burdens it would impose on state enforcement efforts.

73. Commentators also raised concerns over the Department's unjustified amendment of its definition of willfulness, weakening the effect of civil money penalties, in contravention of Supreme Court precedent as well as its decision to import into the FLSA a willfulness requirement for the imposition of civil money penalties for violations of the amended provisions of section 203(m)(2)(B).

74. Finally, commentators also expressed their concerns that the Department's failure to include a salary threshold to determine which employees are managers or supervisors that may not participate in mandatory tip pools was overbroad and would cause certain low wage workers to be excluded from the tip pool and lose out on wages.

The Final Rule

75. The Department issued the Final Rule on December 30, 2020, in the midst of the global COVID-19 pandemic and just weeks after the OIG Report condemned the 2017 NPRM. 85 Fed. Reg. 86,756 (Dec. 30, 2020). Now, in this administration's final days, unable to accomplish its goal through sub-regulatory guidance, the Department has amended the Dual Jobs regulation itself to codify its deletion of the twenty percent cap and permit employers to take the tip credit for "any hours" tipped employees spend on related, non-tipped duties.

76. The Final Rule implements the 2019 NPRM with few changes. *See* Final Rule at 86,762. In responding to comments, the Department determined to maintain each challenged provision of the rule, including eliminating the 80/20 rule, imposing a willfulness requirement, redefining willfulness, failing to implement a salary threshold to identify bona fide managers or supervisors, and incorporating the O*NET occupational definitions.

77. The Department identifies as the primary justification for rescinding the 80/20 rule that it "was difficult for employers to administer and led to confusion," and was "onerous for employers," but replaces the bright line with an undefined standard that still requires

employers to track their employees' tasks and time to ensure the non-tipped work is related and reasonable. Final Rule at 86,767.

78. The Final Rule includes the 2019 NPRM's willfulness requirement for civil money penalties—despite there being no such requirement in the statute—when an employer illegally keeps tips. *Compare* FLSA § 203(m)(2)(B) *with* 29 C.F.R. § 578.3(a).

79. The Final Rule sweepingly amends the willfulness standard across the FLSA, because it provides that "an employer's receipt of advice from WHD that its conduct is unlawful and its failure to inquire further regarding the legality of its conduct are each 'a relevant fact and circumstance' in determining willfulness," but not determinative. *Id.* at 86,773.

80. Further, the Department failed to incorporate a salary threshold for assistance in identifying bona fide "managers" or "supervisors," as commenters suggested, instead using only a duties test borrowed from the executive exemption. § 531.52(b)(2).

81. The Final Rule emphasized its reliance on O*NET to determine whether a non-tipped duty is related to the tipped occupation and provides that the O*NET tasks for an occupation, though comprehensive, are not exhaustive. In this way, the Final Rule is even broader than the 2019 NPRM.

82. The Department applauds itself in the Final Rule for lowering employers' monitoring costs associated with the tip credit, though the Department does not provide any data establishing that monitoring costs were particularly burdensome or that they will, in fact, be lower. *See* Final Rule at 86,767.

83. The Final Rule contains an example that purports to tout its reasonability. The Department explains that a bellhop who works an eight-hour shift performing tipped duties and then two hours performing non-tipped duties must be paid the full minimum wage for the two

hours of non-tipped duties because it is not a "reasonable time" after the shift. Final Rule at 86,769. But the same bellhop who works a ten hour shift and performs two hours of non-tipped duties throughout that shift (approximately twelve minutes per hour) could be paid the tipped minimum wage for all hours worked that shift. *Id.* The example seems to indicate that the "reasonability" of the non-tipped time depends on the nominal length of the shift or how busy an employee is during the shift, but provides no limit to non-tipped duties other than two hours after a shift.

84. The Final Rule also claims without explanation that the new "reasonable time" method requires less specificity in evaluating whether a particular task is tipped or non-tipped. Final Rule at 86,769.

85. Although the Department requested data in order to quantify the effect on tipped workers of rescinding the 80/20 rule, it disregarded the analysis commenters provided. *See* Final Rule at 86,784-86.

86. The Department argues in the Final Rule that the 80/20 rule actually allows greater exploitation of tipped workers than its new method but also admits that the new rule will primarily benefit employers. Final Rule at 86,786. The Final Rule provides that the "efficiencies" the rule advances may result in higher employee earnings despite acknowledging that "transfers" from employees to employers "could occur in some cases." *Id.* Specifically, the Department "believes" without basis that "employers will see a reduction in regulatory cost and be able to adopt work arrangements that better serve customers, leading to more business and greater tips." *Id.*

ALLEGATIONS

I. The Final Rule is Unlawful Under the Administrative Procedure Act.

A. The Final Rule's Abandonment of the 80/20 Rule is Contrary to the Text and Purpose of the FLSA and to Supreme Court Precedent.

87. The Final Rule renders meaningless the statutory definition that a tipped worker must be "engaged in an occupation" which receives tips, instead substituting a non-exhaustive list of related, untipped tasks which may be considered part of a tipped occupation. *See* 29 U.S.C. § 203(t). When employees "spend more than twenty percent of their time performing untipped related work," they are no longer "engaged in an occupation in which [they] customarily and regularly receive[] . . . tips." *Belt*, 401 F. Supp. 3d at 526.

88. The former Dual Jobs regulation, interpreting "engaged in an occupation" in which a tipped worker performs untipped duties only "occasionally" or "part of [the] time" to impose a twenty percent cap on untipped duties has been afforded *Chevron* deference by the United States Courts of Appeals for the Eighth and Ninth Circuits as well as multiple district courts. *Belt*, 401 F. Supp. 3d at 529 (collecting cases).

89. The Final Rule fails to limit the hours of non-tipped work tipped workers may be instructed to complete by their employer in direct contravention of the purposes and limitations of the tip credit crafted by Congress.

90. Defendants' decision to require a willful violation of Section 203(m)(2)(B) to impose civil money penalties is also contrary to the plain text of the statute. *Compare* Final Rule at § 578.3 *with* 29 U.S.C. § 216(e)(2).

91. The Final Rule's provisions that an employer's ignoring Department advice is a mere factor to be considered and deleting the requirement that an employer make an adequate

inquiry contradict the Supreme Court's long-established definition of willfulness. Final Rule at § 578.3(c).

B. The Final Rule's Willfulness Requirement and Its Definition of Willfulness Are Contrary to Law.

92. The Supreme Court has explained that "willful" refers to "conduct that is not merely negligent"; that is, the "employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Richland Shoe*, 486 U.S. at 133.

93. For nearly thirty years, the Department has incorporated the Supreme Court's definition into its regulations, describing a violation as "willful" where "the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." 29 C.F.R. § 578.3(c) (Dec. 3, 1992). Further, the regulations provide that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful." *Id.*

94. The Final Rule makes the "receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful" a mere factor to be considered in determining whether conduct is willful. The Final Rule also removes an employer's failure to inquire further into whether its conduct was in compliance with the Act from the Department's description of willfulness. Final Rule at § 578.3(c). The Final Rule's description of willfulness contradicts the Supreme Court's long-established definition. The Department's Final Rule encourages employers to ignore the advice of the Department's compliance officers. This will create confusion among employers, and will create administrative and enforcement burdens for the Plaintiff states.

95. Additionally, the Final Rule imports a willfulness requirement into violations of the recently amended provisions of the FLSA in contravention of Congressional intent.

96. Section 16(e)(2) of the FLSA states that "any person who repeatedly or willfully violates sections 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not exceeding $1100 for each violation." Accordingly, the Act imposes civil money penalties on employers that repeatedly or willfully violate the Act's minimum wage and overtime requirements.

97. Section 1201(b)(3) of the 2018 Consolidated Appropriations Act amended section 16(e)(2) of the FLSA to add that "[a]ny person who violates section 3(m)(2)(B)," (the prohibition on employers, including managers and supervisors from keeping employees' tips) "shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary deems appropriate."

98. Unlike Congress' imposition of civil money penalties relating to violations of the minimum wage and overtime requirements of the FLSA, Congress did not make the imposition of civil money penalties for violations of section 3(m)(2)(B) of the Act contingent upon a finding of willfulness. Contrary to Congress' intent, however, the Final Rule hinges imposition of civil money penalties for violations of section 3(m)(2)(B) of the Act upon a finding of willfulness.

C. The Final Rule Is Arbitrary and Capricious

99. The Final Rule is arbitrary and capricious because it fails to consider and quantify the effect on tipped workers while ignoring evidence that contradicts its position. Further, the Final Rule is an unjustified break with decades of consistent application of the Dual Jobs regulation.

100. The Department has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, and offered an explanation for its decision that runs counter to the evidence before the agency.

101. The Final Rule does not examine the relevant considerations and articulate a satisfactory explanation for its action that includes a rational connection between the facts found and the choice made. It fails to reflect upon contrary evidence to the rule and treats contrary evidence in a conclusory fashion.

102. The Final Rule fails to establish good reasons for its change in position and does not consider that its longstanding policy may have engendered serious reliance interests that must be taken into account.

103. For example, many states, including some Plaintiff states, have long looked to the FLSA and to the Department's regulations for guidance when interpreting their own wage laws. The 80/20 rule has been the law for thirty years. The Department failed to consider the confusion that its rash abandonment of the 80/20 rule would cause among employers subject to state requirements that follow the 80/20 rule, or the administrative burden this departure would cause for states' enforcement efforts.

i. The Department failed to consider or quantify the effect the rule would have on workers and their families and ignored evidence of those effects.

104. The Department claims that the Final Rule will lower costs related to monitoring tipped employees' time spent on various tasks but failed to demonstrate that employers actually incur any such burdensome costs. 85 Fed. Reg. at 86,767. In fact, the rule still requires employers to differentiate between tipped and non-tipped tasks and ensure that time spent on non-tipped tasks is "reasonable."

105. However, the Department's lack of reasoned decision-making is perhaps best demonstrated by its refusal to conduct any meaningful analysis of the cost of the most significant change the rule makes—eliminating the twenty percent cap on related, non-tipped duties—to the millions of tipped workers nationwide.

106. In the 2019 NPRM, the Department stated that it "lacks data to quantify any potential costs, benefits, or transfers which may be associated with the implementation of" the revised Dual Jobs regulation, a claim with questionable credibility in light of the OIG's findings from its investigation into the 2017 rulemaking process. 84 Fed. Reg. at 53,967.

107. In response to the Proposed Rule, commenters raised serious concerns that replacing the 80/20 rule with a vague standard that places no limit on the amount of time tipped employees can be required to spend on non-tip-producing work would have a devastating effect on their income.

108. The Economic Policy Institute ("EPI") estimated that workers would lose more than $700 million annually under the proposed rule. EPI Comment at 4;[4] *see* Heidi Shierholz and David Cooper, *Workers will lose more than $700 million annually under proposed DOL rule,* Economic Policy Institute (Nov. 30, 2019).[5]

109. The EPI analysis of the Rule was of the sort that the Department would normally produce but the Department disregarded it in the Final Rule, claiming it relied on flawed methods and assumptions. Final Rule at 86,784-86. The basis of the Department's conclusory dismissal may have been illuminated by the text of footnote 54, but it was omitted. Final Rule at 86,785.

110. EPI also estimated that employment in non-tipped food service occupations will decline by 5.3 percent and employment in tipped occupations will increase by 12.2 percent, resulting in 243,000 jobs shifting from being non-tipped to being tipped, while wages will decline overall. *Id.*

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[4] https://downloads.regulations.gov/WHD-2019-0004-0423/attachment_1.pdf

[5] https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/

111. Instead, without explanation, the Department makes the unfounded suggestion that employers might not use the enabling mechanism provided by the Final Rule to use tips to supplement payroll expenses. 85 Fed. Reg. at 86,785-86.

112. The restaurant industry, which employs sixty percent of all tipped workers, has a disturbingly high rate of wage and hour violations; in its 2010-12 compliance sweep of nearly 9,000 full-service restaurants, the Department found that a staggering 83.8 percent of the restaurants it investigated violated wage and hour laws. Sylvia A. Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change: Why it's Time to Give Tipped Workers the Regular Minimum Wage* 7, 18 Economic Policy Institute (Jul. 10, 2014).[6]

113. That included 1,170 tip credit violations, which cost workers $5.5 million in lost income. *Id*. at 18.

114. By permitting employers to reference O*NET to determine "related" job duties, the Rule also dramatically expands the universe of duties that can be performed by tipped workers without running afoul of the FLSA.

115. Because O*NET compiles lists of task assignments reported in surveys and does not objectively evaluate whether a task is actually related to a given occupation or how much time workers spend on given tasks within an occupation, its incorporation into the Final Rule obliterates any meaningful distinction between tipped and non-tipped occupations. *See* O*NET Online, *Data Collection Overview*.[7] Because it seeks to describe the work world as it is, not as it should be, O*NET cannot and does not account for FLSA violations in industries known to have

[6] https://www.epi.org/files/2014/EPI-CWED-BP379.pdf.

[7] https://www.onetonline.org/dataCollection.htm.

high violation rates like the restaurant industry; therefore, using it to determine related duties will sanction conduct that has been prohibited under the FLSA for decades.

116. The Final Rule thus creates an economic incentive to turn non-tipped positions into tipped jobs, which would allow employers to take the tip credit and use tip pool funds that would normally have gone to tipped employees to subsidize employers' minimum wage obligations. Alternatively, an employer may eliminate certain positions altogether, resulting in increased unemployment, and shift the duties that non-tipped employees perform onto tipped employees.

117. For example, O*NET tasks for waiters and waitresses include "cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station, taking out trash, or checking and cleaning bathrooms"—when from 1988 until 2018, the Department's Field Operations Handbook specified as an example, "maintenance work (e.g., cleaning bathrooms and washing windows) [is] not related to the tipped occupation of a server; such jobs are non-tipped occupations." Catherine Ruckelshaus, *Comments in Response to Proposed Rulemaking: Tip Regulations Under the Fair Labor Standards Act*, National Employment Law Project (Dec. 11, 2019).[8]

118. For those reasons, incorporating the O*NET occupational listings into the Final Rule is arbitrary and capricious itself.

119. Moreover, the Department acknowledges that the Final Rule will primarily benefit employers. 85 Fed. Reg. at 86,786.

120. The Final Rule allows employers to take a tip credit even when their employees are completing tasks which do not produce tips—doing more work for less pay—with no cap on

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[8] https://downloads.regulations.gov/WHD-2019-0004-0453/attachment_1.pdf

the amount of time a worker may spend on non-tipped duties. It allows employers to capture the tips of workers by roundabout means.

121. The Department's indifference to the harm the Final Rule will cause to workers is arbitrary and capricious and undermines the Department's purpose to "foster, promote, and develop the welfare of the wage earners." 29 U.S.C. § 551.

ii. The Department failed to articulate valid reasons for its departure from decades of consistent application of the Dual Jobs regulation.

122. The Final Rule is arbitrary and capricious because the Department failed to articulate sufficient reasons for its departure from decades of consistent application of the Dual Jobs regulation and the reliance interests that application has engendered.

123. The Department's conclusory claim that the 80/20 rule has created some confusion and inconsistent application is unsupported by facts and fails to provide a valid reason for abandoning the 80/20 rule that several Plaintiff states have long looked to for guidance.

iii. The 80/20 rule has not proven difficult for courts to apply.

124. In its attempt to demonstrate that the "practical difficulties of complying with the 80/20 approach are . . . evident in case law[,]" the Department cites only one case, *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff'd*, 291 F. App'x 310 (11th Cir. Sept. 3, 2008) (per curiam). However, that case did not even apply the 80/20 rule, much less justify its rescission.

125. The *Pellon* court found that a determination of how much of the plaintiff skycaps' time was spent on non-tipped duties was "infeasible" because of the lack of evidence, noting several of the plaintiffs "admitted that dividing their workday among the various tasks they perform is impractical or impossible." 528 F. Supp. 2d at 1313-14. Applying the 80/20 rule was simply not necessary because the plaintiff skycaps did not offer evidence that the non-tipped

duties they performed consumed more than twenty percent of their working time. 528 F. Supp. 2d at 1314.

126. In affirming the decision of the trial court, the United States Court of Appeals for the Eleventh Circuit did not abrogate the 80/20 rule, nor characterize it as impractical or "infeasible"; rather, it issued a one-page per curiam decision affirming the court's determination that the skycaps failed to demonstrate that they spent substantial time doing non-tipped work. 291 Fed. App'x at 310.

iv. The Final Rule is vague and will result in increased litigation, not less.

127. The Department engaged in unnecessary rulemaking to implement changes unrelated to the FLSA amendment contained in the 2018 CAA. The 20 percent limitation on non-tipped hours has been consistently and easily applied for more than thirty years. Defendants' amorphous standard provides only murkiness, not clarity, and replaces a bright line rule—belying the stated purpose of the Final Rule.

128. The ill-defined limits of the "contemporaneous with" or "for a reasonable time immediately before or after" provisions are certain to cause a flood of new litigation. The Final Rule defines neither phrase.

129. The Department never provides a precise definition of "contemporaneous," simply stating that it means "during the same time as" before making the caveat that it "does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time." 85 Fed. Reg. at 86,768.

130. The Department stated that "the allowance for related duties performed 'for a reasonable time immediately before or after' a tipped duty creates a sufficiently intelligible distinction between employees engaged in tipped occupations and non-tipped occupations." *Id.*

131. Neither the Department's definitions nor its bellhop example, discussed *supra*, provide any guidance as to when–or whether–a worker could be deemed a dual employee during a shift or how long before or after a shift constitutes a "reasonable time." And, in the example of the bellhop, the worker could be entitled only to the sub-minimum wage for an entire shift one day (the busy day, in the example) but entitled to minimum wage for part of the shift the next day (the two hours of non-tipped duties after the shift). The Department criticizes the 80/20 rule for treating twelve minutes of non-tipped work per hour during a ten hour shift the same as two hours of non-tipped work immediately after an eight hour shift. But the Final Rule would treat virtually any amount of non-tipped work per hour the same no matter the length of the shift, so long as it is performed "contemporaneously" with tipped duties, and does not expressly prohibit one and half hours of time at the end of an eight hour shift or two hours at the end of a ten hour shift.

132. Further, because the Final Rule focuses on the timing of tasks rather than the proportion of tip-producing duties, a worker could be deemed a dual employee on one day and a solely tipped worker the next.

133. The Final Rule's new related duties standard not only radically departs from decades of agency practice, but will make it more difficult for workers, businesses, and state enforcement agencies that have relied on the 80/20 rule to determine whether a tipped worker is employed in dual occupations.

II. Plaintiffs Will Suffer Irreparable Harm as a Result of Defendants' Actions

134. The Final Rule harms Plaintiffs' quasi-sovereign and proprietary interests, including by harming Plaintiffs' residents, directly diminishing Plaintiffs' tax revenue, increasing the costs of funding and administering Plaintiffs' public benefit programs, and inflicting substantial and burdensome administrative and enforcement costs on Plaintiffs' state agencies.

135. Many of the Plaintiff States, including Pennsylvania, Maryland, and Michigan, rely on the 80/20 rule by incorporating federal law, through similar or identical provisions of state law, or judicial decisions.[9]

136. Because the states rely on federal law for the 80/20 rule, its effects will be immediate and far-reaching.

137. The likely increase in non-tipped work performed by tipped workers due to the Final Rule will directly harm Plaintiffs in at least three ways. First, the Final Rule will lower wages and decrease compliance with minimum wage laws, harming workers in Plaintiffs' States. Second, reduced wages for tipped workers will directly reduce Plaintiffs' tax revenue. Third, the Final Rule will impose administrative and regulatory costs on Plaintiffs and their state agencies, including increasing expenditures on public benefits they fund or administer. All of these effects will require the expenditure of funds which cannot be recovered from Defendants.

A. The Final Rule Will Harm Workers in the Plaintiff States.

138. The Final Rule causes direct economic injury to Plaintiffs.

139. As discussed *supra*, the Final Rule will lead to tipped employees spending a more significant amount of time each shift performing non-tipped work while earning the lower tipped minimum wage rate, thus reducing their opportunity to earn more tips.

140. With less opportunity to earn tips, tipped employees' hourly rate of pay will decrease, resulting in a lower take-home pay.

141. Additionally, prior to the issuance of the Final Rule, workers in tipped occupations, especially service workers, were more likely than workers in other occupations to

[9] Other states, such as Massachusetts, informally look to the Department's 80/20 rule for guidance.

experience minimum wage violations.[10] Indeed, service workers made up 46.5 percent of workers who experienced minimum wage violations.[11]

142. The Final Rule will lead to a continuation of minimum wage violations suffered by service workers as now it will be difficult for employees to determine when they should be paid the regular minimum wage rate instead of the tipped minimum wage rate for their time spent on non-tipped duties.

143. The Department issues the Final Rule as service-sector workers are already in a particularly vulnerable position due to the COVID-19 pandemic; indeed, as of November 2020, 1,303,000 workers in the food services industry were unemployed. Bureau of Labor Statistics, *Unemployed persons by industry, class of worker, and sex* (Dec. 4, 2020).[12]

144. Those 1,303,000 workers represent 13.8 percent of the workforce of the food services and drinking places subsector. Bureau of Labor Statistics, Workforce Statistics.[13]

145. Some tipped workers have reported being unable to access unemployment compensation benefits because their wages were too low to meet the minimum qualification threshold. *See, e.g.,* One Fair Wage, *Locked Out by Low Wages: New York Service Workers' Challenges With Accessing Unemployment Insurance During COVID-19*, 3 (Jun. 2020).[14]

146. Those who are working are in even more precarious positions than they were before the pandemic. A survey of service workers from New York, New Jersey, Massachusetts,

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[10] https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/

[11] Id.

[12] https://www.bls.gov/web/empsit/cpseea31.htm

[13] https://www.bls.gov/iag/tgs/iag722.htm#workforce

[14] https://onefairwage.site//wp-content/uploads/2020/11/OFW_LockedOut_NY_2.pdf

Illinois, and Pennsylvania found that 83 percent of respondents experienced a decline in tips during the pandemic, with 63 percent reporting that tips had fallen by at least 50 percent. One Fair Wage et al., *Take Off Your Mask So I Know How Much To Tip You: Service Workers' Experience of Health & Harassment During COVID-19*, 3 (Nov. 2020).[15]

147. Sixty-seven percent of respondents have received a lesser than usual tip after enforcing COVID-19 safety protocols with customers. *Id.*

148. Workers have also seen a dramatic increase in sexual harassment; many women in the service industry have had to contend with "requests from male customers that female service workers remove their mask so that they could judge their looks, and, implicitly, determine their tips on that basis." *Id.*

149. As businesses look to meet the financial struggles brought on by the pandemic, the Final Rule hands them a way to transfer their labor costs on to tipped workers. Tipped workers could ill afford the $700 million transfer even in a healthy economy; taking money out of the pockets of tipped workers as the pandemic rages is sure to leave many destitute.

150. Tipped workers, a difficult group to define with accuracy, are among the most vulnerable and lowest paid in our states. For example, in Pennsylvania, the average restaurant server earns $25,380 annually, bartenders earn $24,360, bellhops and baggage handlers earn $28,150, and manicurists and pedicurists earn $21,630. Dep't of Labor, Bureau of Labor Statistics, *May 2019 State Occupational Employment and Wage Estimates Pennsylvania* (35-3031, 35-3011, 39-6011, 39-5092).[16] In Illinois, the average is $23,340, $24,480, $25,280, and

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[15] https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_ WorkerExp_Emb-1.pdf

[16] https://www.bls.gov/oes/current/oes_pa.htm#39-0000

$24,580, respectively. *Id.* (Illinois).[17] In Massachusetts, the average is $32,970, $31,690, $32,170, $31,690, and $28,620 per year. *Id*. (Massachusetts).[18] A fourteen percent reduction—to use the Department's example—or more would be devastating.

151. Service industry employers desperately need economic relief but it cannot come out of the pockets of their lowest paid workers.

B. The Final Rule Will Directly Reduce the Plaintiffs States' Tax Revenue.

152. As the Final Rule lowers workers' pay, it will also lower the income tax receipts for Plaintiffs' States.

153. In addition, as the Department admits, the Final Rule will cause workers to shift some responsibilities for non-tipped work to tipped workers, resulting in a loss of non-tipped jobs. The increased unemployment will decrease Plaintiffs' income tax revenue and increase reliance on Plaintiffs' public benefits.

C. The Final Rule Will Impose Administrative and Regulatory Costs on the Plaintiff States and Their Agencies by Increasing Reliance on Public Benefits.

154. The Final Rule will cause more vulnerable, low-wage workers to seek and qualify for public benefits that the states fund or administer.

155. In Pennsylvania, as noted above, the average restaurant server earns $25,380 per year. Manicurists and pedicurists earn $21,630.

156. Using the Department's example, 2019 NPRM at 53,972, a fourteen percent decrease in wages will result in the average Pennsylvania restaurant server earning $21,826. If the server is the head of a two-person household, that server would have been ineligible for

[17] https://www.bls.gov/oes/current/oes_il.htm#39-0000

[18] https://www.bls.gov/oes/current/oes_ma.htm#35-0000

Medicaid and SNAP benefits administered by Pennsylvania but now would become eligible. In addition, the server will be more likely to require other public benefits for which he or she already qualified. Other benefits include: unemployment compensation for those non-tipped employees whose positions are eliminated in order to have tipped employees perform the same duties; Medicaid ($22,929.20 threshold for a two-person household); Supplemental Nutrition Assistance Program ("SNAP") ($21,984 threshold for a two-person household); Temporary Assistance for Needy Families ("TANF") (resources valued at $1,000 or less); Low Income Home Energy Assistance Program ("LIHEAP") ($25,860 threshold for household income); child care subsidies ($34,480 threshold for two-person household); Children's Health Insurance Program ("CHIP") ($22,390-35,860 household income); Women Infants Children ("WIC") ($31,894 threshold for two-person household); and local housing programs (varies by region).

157. The Final Rule will cause more Pennsylvania workers to be eligible for more benefits that the Commonwealth funds or administers, or receive higher amounts.

158. In Pennsylvania, the leisure and hospitality industry has accounted for as much as 24.8% of continuing unemployment claims. Pa. Dep't of Labor & Indus., *Claims by Industry and Week: Continuing Claims by Industry and Week* (2021) (last accessed Jan. 1, 2021) (showing that the leisure and hospitality industry accounted for 24.8% of continuing claims during the week ending Jun. 27, 2020)

159. In Illinois, the average restaurant server earns $23,340 per year. Dep't of Labor, Bureau of Labor Statistics, *May 2019 State Occupational Employment and Wage Estimates Illinois* (35-3031).[19] Manicurists and pedicurists earn $24,580. *Id.* (39-5092).[20]

[19] https://www.bls.gov/oes/current/oes_il.htm#35-0000

[20] https://www.bls.gov/oes/current/oes_il.htm#39-0000

160. Using the Department's example, 2019 NPRM at 53,972, a fourteen percent decrease in wages will result in the average Illinois restaurant server earning $20,072.40. If the server is the head of a two-person household, that server previously ineligible for Medicaid and SNAP benefits administered by Illinois would now become eligible. In addition, the server will be more likely to require other public benefits for which he or she already qualified. Other benefits include: unemployment compensation for those non-tipped employees whose positions are eliminated in order to have tipped employees perform the same duties; Medicaid ($23,929.20 threshold for a two-person household);[21] Supplemental Nutrition Assistance Program ("SNAP") ($28,452 threshold for a two-person household); Temporary Assistance for Needy Families ("TANF") (resources valued at $1,000 or less); Low Income Home Energy Assistance Program ("LIHEAP") ($25,860 threshold for a two-person household)[22]; child care subsidies ($34,488 threshold for two-person household);[23] Children's Health Insurance Program ("CHIP") ($25,860-39,300 household income);[24] Women Infants Children ("WIC") ($31,894 threshold for two-person household); and local housing programs (varies by region).

161. The Final Rule will cause more Illinois workers to be eligible for more benefits that the State funds or administers.

162. Due to the impact of COVID-19 mitigations to minimize the spread of the virus in the community, thousands of Illinois workers lost their jobs, many of which were in tipped occupations.

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[21] https://www.benefits.gov/benefit/1628

[22] https://www.benefits.gov/benefit/1556

[23] https://www.dhs.state.il.us/page.aspx?item=118832

[24] https://www.benefits.gov/benefit/1601

163. In Illinois, the leisure and hospitality industry has accounted for as much as 34.1% of jobs lost over the last year.[25] In particular, the accommodation and food services industry account for 88.5% of those jobs lost. *Id.*

164. Now with the Department's Final Rule being issued, many of these workers who either saw their incomes significantly decreased, if not eliminated completely, by the pandemic are at risk of experiencing a more permanent decrease in their wages.

165. The rash abandonment of the 80/20 rule will force states like Illinois and Maryland that have looked to the FLSA and the Department Regulations for the last three decades to consider their own rule-making to prevent workers within the state from being harmed by the operation of the Final Rule. To promulgate its own rule the Illinois Department of Labor (IDOL), like other states, would have to invest significant resources to research, draft, propose, and implement an appropriate tipped worker rule in compliance with the Illinois Administrative Procedure Act. IDOL would also have to devote significant resources to publish the proposed rule in the Illinois Register, solicit and review public comment, hold a public hearing, and obtain approval from the Joint Committee on Administrative Rule, a bipartisan legislative oversight committee which conducts systematic reviews of administrative rules proposed by Illinois agencies. Adopting a new rule is a resource-intensive process that will require Illinois to incur significant regulatory and administrative expense.

166. In the District of Columbia, the average restaurant server earns $49,570 per year. Dep't of Labor, Bureau of Labor Statistics, *May 2019 State Occupational Employment and Wage*

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[25] https://illinois.virtuallmi.com/vosnet/analyzer/resultsNew.aspx?session=indces&lmidbl=1

Estimates District of Columbia (35-3031).[26] Manicurists and pedicurists earn $36,420. *Id.* (39-5092).[27]

167. Using the Department's example, 2019 NPRM at 53,972, a fourteen percent decrease in wages will result in the average District restaurant server earning $42,630. If the server is the head of a three-person household, that server previously ineligible for DC Healthcare Alliance coverage (a District-funded program designed to provide medical assistance to District residents who are not eligible for Medicaid) and SNAP benefits administered by the District would now become eligible. In addition, the server will be more likely to require other public benefits for which he or she already qualified.

168. The Final Rule will cause more District workers and their families to be eligible for more public benefit programs that the District funds or administers. The District's administrative costs and burdens would increase under the Final Rule while simultaneously forcing the District to redirect resources away from essential program activities towards administrative tasks.

169. In Maryland, the average restaurant server earns $25,910 per year. Dep't of Labor, Bureau of Labor Statistics, *May 2019 State Occupational Employment and Wage Estimates Maryland* (35-3031).[28] Manicurists and pedicurists earn $25,130. *Id.* (39-5092).[29]

170. Using the Department's example, 2019 NPRM at 53,972, a fourteen percent decrease in wages will result in the average Maryland restaurant server earning $22,282. If the server is the head of a two-person household, that server previously ineligible for Medicaid

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[26] https://www.bls.gov/oes/current/oes_dc.htm#35-0000

[27] https://www.bls.gov/oes/current/oes_dc.htm#39-0000

[28] https://www.bls.gov/oes/current/oes_md.htm#35-0000

[29] https://www.bls.gov/oes/current/oes_md.htm#39-0000

($23,796 threshold for a two-person household) and SNAP benefits ($22,412 threshold for a two-person household) administered by Maryland would now become eligible. In addition, the server will be more likely to require other public benefits for which he or she already qualified.

171. The Final Rule will cause more Maryland workers to be eligible for more benefits that the State funds or administers.

172. In Michigan, workers who customarily receive tips are only required to receive 38 percent of the applicable minimum wage; provided, however, that that amount plus their tips equal the minimum wage or the employer must make up the shortfall. Mich. Comp. Laws § 408.934d. Tipped workers in Michigan will see a significant reduction in their overall income if they are required to spend more of their time performing services that do not generate tips.

173. According to DOL labor statistics as of May 2018, of over 4.3 million total employees, Michigan employs 80,880 waiters and waitresses with average annual earnings of $23,920 and employs 17,500 bartenders with average annual earnings of $24,070. These two categories make up roughly 25 percent of the food preparation and service industry in Michigan. While there are certainly other types of employment that may rely on tips as their primary source of income, these are the two most obvious categories of workers in Michigan who are likely to be affected by DOL's final rule. This means that at least 100,000 Michigan workers could be subjected to spending more than 20 percent of their time performing duties that do not generate tips while still being paid below minimum wage for those services.

174. And also in Michigan, if low-income workers' wages are further reduced and if jobs are eliminate as is very likely to occur, this necessarily increases the strain on food assistance and other programs provided by Michigan. Notably, DOL statistics show that Michigan wait staff and bartenders receive *the lowest* median hourly wages of all reported

industries. Considering that Michigan is already facing budget shortages for needed services, increasing the demand for these services by eliminating the 80/20 rule would only make matters worse.

175. In addition, Plaintiffs will have to conduct outreach and education, and consider legislative or regulatory action to reverse the harm.

CAUSES OF ACTION

COUNT I

Violation of Administrative Procedure Act—Not in Accordance with Law

176. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

177. Under the APA, a court must set "aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A).

178. The Final Rule's provisions eliminating the twenty percent cap on tipped work, imposing a willfulness standard, and narrowing the range of conduct that qualifies as "willful" are contrary to the Fair Labor Standards Act and federal judicial decisions interpreting the statute as described.

179. The Final Rule is therefore "not in accordance with law" as required by the APA. 5 U.S.C. § 706(2)(A).

180. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

COUNT II

Violation of Administrative Procedure Act—Arbitrary and Capricious

181. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

182. The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

183. The Final Rule is arbitrary and capricious because it fails to justify its departure from decades of policy and practice, runs counter to the evidence before the agency, relies on factors Congress did not intend the agency to consider, disregards material facts and evidence, and fails to consider important aspects of the issue, including how the Final Rule will harm tipped workers.

184. The Final Rule is therefore "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA. 5 U.S.C. § 706(2)(A).

185. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs request that this Court enter judgment in its favor and grant the following relief:

a. Declare that the challenged provisions of the Final Rule are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

b. Vacate and set aside the challenged provisions of the Final Rule;

c. Preliminarily and permanently enjoin the Department and all its officers, employees, and agents, and anyone acting in concert with them, from implementing, applying, or taking any action whatsoever under the challenged provisions of the Final Rule;

d. Award Plaintiffs reasonable fees and costs, including attorneys' fees pursuant to 28 U.S.C. § 2412; and

e. Grant such other and further relief as the Court deems just and proper.

DATED: January 19, 2021 Respectfully submitted,

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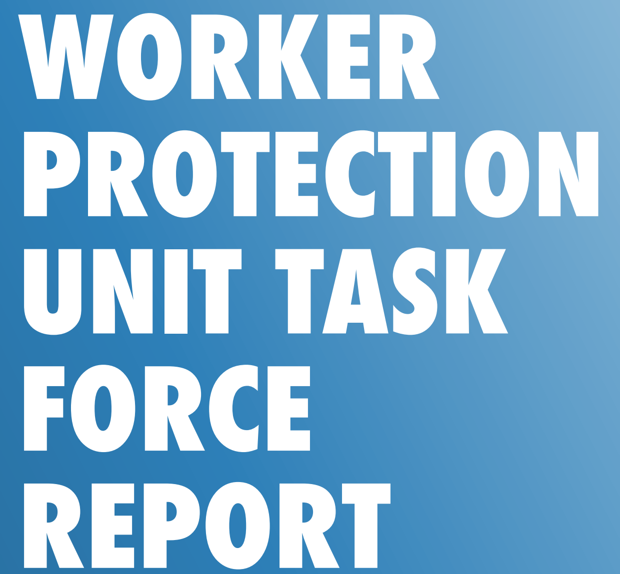

WORKER PROTECTION UNIT TASK FORCE REPORT

2020

Illinois Attorney General Kwame Raoul, Chairperson
Submitted to the Governor and General Assembly
November 23, 2020

WORKER PROTECTION UNIT TASK FORCE REPORT

EXECUTIVE SUMMARY

The wealth of our state is in its workforce. Illinois' laws are designed to protect workers from a variety of unscrupulous practices by employers who try to cut corners at the expense of their workforce. These wage and labor laws not only protect the state's workforce but also affirm the practices of employers who do the right thing. While Illinois has strong statutes on the books to support workers and law-abiding businesses, vigilant enforcement is required for those laws to be effective.

The Worker Protection Unit Task Force ("Task Force") was created as part of a new law that formally establishes a Worker Protection Unit within the Office of the Attorney General ("OAG").[1] The membership of the Task Force consists of state agencies, designated county state's attorneys, and other stakeholders committed to enforcing workplace protections. This report describes the work of the Task Force and the OAG's Worker Protection Unit during the first year in which the new law has been in effect.

The first meeting of the Task Force took place on January 23, 2020. Before the next planned meeting in April 2020, the COVID-19 pandemic began to accelerate in the United States. As a result, this report reflects both a reality that existed for workers prior to the pandemic and a new reality ushered in by COVID-19. If anything, COVID-19 has magnified the pre-existing challenges faced by Illinois workers:

- Low-wage workers frequently confront dangerous working conditions that threaten their health and safety.
- Certain employers steal wages from workers by failing to pay them at the proper rate for work performed as determined by the state's minimum wage and prevailing wage laws.
- Unlawful deductions are taken from workers' paychecks.
- Industries misclassify their workforce in order to evade wage and labor laws.
- Employee protections and benefits have eroded due to an increasingly fissured workplace in which companies seek to avoid some of the costs and obligations placed on employers through the use of subcontractors and independent contractors.
- Women and people of color continue to be subjected to harassment and discrimination.

[1] Public Act 101-0527, https://ilga.gov/legislation/publicacts/101/PDF/101-0527.pdf.

These challenges facing workers in Illinois are not new, even if the COVID-19 pandemic has exacerbated them. The goal of this report is to highlight ongoing efforts to begin tackling these challenges and ways that government entities can work together to further address these issues. Specifically, the Task Force offers the following recommendations for the future to effectively collaborate on prevention and enforcement efforts:

- *Subject Matter-Focused Enforcement Working Groups* – Persistent unlawful practices by employers require the attention of different governmental entities, depending on the subject area. By creating working groups to focus on specific issues, the member entities can work together to set priorities and draw on their respective tools and resources to most effectively take actions against bad actors and prevent recurrent unlawful practices.
- *Sharing Data and Information Between Entities*– One obstacle to effective enforcement is that key information held by governmental entities often exists in "silos" and is not easily accessible by other enforcement entities. Identifying useful information that each respective entity holds and strategizing on how best to analyze and share this information between enforcement entities is necessary to bridge this divide.
- *Regular Communications with Stakeholders to Share Insight and Information* – Part of any enforcement effort should include reaching out to those in community and labor organizations who interact with workers facing the challenges identified in this report. Establishing regular communications and collaboration with these individuals and groups can bring to light opportunities for enforcement that may be missed by traditional government points-of-contact.

I. The Worker Protection Unit Task Force

In 2019, the OAG worked extensively with the Illinois Department of Labor, legislators, and other interested parties to address the concerns raised in a prior version of the bill that became Public Act 101-0527. This collaboration resulted in a stronger piece of legislation. The resulting bill passed out of the legislature with bipartisan sponsorship and support.[2]

Public Act 101-0527, which became effective on January 1, 2020, gives clear enforcement authority to the OAG for certain labor statutes[3] while simultaneously creating a Task Force to bring together each agency charged with protecting the state's workers to strategize how to leverage their collective resources in the most efficient and effective manner.[4] Adopting a coordinated approach across the state helps ensure that workers can count on the protections the law provides and that businesses can compete on a level playing field. The need to adopt a coordinated approach to protecting workers is even more important now in the face of the ongoing health and safety concerns posed by the COVID-19 pandemic.

A. The Task Force's Statutory Requirements

The Task Force seeks to "promote statewide outreach and enforcement efforts to target businesses that violate the State's worker protection laws."[5] The statutory goals of the Task Force are to:

(1) create a coalition in Illinois dedicated to protecting the State's workforce and law-abiding businesses;

(2) facilitate the timely sharing of information between Task Force members relating to suspected worker exploitation;

(3) improve targeting methods, implement best practices, and develop strategies to systemically investigate worker exploitation; and

(4) work cooperatively with labor and community organizations, businesses and business coalitions, and other advocacy groups to increase public awareness on the underground economy in an effort to promote fairness, combat discrimination, and protect the welfare of the State.[6]

[2] See Senate Bill 161 as amended by Senate Amendment 1 (101st General Assembly) https://www.ilga.gov/legislation/101/SB/PDF/10100SB0161sam001.pdf. An earlier version of the legislation passed out of the legislature in the 100th General Assembly, but then-Governor Rauner vetoed the bill. See Senate Bill 193 (100th General Assembly) https://ilga.gov/legislation/BillStatus.asp?GA=100&DocTypeID=SB&DocNum=193&GAID=14&SessionID=91&LegID=100108.
[3] 15 ILCS 205/6.3.
[4] 15 ILCS 205/6.4(a).
[5] *Id.*
[6] *Id.*

The Task Force is chaired by the Attorney General and comprised of State's Attorneys selected by the Attorney General and representatives from the OAG, the Illinois Department of Labor ("IDOL"), the Illinois Department of Employment Security ("IDES"), the Illinois Department of Human Rights ("IDHR"), and the Illinois Workers' Compensation Committee ("IWCC").[7] The following individuals have been appointed to the Task Force:

Kwame Raoul, *Illinois Attorney General and Task Force Chairperson*

Alvar Ayala, *Workplace Rights Bureau Chief, Office of the Attorney General*

Robert Berlin, *DuPage County State's Attorney*

Michael Brennan, *Chairman of the Illinois Workers' Compensation Commission*

Kimberly Foxx, *Cook County State's Attorney*

John Greenwood, *Special Prosecutions Bureau Chief, Office of the Attorney General*

James Gomric, *St. Clair County State's Attorney*

Brent Harzman, *Manager, Charge Processing Division, Illinois Department of Human Rights*

Michael Kleinik, *Director of the Illinois Department of Labor*

John Waters, *Senior Policy Advisor, Illinois Department of Employment Security*

The statute requires the Task Force to submit a report "regarding its progress" to the Governor and General Assembly by December 1, 2020.[8] This report is submitted to the Governor and the General Assembly in accordance with that statutory requirement.

B. Summary of the 2020 Task Force Meetings[9]

In 2020, the Task Force held three meetings—a schedule curtailed by the COVID-19 pandemic. Despite having to transition to a virtual format from the original plan of quarterly meetings at locations across Illinois, the Task Force's three meetings (one in-person and two virtual) provided valuable insight into the ongoing challenges facing Illinois workers and a forum to establish connections between state and local governmental entities to address those challenges.

January 23, 2020 Meeting

On January 23, 2020, the Task Force held its first meeting in Chicago. During the meeting, the Task Force members elected Attorney General Raoul to serve as Chairperson of the Task Force.

Members of the Task Force listened to presentations from the following workers, labor organizations, and worker centers on the challenges facing Illinois workers: Tim Drea, President of the Illinois AFL-CIO; Mark Poulos, Executive Director of the Illinois-Indiana-Iowa Federation for Fair Contracting;

[7] 15 ILCS 205/6.4(b).
[8] 15 ILCS 205/6.4(d).
[9] The meeting agendas and adopted minutes are attached to this Report.

Alison Howlett Walters, Executive Director of Chicago Laborers' District Council; Martin Unzueta, Executive Director of Chicago Community and Workers' Rights; Fernando Corona, a low-wage worker from the Little Village neighborhood in Chicago; Chris Williams, Director of National Legal Advocacy Network; and Daisy Corral, a former staffing agency worker liaison and whistleblower.

Mr. Drea spoke about the many ways that workers experience wage theft in Illinois, and shared insight on how the problem impacts workers in all types of industries from workers in construction to workers who rely on tips. Mr. Drea noted that part of the challenge in addressing wage theft is the risk of retaliation that workers face when they complain. The threat of retaliation falls particularly hard on vulnerable immigrant workers who are often afraid to seek assistance from state authorities.

The problem of wage theft and the risk of retaliation were further demonstrated by Mr. Unzueta and Mr. Corona. Mr. Corona narrated his own experience with wage theft having worked for weeks at a restaurant only to have his employer refuse to pay him his earned wages. When Mr. Corona demanded payment with the help of a worker center, Chicago Community and Workers' Rights, his employer threatened to call federal immigration authorities and get him deported. Mr. Corona was able to continue fighting for his wages with the support of his worker center. Mr. Unzueta highlighted the importance of worker centers, like his organization, which are deeply rooted in their communities, in protecting the most vulnerable workers in Illinois.

Similarly, Ms. Corrales and Mr. Williams spoke about the discrimination faced by low-wage workers in the temporary staffing industry. Ms. Corrales, who worked as a liaison between a temporary staffing agency and the company-clients it serviced, described how the agency's company-clients would turn away African American workers seeking work, and how the staffing agency would fulfill discriminatory requests for Latino workers and bans on African American workers. Ms. Corrales also noted how the company-clients would make gender-specific requests for laborers from the staffing agency using words like "heavy" as code for men and "light" as code for women. Mr. Williams noted that sexual harassment is another form of discrimination faced by temporary laborers. That discrimination is a very common challenge faced by women working as temporary laborers. As Mr. Williams noted, unscrupulous employers using temporary staffing agencies often abuse their power to terminate a worker's assignment to force workers to choose between keeping their jobs and enduring sexual harassment.

Ms. Howlett Walters and Mr. Poulos also spoke of the prevalence of misclassification in the construction industry. Ms. Howlett Walters spoke about how employers shirk key Illinois statutes like the Prevailing Wage Act to rob workers of their wages and benefits. Mr. Poulos also described how certain employers in the construction industry rely on misclassifying workers and ignoring Illinois employment and prevailing wage statutes to gain an unfair competitive advantage over law-abiding contractors. Both Ms. Howlett Walters and Mr. Poulos also noted successful efforts in states like New York to use criminal penalties to tackle wage theft and payroll falsification and send a powerful message of deterrence. Ms. Howlett Walters and Mr. Poulos shared that similar criminal penalties currently exist in Illinois law, and could also be used as a deterrent to combat these practices.

September 17, 2020 Meeting

Despite the new challenges posed by the pandemic, the Task Force virtually convened a second meeting via WebEx on September 17, 2020. During the second Task Force meeting, members had the opportunity to listen to accounts from front-line workers and the unions that represent them about the safety hazards workers have faced during the pandemic. The members themselves also explained the work their respective agencies have done to protect workers during the pandemic, which is explained in further detail below. At this second meeting, the Task Force heard presentations from: Bob O'Toole, President of United Food & Commercial Workers ("UFCW") Local 1546; Zach Koutsky, Legislative Director of UFCW Local 881; Brian Tarbill, a Walmart worker in Dixon, Illinois; Bob Schroeder, Business Manager for Laborers Local 231; Jake Moody, Business Representative for the Carpenters Union Local 277; and Isaura Martinez, a community organizer with the Chicago Workers' Collaborative and former temporary worker.

Mr. O'Toole spoke about the risks that workers in health care, retail, food packing and processing, and manufacturing have faced during the pandemic. Mr. O'Toole noted that while employers have enacted measures to improve the safety for workers in these sectors, some employers were slow to act, and more remains to be done. For example, not all workers are protected by plexiglass in these industries, and customers who refuse to wear masks put workers in retail, like grocery stores, at risk. Moreover, despite safety measures implemented in meat packing plants, COVID-19 continues to impact workers in these facilities. These workers, Mr. O'Toole noted, have to choose between feeding their families and risking their lives every day.

Mr. Koutsky also spoke about the challenges faced by workers in retail, food production, and health care. He noted how hundreds of Local 881's members have contracted COVID-19, but continue to show up for work every day to serve their communities. Mr. Koutsky also emphasized the need for legislative action to make sick leave available to workers in Illinois and protect workers from retaliation for taking leave when sick. Front-line workers, he noted, have oftentimes been retaliated against for quarantining despite current protections in the law. Moreover, workers often do not have the option to quarantine because they are not entitled to any paid leave under the existing patchwork of federal and state laws and regulations.

Mr. Tarbill gave first-hand accounts of the problems described by Mr. O'Toole and Mr. Koutsky. Mr. Tarbill described how the unfair expectations placed on Walmart workers who are sick and inadequate paid sick-leave policies are not new or unique to the current pandemic. Mr. Tarbill noted how workers often feel pressured to come to work even if they are sick because paid leave is not typically an option for them. Mr. Tarbill also described how Walmart is not adequately enforcing a requirement for customers to wear face coverings, and how front-line workers are tasked with attempting to enforce the requirement against sometimes belligerent customers.

Mr. Schoeder presented on the difficulties workers in the construction industry face in staying safe during the pandemic. The work that members of his union perform does not typically allow for adequate social distancing, making mask wearing essential to worker safety. Yet many contractors still do not require their employees to wear masks or face coverings. Mr. Schroeder also noted the

confusion created by the lack of consistency across federal and Illinois laws and guidelines when it comes to the availability of paid sick leave. Mr. Schroeder noted that employers need to ensure that sick workers have access to paid leave and can quarantine at home so other employees are safe.

In addition to highlighting the impacts of the pandemic, the presenters reminded the Task Force of challenges, like misclassification and sexual harassment, which continue to impact workers even during the pandemic. Mr. Moody emphasized that the practice by employers in the construction industry of misclassifying employees as independent contractors and paying these workers in cash results in Illinois losing millions of dollars in tax revenue and unemployment insurance contributions. Moreover, employers engaging in misclassification often flaunt overtime and minimum wage laws that are intended to protect employees in Illinois. Mr. Moody called for increased enforcement and presence in the field through audits to address this problem.

Finally, Ms. Martinez, a former temporary worker at Voyant, a beauty product packaging company, spoke about the sexual harassment that temporary workers often face as well as the psychological and physical impact of this abuse on workers. Ms. Martinez reported on a consent decree the OAG negotiated with Voyant that requires independent monitoring of the company. The oversight agreement aims to help address many of the challenges that workers face in protecting themselves against sexual harassment, including the fear of retaliation, the indifference of supervisors, and the burden of obtaining evidence on their own to substantiate their allegations. The abuse that workers at Voyant faced, she emphasized, is not unique to any one company but rather a common challenge for vulnerable low-wage workers.

November 10, 2020 Meeting

The Task Force virtually convened for its final meeting of the year on November 10, 2020, to approve this report to be submitted to the Governor and General Assembly by December 1, 2020.

II. The Impact of the COVID-19 Pandemic on Illinois Workers

The original purpose of the legislation that became Public Act 101-0527 was to empower the OAG to take enforcement action against employers that have committed widespread or particularly egregious violations of workers' rights and wage and labor laws, and to foster cooperation and collaboration between government agencies that have been tasked with protecting workers. When Governor Pritzker signed the law that created the Task Force on August 23, 2019, it was not anticipated that a global pandemic would become the most pressing issue facing workers in 2020, particularly as its impact magnified pre-existing shortcomings in workplace protections.

A. Workplace Safety Concerns About COVID-19

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. As the number of confirmed COVID-19 cases in the United States climbed in March and April of this year, states across the country, including Illinois, declared a state of emergency. On March 20, 2020, Governor Pritzker issued an executive order that required Illinois residents to adhere to social distancing guidelines and to stay in their homes or places of residence, except to engage in essential activities, perform government functions, or to operate and work at essential businesses. The Governor's order also required non-essential businesses to cease all activities in the state, except to conduct minimum basic operations.

Ordinarily, the U.S. Department of Labor's Office of Occupational Safety and Health Administration ("federal OSHA") is the primary agency responsible for ensuring safety in the workplace for private sector employees in Illinois. However, workers and community organizations were reportedly informed by federal OSHA in March that while the Center for Disease Control and Prevention ("CDC") had issued guidance for employers to control the spread of COVID-19, this guidance would not be enforced by federal OSHA.

In mid-March, the OAG's Workplace Rights Bureau began receiving complaints from workers about employers failing to comply with the Governor's executive orders and Illinois safety guidelines related to COVID-19. The complaints the OAG received described how non-essential employers were forcing workers to continue reporting for work as normal. Additionally, many workers employed by essential businesses stated that they had to keep working shoulder-to-shoulder with their coworkers and could not maintain the required social distance in their workplace. Many workers were not receiving any masks or other protective equipment from their employers, and some employers were failing to implement adequate measures to disinfect their facilities and prevent the spread of COVID-19.

The OAG responded to the rising number of pandemic-related workplace complaints by dedicating a team of Assistant Attorneys General ("AAGs") to respond to these complaints. The Workplace Rights Bureau maintained a hotline dedicated to receiving calls about COVID-19-related safety concerns in the workplace. It was not long before the OAG began receiving hundreds of complaints each week. By April 15, 2020, the OAG's COVID-19 response team had grown to a total of 32 AAGs from multiple bureaus and divisions within the office. On June 1, 2020, the OAG also assigned

13 additional support staff, including bilingual paralegals and investigators, to the COVID-19 response team to assist with interviewing individuals complaining about employers failing to abide by the requirements in the Governor's executive orders and related state safety guidance.

Since March, the OAG has contacted hundreds of employers in an effort to achieve their compliance with the Governor's executive orders and state safety guidance related to the pandemic. The OAG has gathered information from workers to present to employers to ensure they know about and abide by their obligations to ensure a safe workplace. The compliance measures the OAG has advocated for include: increasing distance between workers along production lines as much as possible, increasing the availability and use of protective equipment, installing barriers between workers or between workers and customers, improving contact tracing, and following adequate sanitation procedures. As employers across the state struggled with the ever-evolving challenge of operating in a pandemic, these discussions also helped educate businesses that needed guidance on how to protect their workforce from the spread of COVID-19.

Beyond one-on-one conversations with employers who were subject to complaints or submitted inquires, several member agencies developed written guidance, on their own or along with other agencies. The IDHR, in consultation with the OAG, published an "FAQ for Businesses Concerning the Use of Face-Coverings During COVID-19."[10] The Governor's Office, IDOL, IDES, and IDPH, in consultation with the OAG, developed "Guidance for Employers and Employees on Workers' Rights and Safety."[11] The OAG developed "Guidance on Employment Leave During the COVID-19 Pandemic."[12]

While some businesses have been able to re-open in some capacity, the pandemic is ongoing and agencies must anticipate new issues that may arise. For example, according to IDHR, it is monitoring several considerations to protect workers from potential COVID-19-related discrimination in the workplace. First, whether COVID-19 by itself – or the resulting medical conditions – qualify as a "disability" under the Illinois Human Rights Act ("IHRA") will depend on the facts of each case, and therefore, the IDHR will make individualized assessments. Until the legislature or courts determine otherwise, the IDHR will continue to process COVID-19 related charges under the definition of "disability," and/or "perception of a disability and/or "history" of a disability. Further, the IHRA does not cover association with a person who has a disability – for example, a spouse or dependent. The IDHR is considering legislation to include this protection. Second, the IDHR anticipates receiving charges involving requests for accommodation. These could include accommodations based on disability for an existing condition or a condition that may result from having become infected with COVID-19, or based on religious practices that are in tension with requirements for the use of personal protective equipment. Third, for inactive workers – individuals who have been laid off or furloughed due to their workplace temporarily closing – the IDHR anticipates receiving charges alleging that employers are selectively returning some staff to work on a discriminatory basis. Finally, media reports have documented various potential hate crimes

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[10] https://www2.illinois.gov/dhr/Documents/IDHR_FAQ_for_Businesses_Concerning_Use_of_Face-Coverings_During_COVID-19_Ver_2020511b%20copy.pdf

[11] http://www.dph.illinois.gov/COVID19/community-guidance/workplace-health-and-safety-guidance/employee-employer-rights-and-safety

[12] https://illinoisattorneygeneral.gov/rights/WRB_Paid_Sick_Leave_FAQ.pdf

and acts of discrimination against Asian Americans related to COVID-19. This type of harassment occurring in the workplace, housing, or a public accommodation would fall within the scope of the IHRA.

Further, the spread of COVID-19 has highlighted that access to affordable health care is now more important than ever. The CCSAO, on behalf of Cook County, is currently working with the cities of San Francisco and Oakland to author a Ninth Circuit local government amicus brief. The brief supports the City of Seattle, which is defending a worker protection ordinance against a challenge by a hospitality service group. Specifically, the Ordinance requires large hotel employers and ancillary hotel businesses to make "health expenditures" on behalf of covered employees, with the goal of improving low-wage hospital employees' access to high quality, affordable health care coverage. The brief argues, for example, that improving low-wage workers' access to affordable health care benefits not only workers, but also entire communities and local government health care systems.

B. Inter-Agency Collaboration Regarding COVID-19 Workplace Safety Concerns

The last time the United States faced a health crisis of this magnitude occurred over a century ago when influenza swept across the country in 1918. When COVID-19 arrived in Illinois, no one agency alone had the tools to respond to such a once-in-century challenge. Early on, the OAG sought to collaborate with traditional partners, like state agencies and the Governor's Office, and to develop new partnerships with local health departments to better respond to the pandemic.

The OAG collaborated closely with the Governor's Office and executive agencies to fight the spread of COVID-19 at a statewide level by participating in biweekly inter-agency calls convened by Governor's Office to discuss statewide guidance as well as opportunities to collaborate in responding to COVID-19-related complaints and issues. The inter-agency collaboration allowed agencies to exchange information about reported cases and tap into the expertise housed within each respective agency. The Department of Commerce and Economic Opportunity ("DCEO"), the Department of Public Health ("IDPH"), the Illinois State Police ("ISP"), and counsel from the Governor's Office regularly joined these calls. This inter-agency collaboration provided a mechanism to readily exchange information about reported cases and to tap into the expertise housed within each respective agency when developing guidance to employers and the public. It also allowed agencies to coordinate enforcement efforts and establish referral mechanisms to direct Illinois residents to the agency best suited to address their COVID-19-related concerns.

In one example, the OAG coordinated with IDOL to re-direct complaints regarding public sector employees to IDOL, which is the state agency charged with enforcing workplace safety standards for public sector employees in Illinois. According to IDOL, the enforcement and consultation federal grants require the IDOL to staff a total of 32 positions in the Illinois Occupational Safety and Health Administration ("Illinois OSHA") division. At the beginning of 2015, there were 25 staffed positions with seven vacancies to be filled. By the end of 2018, the vacancies increased to 18, leaving only 14 staffed positions. From January 2019 to September 2020, the IDOL implemented a hiring

plan which increased staff from 14 to 22. The agency has extended offers for 5 of the remaining 10 positions and is actively recruiting for the remaining vacancies. Once all 32 positions filled, the IDOL will have reached its highest staffing level in the OSHA division since it was created.

Turning to collaboration at the local level, local health departments were well-positioned to provide needed information from health experts to address workers' concerns. Given the high volume of complaints the OAG was receiving, the OAG worked to strategically identify and notify local health departments of complaints covering large numbers of workers at increased risk of infection because of their employer's failure to follow safety guidelines. Local health departments were able to perform on-site inspections of the employer's facility, record working conditions, and make specific recommendations where necessary. This allowed the OAG to gain real-time insight into conditions in specific workplaces to aid the OAG in bringing employers into compliance with COVID-19 safety requirements. The OAG also assisted local health departments in obtaining employers' collaboration with contact tracing. As the pandemic progressed, contact tracing became an increasingly important task for local health departments. When some employers expressed reluctance to providing local health departments with important information needed for contact tracing, the OAG was able to assist in obtaining this information. The OAG's collaboration with local health departments generated multiple successes and also spurred collaboration between the OAG and State's Attorneys' Offices in multiple counties.

C. The Pandemic Is Changing the Way Agencies Serve the Public

The onset of the COVID-19 pandemic has caused all governmental entities to revise and rethink their office procedures in order to protect their employees and the public they serve. Members of the Task Force shared some of their successes in adapting their prior service delivery methods to meet the needs of the public during the COVID-19 pandemic.

Record numbers of Illinois workers have become unemployed as a result of the COVID-19 pandemic. During the first six months of the COVID-19 pandemic, the IDES received more claims than the previous four years combined. Furthermore, from March 1 to October 1, the IDES received over 2.3 million total initial claims across all programs. IDES responded to this unprecedented volume by modernizing their systems, introducing innovative technology, and collaborating with other agencies and front-line providers to serve more claimants. Through the end of September, IDES paid out more than $16 billion in benefits to Illinoisans (inclusive of new federal programs and state Extended Benefits). It has also been the state agency charged with implementing new federal benefit programs introduced by the federal CARES Act, including: Pandemic Unemployment Assistance, which provides unemployment benefits to individuals who are not typically eligible, such as independent contractors and self-proprietors; Pandemic Emergency Unemployment Compensation, which provides 13 additional weeks of unemployment benefits to individuals who exhausted their regular benefits; Federal Pandemic Unemployment Compensation, which provides an additional $600 per week to individuals who are receiving regular unemployment benefits or benefits under one of the new programs; and Lost Wages Assistance, which provides an additional $300 a week in unemployment benefits to eligible individuals.

In the spring, the Illinois legislature passed a new law which creates a rebuttable presumption of workers' compensation coverage, under the Illinois Occupational Diseases Act, for all first responders and essential workers, who are exposed to and contract COVID-19.[13] At an operational level, the IWCC, the state agency charged with resolving all workers' compensation claims between injured workers and their employers, created Special Circumstance Procedures to allow the agency to continue to operate safely during the pandemic. These procedures allow for the monthly status calls and pre-trial conferences to be conducted virtually, thus eliminating the need for large number of attorneys and other personnel to gather at IWCC hearing sites across Illinois. The IDHR has also made changes to reduce the necessity for in-person filings, and in March, published FAQ for procedures implemented in response to the pandemic.[14]

The duration of the COVID-19 pandemic remains unknown so it is also vital for government entities to plan for ongoing changes to service delivery. Building on its prior efforts before the pandemic to move to a paperless filing system, IWCC is implementing another phase of CompFile, a system that will replace the current paper-based filing process for cases filed by injured workers. This will allow for the filing of all documents and pleadings through the IWCC portal and will further reduce in-person traffic at IWCC. Similarly, the Illinois Human Rights Commission began to allow for electronic filing. On July 10, 2020, the IDHR published an emergency rulemaking to change three regulations to facilitate both service and filing of documents via electronic means (56 Ill. Adm. Code Ch. II, Sec. 2520.30 and 2520.40), and to allow complainants to file the charge under oath and affirmation rather than requiring notarization for non-housing charges (56 Ill. Adm. Code Ch. II, Sec. 2520.330). IDES is developing a COVID-19 Response Plan and a Continuous Operations Plan and continues to engage staff to improve its service delivery to the public in response to an unprecedented number of filed claims for unemployment assistance. It also plans to contribute to the state's economic recovery by providing programs, services, and economic analyses to employers.

[13] Public Act 101-0633, https://ilga.gov/legislation/publicacts/101/PDF/101-0633.pdf.
[14] https://www2.illinois.gov/dhr/Pages/COVID-19-Alerts.aspx

III. The Task Force Presents an Opportunity for Ongoing Inter-Agency Collaboration

Responding to the COVID-19 pandemic has required a substantial shift in focus and resources by many agencies represented on the Task Force. Nonetheless, unlawful practices that harm workers existed before COVID-19 and have only been magnified due to the current public health and economic crisis. There is a continued duty to hold irresponsible employers accountable when they violate worker protection laws by engaging in: misclassification, wage theft, failure to pay prevailing wage, systemic discrimination, and anti-competitive practices limiting workers' mobility, such as no-poach agreements. While these practices harm workers, they also harm law-abiding businesses, taxpayers, and the state at large. These are practices that concern each agency in the Task Force. Moreover, each agency in the Task Force possesses unique tools and knowledge that can be used to combat these practices. Just as COVID-19 presented an opportunity for increased inter-agency cooperation, eradicating these practices in Illinois likewise presents an opportunity for inter-agency cooperation between Task Force members.

A. Misclassification

Misclassification occurs when a worker who meets the legal definition of an "employee" under Illinois wage and hour statutes like the Illinois Minimum Wage Law ("IMWL"),[15] the Illinois Wage Payment and Collection Act ("IWPCA"),[16] and the Illinois Employee Classification Act ("ECA"),[17] is classified or treated by their employer as something other than an employee, thereby stripping them of the benefits and protections of employment. The most common form of misclassification occurs when employees are mislabeled as independent contractors.[18] This unlawful practice is common in the construction and logistics industries. The practice has also become increasingly common in the gig economy.

The incentives to misclassify workers are clear. Employees are entitled to minimum wages for all time worked, and overtime wages when they work in excess of forty hours per week. The Illinois minimum wage increased when Governor Pritzker signed into law Public Act 101-1 in 2019, which lead to two minimum wage increases that have taken effect thus far: to $9.25 on January 1, 2020, and to $10 on July 1, 2020. IDOL has worked to ensure the increase in the state's minimum wage was communicated and enforced this year, but independent contractors are not entitled to a minimum wage or overtime wages. Employers who misclassify their workers as independent contractors usually subject workers to long work weeks while paying them subminimum wages.

Employers also have engaged in misclassification to unlawfully lower their premiums for workers' compensation insurance. Schemes to misclassify employees - either by number of employees or job category (e.g. identifying riskier jobs as something safer like clerical work) - are often discovered when there is an accident and a worker files a workers' compensation claim, but the worker

[15] 820 ILCS 105/1 et seq.
[16] 820 ILCS 115/1 et seq.
[17] 820 ILCS 185/a et seq.
[18] Misclassification can also take forms other than employees being labeled independent contractors, such as employees being treated as franchisees.

was not properly classified for benefits. Such cases have been prosecuted by the OAG's Special Prosecutions Bureau with information from the IWCC. Other misclassification schemes involve employers' failure to pay contributions to Illinois' unemployment insurance fund. This means that misclassified workers are more likely to burden state resources when they are injured at work or become unemployed. Finally, employers engaging in misclassification avoid paying any payroll taxes by passing this expense, along with every other cost of doing business, to their vulnerable workers.

Further, misclassification is often a used a means to circumvent the Illinois Prevailing Wage Act ("IPWA"). Contractors that circumvent the law underbid law-abiding contractors by relying on laborers that they misclassify and pay "off the books." These workers are often paid in cash and are not reported on contractors' certified payroll to IDOL. Such laborers are typically not paid at the mandated prevailing rate of pay, and are not paid any overtime wages for the hours they work in excess of forty per week.

IDOL and the OAG have worked together to identify actors engaging in misclassification and to collaborate around enforcement strategies. Indeed, misclassification is a particularly ripe area for further inter-agency collaboration. For example, the OAG supports IDOL's pending rulemaking that codifies long-standing principles around "joint employment."[19] IDOL's proposed rule will protect workers against businesses that attempt to circumvent the Illinois Minimum Wage Law through schemes where workers perform work for the benefit of a primary company while employed on paper by a subcontractor. These schemes subject workers to misclassification and wage theft while the primary employer who controls the job and receives the benefits of the work performed is not legally liable to the worker. IDOL's rulemaking ensures that workers and employers have clear guidance on joint employers' obligations to their workforce.

In addition, the Illinois Unemployment Insurance Act sets a three-factor test to determine whether a worker is properly labeled as an independent contractor, including: a) whether the worker is free of the alleged employer's control; b) whether his or her services are outside the employer's usual course of business; and c) whether the worker is engaged in an independently established trade.[20] It is particularly difficult for employers seeking to misclassify employees to circumvent the requirements of this test. Using the Unemployment Insurance Act to combat misclassification presents a clear opportunity for strategic collaboration between the agencies on this Task Force.

Increasing communication and sharing of information between the agencies on this Task Force would expand tools available to combat misclassification and its effects on low-wage workers. Misclassification often goes hand-in-hand with wage theft and failure to pay prevailing wage. For example, fly-by-night contractors in the construction industry often employ vulnerable workers whom they misclassify as independent contractors. Typically, these workers are not paid any minimum or overtime wages. Too often these workers are not paid at all for entire work weeks. Illinois' wage and hour statutes, including the ECA, the IMWL, and the IWPCA, carry criminal penalties for certain violations of these the laws.[21] Similarly, the IPWA makes failure to maintain

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[19] See proposed amendment 56 Ill. Admin. Code 210.115.
[20] 820 ILCS 405/100 et seq.
[21] See 820 ILCS 185/45(d); 820 ILCS 115/14(a)-(c); 820 ILCS 105/11.

the records required under the Act and the knowing submission of false certified payroll a Class A misdemeanor. Strategic enforcement of criminal penalties in Illinois wage statutes to deter wage theft also presents an opportunity for increased collaboration between State's Attorneys' offices, the OAG, and other agencies on this Task Force.

B. Wage Theft and "Off the Books" Payroll Practices

As noted above, certain employers prey on vulnerable employees who they can subject to long hours of work without paying them minimum or overtime wages. These employers often pay these vulnerable workers in cash for a number of reasons. First, employers seek to avoid paying payroll taxes through this practice. Second, employers seek to avoid leaving any trace of their unlawful activities and to make it difficult for workers to recover owed wages from them. This practice often occurs in conjunction with misclassification. Employers engaging in these practices are stealing money from workers and their families as well as from Illinois taxpayers. Employers engaging in these practices are also gaining an unfair competitive advantage over law-abiding employers.

In recent years, IDOL has obtained significant success through enforcement of the Wage Payment and Collection Act. IDOL's Wage Claims Unit in its Fair Labor Standards Division helped recover $3.9 million in back wages for workers and processed 3,800 complaints with a team of 5 staff in fiscal year 2020. The Wage Claims Unit recovered $3.3 million in back wages for workers and processed 3,768 claims in fiscal year 2019, with most of the wages ($1,750,527) recovered from January to June of 2019 after the change in gubernatorial administration. According to IDOL, returning money to workers that should have been paid to them is one of the agency's proudest accomplishments.

Tackling wage theft also presents an opportunity for inter-agency collaboration. For example, it is likely that employers that pay their workers "off the books" do not carry workers' compensation insurance. Part of the IWCC's responsibilities include investigating employers who do not maintain workers' compensation insurance. Earlier this year, the IWCC and the OAG worked together to successfully hold accountable an employer for failing to maintain workers' compensation insurance for a period of ten years for his trucking company. The IWCC discovered he had failed to obtain workers' compensation insurance even after taking reimbursement for the insurance from the U.S. Postal Service ("USPS"). Cooperation between the IWCC investigators and USPS found that the employer defrauded the USPS of over $1.9 million. Working together, the OAG's Special Prosecutions Bureau sought to hold the employer criminally liable, and he pled guilty on August 21, 2020, to a Class 1 felony for theft by deception and was sentenced to six years in prison.[22]

Alternatively, employers also commit insurance fraud by misrepresenting the number of workers they employ when applying to workers' compensation insurance. Needless to say, employers that engage in these practices also fail to pay any unemployment insurance contributions. As such, the problem, as noted above, goes beyond unpaid wages. Increased inter-agency collaboration and information-sharing would allow the Task Force members to address the ills associated with employers paying workers "off the books" in a more holistic fashion.

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[22] https://illinoisattorneygeneral.gov/pressroom/2020_08/20200821.html

C. Discrimination in the Workplace

Unscrupulous employers continue to subject Illinois workers to systemic discrimination. This discrimination takes many forms. Sometimes workers are denied the opportunity to work at all based on an immutable and protected characteristic, such as their race or gender. This kind of discrimination marginalizes communities of color by robbing workers and their families of the opportunity to earn a living. At other times, discrimination takes the form of sexual harassment. Irresponsible employers too often tolerate or promote a culture in their workplace where workers are subjected to unwelcome sexual comments, vulgar looks and gestures, physical touching and groping, and other forms of sexual harassment. Working in this kind of environment is, at a minimum, emotionally and psychologically damaging to anyone that must endure it. Tolerating these abusive work environments can escalate the situation and lead to serious crimes like sexual assault. No worker should have to balance their need to earn a living with the physical and mental harm caused by sexual harassment.

Illinois has made recent changes to its anti-discrimination and anti-sexual harassment laws in order to better protect more workers. The Illinois Human Rights Act ("IHRA") prohibits employers from discriminating with respect to not only hiring, discipline, and discharge, but also in the terms, privileges, or conditions of employment, including the payment of unequal wages and scheduling of unequal hours on a work schedule. The IHRA also prohibits employers and their employees from engaging in sexual harassment and harassment based on a protected category. The IHRA has been amended in recent years to: expand the definition of "unlawful discrimination" to include "actual or perceived" to all protected categories (effective January 1, 2020); add a definition of "harassment" and clarify that harassment on the basis of any protected category constitutes a civil rights violation; expand protection from harassment to "nonemployees";[23] and effective July 1, 2020, amend the definition of "employer" to include any person employing one or more employees within Illinois.[24] This latest amendment lowered the minimum number of employees required under the IHRA from the previous standard of 15 or more employees for most protected categories.

The OAG has sought to send a message to employers that sexual harassment in the workplace and retaliation against those who complain about sexual harassment will not be tolerated. For example, on August 24, 2020, the OAG simultaneously filed a lawsuit and a consent decree requiring Voyant, a beauty packaging facility near Chicago, to ensure the company's practice of tolerating sexual harassment and retaliating against employees that complain about sexual harassment comes to an end. The consent decree required the company to pay a civil penalty and to subject itself to two years of independent monitoring. The OAG's investigation was initiated soon after workers who alleged they had complained about sexual harassment at Voyant for years organized a protest. Voyant also received a petition signed by 50 workers calling for corrective action. The workers who organized this protest alleged that they were retaliated against soon afterwards. Indeed, most of them were allegedly terminated, only to be reinstated soon after the OAG initiated its

[23] Public Act 101-0221, https://ilga.gov/legislation/publicacts/101/PDF/101-0221.pdf.
[24] Public Act 101-0430, https://ilga.gov/legislation/publicacts/101/PDF/101-0430.pdf.

investigation. The OAG's consent decree will ensure that this culture of sexual harassment and retaliation at Voyant ends.[25]

The women who organized themselves and complained about sexual harassment as a group in the above referenced matter showed exceptional courage and unity. Such public denouncement of sexual harassment is rare, however, which is why it is important for the agencies in this Task Force to remain vigilant and connected to the communities they serve, if this problem is to be rooted out. The same is true of other forms of systemic discrimination. The IDHR and the OAG routinely collaborate on the enforcement of the IHRA, particularly when patterns and practices of violations are identified. There is ample opportunity for continued strategic collaboration between the OAG, IDHR, and other agencies in combating workplace discrimination and harassment.

D. No-Poach Agreements, Non-Competes, and Other Anti-Competitive Practices

Anti-competitive practices like no-poach agreements and non-competes have become an increasingly common way to trap workers into low paying jobs and limit their ability to advance by seeking better employment opportunities. Recently, however, irresponsible employers have sought to use burdensome non-compete agreements in employment contracts with low-wage workers when no such legitimate interest is at stake but to erode workers' mobility and ability to seek better wages or benefits from a new employer. Non-compete clauses are frequently used in employment agreements and limit or prevent an employee's ability to work for a competitor or start their own business when they leave a job. Agreements not to compete must be reasonably crafted to protect a legitimate interest to pass muster under the law. Such agreements, for example, have long been used as a way to protect against competitors and employees stealing trade secrets or client lists from employers. The OAG has used its authority to end the abusive of non-compete clauses in several fast food franchises, pay-day loan businesses, and other low-wage, low-skill occupations.

The Affirmative & Impact Litigation Section of the Cook County State's Attorney's Office ("CCSAO") has also engaged in work to oppose non-compete clauses. On March 11, 2020, the CCSAO served as the lead author on a public comment, written on behalf of local governments, in response to a Federal Trade Commission proposed rule limiting non-compete agreements. The County's comment detailed, for example: (1) the effect of non-compete agreements on low-wage workers, particularly those already vulnerable to workplace harassment and discrimination, ie. women and minorities; (2) how non-competes can harm local law enforcement agencies, including state's attorneys' offices, by impeding their efforts to investigate workplace crimes and violations; and (3) how overly broad non-competes drain local economies of revenue, new businesses, and jobs. The cities of Baltimore, Chicago, New York, and Seattle joined the CCSAO by signing on to the comment.

Similarly, no-poach agreements also limit workers' ability to move between different employers and restrict competition in the labor market. No-poach agreements occur when employers enter into agreements not to hire each other's employees. This has an intuitive wage suppressive effect

[25] https://illinoisattorneygeneral.gov/pressroom/2020_08/20200824.html.

because an employer has little incentive to give an employee a raise or treat them better when they have no fear that a competitor will hire them away. While not all no-poach or no-hire agreements are unlawful, such clauses lend themselves to abuse by irresponsible employers and are particularly suspect when applied to low-wage workers as they can hide conspiracies to fix wages. The OAG has sought to use its authority to curb the use of unlawful non-competes, no-poach agreements and other restraints on trade. For example, on July 29, 2020, the OAG filed a lawsuit against three staffing agencies (Elite Staffing, Metro Staff, and Midway Staffing) and their shared client, Colony, a display and manufacturing company, alleging that they had an unlawful agreement not to solicit or hire each other's employees and to fix the wages paid to their employees.

While individual agencies have tools to tackle these unlawful practices, vigilance and teamwork from all Task Force members can go even farther to root out these violations.

E. Emerging Issues Impacting Gig Economy Workers

The rise of the gig economy has accelerated the erosion of a traditional economy where workers have access to full time employment and benefits. The flexibility that is often touted as the hallmark of the gig economy has come at the price of stability for workers. Gig workers find themselves classified as independent contractors without access to overtime or a guaranteed minimum wage, often working long hours without access to any kind of safety net. By classifying workers as independent contractors and entrepreneurs, gig economy employers like Uber, Lyft, Amazon, and a growing host of companies are increasing their profits by transferring all of the costs of doing business to their workers.

Late last year, the CCSAO began monitoring reports that gig-economy employers— particularly rideshare companies such as Uber—were building payday lending plans. CCSAO is concerned that these loans are likely to create a predatory cycle of debt for drivers. For example, Uber sent out an in-app message to some of its drivers explaining that it is "building a new financial product" to help Uber drivers with their finances "in a time of need" and asked, for example, whether drivers "have taken out a small loan in the past three years" and "if Uber provided loans, what amount are you most likely to request." Based upon these questions, along with the lending systems already rolled out by Uber in India and Brazil, it appears likely that ridesharing companies will create payday loan programs in which they will offer drivers short-term credit of up to $500 or more, and drivers then would repay these debts by driving for Uber. Given the history of both payday loans and ridesharing business models, the CCSAO identified this potential lending program as a system ripe for a modern form of indentured servitude in which workers are compelled to work in order to pay off debts to their employers. And although Uber and other companies have not yet launched their payday lending programs, the CCSAO is actively monitoring any progress with local government and non-profit colleagues across the country, and have received positive feedback from partners about joint enforcement efforts. Task Force partnerships can be used to monitor and curb these and other emerging issues that impact workers in the gig economy.

IV. Recommendations for Further Action

The unlawful practices harming Illinois workers discussed in this report present an opportunity for increased collaboration between the agencies appointed to this Task Force. Each member of the Task Force has expressed the need and willingness for the agencies to continue to collaborate on prevention and enforcement efforts. Illinois' response to COVID-19 exemplifies how strategic collaboration between agencies can render better results for Illinois workers. In line with these principles, the Task Force issues the following recommendations.

- **Subject Matter Focused Enforcement Working Groups**

  This report has identified specific practices by unscrupulous employers that require a response by more than one agency on this Task Force. Each governmental entity has its respective legal authority, access to relevant information, and specific expertise. Strategically bringing these tools together and setting shared priorities can result in more impactful enforcement actions against bad actors and problematic industries. Strategic collaboration can include not only enforcement efforts, but partnerships on public comments to proposed regulatory changes and amicus curiae briefs in important court cases. The OAG and IDOL currently meet on a monthly basis to coordinate enforcement strategies and identify specific areas for collaboration. This model can be replicated with other agencies in the Task Force. For instance, IDOL, IDES, IWCC, the State's Attorneys, and the OAG could form a working group to discuss collaborative enforcement around misclassification, wage theft, and failure to pay prevailing wage. By setting up this working group, the participants may share information, exchange best practices, and perform joint investigations rather than one agency going it alone. The ability to aggregate resources allows for more efficient planning, as well as better field operations. Similarly, the OAG, IDOL, and State's Attorneys could form another working group to discuss enforcement of criminal penalties in Illinois' wage theft statutes. Yet another working group could consist of the IWCC, IDOL, and OAG to target fraudulent practices involving workers' compensation insurance.

- **Sharing Data and Information Between Governmental Entities**

  Each government entity collects and retains information to assist in its respective regulatory and enforcement efforts, but that information is not always easily sharable with other enforcement partners. To enable the sharing of information necessary for the agencies in this Task Force to coordinate strategic enforcement efforts effectively, the Task Force working groups should identify the categories of information or documents that each respective entity may retain that could be fruitful for inter-agency enforcement efforts and how that information could be shared (particularly in light of technology hurdles). Governmental entities should enter into Inter-Agency Agreements where the law may not otherwise contemplate the sharing of information between entities. The shared information can be used to identify patterns and widespread, recurrent issues and to inform prevention and enforcement efforts. In addition, Task Force members should continue discussions about how to analyze the information at their disposal to help prioritize enforcement efforts. For example, analyses of the following categories

will help inform where government entities should be focusing their attention: (a) the estimated cost to the state of misclassification in the form of lost payroll taxes or other income; (b) data regarding industries where wage theft and misclassification are most prevalent; (c) data on industries where worker injury rates are highest; and (d) data on industries where failure to carry workers' compensation insurance is the highest.

- **Regular Communications with Stakeholders to Share Insight and Information**

  A significant challenge to government's ability to combat the unlawful practices described in this report is that vulnerable workers who suffer from these practices may not be in the habit of reaching out to government agencies for assistance or may fear retaliation for doing so. For this reason, it is of critical importance for Task Force members to maintain communications with community stakeholders like legal aid organizations, worker centers, and other community organizations. Continued communications with labor organizations are also essential. These stakeholders often have deeper roots in the community and workforce than government agencies and can help create a bridge between vulnerable workers and government. Such stakeholders also have useful insight into the very unlawful practices that this Task Force seeks to address and can be very helpful in focusing Task Force members' strategic enforcement efforts. In addition, maintaining multi-lingual staff and translating forms and outreach materials will improve the government's communications with individuals and communities across the state.

V. Conclusion

The increased coordination across different agencies to protect workers' safety during the COVID-19 pandemic highlighted the benefits of inter-agency collaboration in addressing a shared challenge. This inter-agency collaboration will remain essential to continue protecting workers' safety throughout the pandemic as it will be in addressing the other persisting problems facing workers discussed in this report and can be facilitated through the Task Force members. This report's recommendations will further the Task Force's statutory goals of facilitating the timely sharing of information across agencies, and cooperating with community and union stakeholders to develop and implement best practices to identify bad actors and combat systemic discrimination, wage theft and other unlawful practices impacting Illinois workers and law-abiding employers.

MEETING AGENDAS AND MINUTES

OFFICE OF THE ATTORNEY GENERAL

Worker Protection Unit Task Force
AGENDA

Regular Meeting - Thursday, January 23, 2020 at 1:00 p.m.
Michael A. Bilandic Building, 160 N. LaSalle St., Room C-500, Chicago 60601

I. Roll Call

II. Opening remarks

III. Election of chairperson

IV. Adoption of rules

V. Presentations to the Task Force regarding worker protection issues, including wage theft, misclassification, prevailing wage, worker discrimination, and the fractured workplace

VI. Public Comments

VII. Adjournment

OFFICE OF THE ATTORNEY GENERAL

Worker Protection Unit Task Force
MEETING MINUTES

Thursday, January 23, 2020

The Worker Protection Unit Task Force met in public session on **Thursday, January 23, 2020**, in the Michael A. Bilandic Building, 160 N. LaSalle St., Room C-500, pursuant to notice.

Kwame Raoul, Attorney General called the meeting to order at 1:09 p.m.

ROLL CALL

Board Members Present (10/10)

Chicago: Alvar Ayala, Office of the Illinois Attorney General
Robert Berlin, DuPage County State's Attorney (present via speakerphone)
Michael Brennan, Illinois Workers Compensation Commission
Kimberly Foxx, Cook County State's Attorney
John Greenwood, Office of the Illinois Attorney General
James Gomric, St. Clair County State's Attorney
Brent Harzman, Illinois Department of Human Rights
Michael Kleinik, Illinois Department of Labor
Kwame Raoul, Illinois Attorney General
John Waters, Illinois Department of Employment Security

Introductory Remarks:

Attorney General Kwame Raoul calls the meeting to order at 1:09 p.m. A quorum is present.

The Attorney General gave opening remarks and recognized Robert Berlin as being present by speakerphone.

New Business:

- **Election of Chairperson**: Michael Kleinik moved to elect AG, Kwame Raoul as Chairperson of the Task Force. James Gomric seconded the motion. The motion carried by the following voice vote:

  Yeas:

  Alvar Ayala
  Robert Berlin

Michael Brennan
Kimberly Foxx
John Greenwood
James Gomric
Brent Harzman
Michael Kleinik
John Waters

- **Adoption of Rules:** John Greenwood read the proposed rules to the Task Force. The Open Meetings Act governs the Rules. Michael Kleinik moved to adopt the rules, James Gomric seconded the motion. The motion carried by the following voice vote:

Yeas:
Alvar Ayala
Robert Berlin
Michael Brennan
Kimberly Foxx
John Greenwood
James Gomric
Brent Harzman
Michael Kleinik
Kwame Raoul
John Waters

The following gave presentations to the Task Force regarding worker protection issues, including wage theft, misclassification, prevailing wage, worker discrimination, and the fractured workplace.

Tim Drea, President, AFL-CIO
Mark Poulos, Executive Director, III FCC, Local 150
Alison Howlett Walters, Executive Director of Chicago District Council.
Martin Unzueta.
Fernando Corona (Translated by Lydia Colunga-Merchant, Deputy Bureau Chief, Workplace Rights Bureau)
Chris Williams, Director of Legal Advocacy Network
Daisy Corral, former staffing agency liaison, whistleblower

The Task Force took comments from the public.

Adjournment: Having no further business to discuss, Kwame Raoul moved to adjourn the meeting, the motion was seconded by Michael Kleinik and James Gomric. The motion carried by the following voice vote:

Yeas:

Alvar Ayala
Robert Berlin
Michael Brennan
Kimberly Foxx
John Greenwood
James Gomric
Brent Harzman
Michael Kleinik
Kwame Raoul
John Waters

The meeting adjourned at 2:20 p.m. Next meeting date to be determined.

OFFICE OF THE ATTORNEY GENERAL

Worker Protection Unit Task Force
AGENDA

Regular Meeting - Thursday, September 17, 2020 at 10:30 a.m.
Via WebEx

I. Roll Call

II. Opening remarks

III. Adoption of minutes from the January 23, 2020 meeting

IV. Presentations to the Task Force regarding worker protection issues, focusing on issues that have arisen during the COVID-19 pandemic and ongoing workplace rights violations

V. Presentations from Task Force members regarding how their offices have been addressing worker protection issues and ideas for agency collaboration

VI. Public Comments

VII. Adjournment

OFFICE OF THE ATTORNEY GENERAL

Worker Protection Unit Task Force
MEETING MINUTES

Thursday, September 17, 2020

The Worker Protection Unit Task Force met in public session on **Thursday, September 17, 2020**, via WebEx, pursuant to notice. The full meeting was recorded.

Kwame Raoul, Attorney General, called the meeting to order at 10:34 a.m.

ROLL CALL

Task Force Members Present (10/10)

Via WebEx: Alvar Ayala, Office of the Illinois Attorney General
Robert Berlin, DuPage County State's Attorney
Michael Brennan, Illinois Workers Compensation Commission
Kimberly Foxx, Cook County State's Attorney
John Greenwood, Office of the Illinois Attorney General
James Gomric, St. Clair County State's Attorney
Brent Harzman, Illinois Department of Human Rights
Michael Kleinik, Illinois Department of Labor
Kwame Raoul, Illinois Attorney General
John Waters, Illinois Department of Employment Security

Introductory Remarks:

Attorney General Kwame Raoul calls the meeting to order at 10:34 a.m. A quorum is present.

The Attorney General gave opening remarks

New Business:

- **Adoption of minutes from January 23, 2020 meeting**: Michael Kleinik moved to adopt the meeting minutes, Robert Berlin seconded the motion. The motion carried by the following voice vote:

  Yeas:

  Alvar Ayala
  Robert Berlin
  Michael Brennan

John Greenwood
James Gomric
Brent Harzman
Michael Kleinik
John Waters
Kwame Raoul

(Kimberly Foxx joined the meeting after the motion to adopt the minutes)

The following gave presentations to the Task Force regarding worker protection issues, including dealing with the spread of COVID-19 in meatpacking and processing plants, retail establishments, and trades, and ongoing issues with misclassification, prevailing wage, and sexual harassment

Bob O'Toole, President of UFCW Local 1546
Zach Koutsky, Legislative Director UFCW Local 881
Brian Tarbill, worker from Walmart
Bob Schroeder, Business manager, Laborers' Local 231
Jake Moody, Business Representative, Carpenters 237
Isaura Martinez, organizer/temp worker, Chicago Workers Collaborative (translated by Alvar Ayala)

The following Task Force members gave presentations/comments about their agencies work to protect workers during the pandemic

Michael Brennan, Chairman, Workers Compensation Commission

Brent Harzman, Charge Processing Division Manager, Illinois Department of Human Rights

Michael Kleinik, Director, Illinois Department of Labor

John Waters, Manager, Senior Policy Advisor, Illinois Department of Employment Security

Cook County State's Attorney Kim Foxx

DuPage County State's Attorney Robert Berlin

St. Clair County State's Attorney Jim Gomric

Alvar Ayala, Bureau, Workplace Rights Bureau, Illinois Attorney General's Office

No members of the public sought to give public comment

Adjournment: Having no further business to discuss, Kimberly Foxx moved to adjourn the meeting, and the motion was seconded by Michael Kleinik. The motion carried by the following voice vote:

Yeas:

Alvar Ayala
Robert Berlin
Michael Brennan
Kimberly Foxx
John Greenwood
James Gomric
Brent Harzman
Michael Kleinik
Kwame Raoul
John Waters

The meeting adjourned at 12:20 pm. Next meeting date to be determined.

OFFICE OF THE ATTORNEY GENERAL

Worker Protection Unit Task Force
AGENDA

Regular Meeting – Tuesday, November 10, 2020 at 10:30 a.m.
Via WebEx

I. Roll Call

II. Opening remarks

III. Adoption of minutes from the September 17, 2020 meeting

IV. Approval of status report to be submitted to the Governor and General Assembly by December 1, 2020

V. Public Comments

VI. Adjournment