PROPOSED ACTION MEMORANDUM

Rescinding Anti-Worker Wage and Hour Division Opinion Letters

Wage and Hour Division, Department of Labor
December 2020

I. Summary

The Trump administration's Department of Labor (DOL) has used a particular form of sub-regulatory guidance—Wage and Hour Opinion Letters—to shield employers across the country from liability for certain violations of minimum wage and overtime laws. Employers have routinely sought these opinions from the Wage and Hour Division (WHD) to justify business models and practices that are questionable or even forbidden under current law, regulations, or case law.

To roll back anti-worker WHD opinion letters issued during the Trump administration, DOL could take several executive actions under the next administration, including:

(1) Instruct the Wage and Hour Division not to deliver or release any opinion letters that have not yet been sent, and to hold them for further review.
(2) Withdraw six specific anti-worker opinion letters issued by the Trump administration that rely on questionable interpretations.
(3) Continue issuing WHD opinion letters even though the Obama administration halted the practice.
(4) Review pre-Trump opinion letters and withdraw them if appropriate.

II. Background and Current State

The WHD enforces a number of worker protection laws, including the Fair Labor Standards Act of 1938 (FLSA).[1] In part, the FLSA requires most employers to pay most employees at least the federal minimum wage (currently $7.25 per hour) and premium pay for overtime (one-and-a-half times a worker's regular rate of pay for hours worked in excess of forty each week).

The FLSA can be enforced either by DOL or through private litigation,[2] and it provides that workers whose rights are violated may recover back wages and liquidated damages.[3] However, the Portal-to-Portal Act of 1947 creates an "absolute defense" to actions under the FLSA upon a court finding that an employer acted "in good faith in conformity and in reliance on any written administrative regulation, order, ruling, approval or interpretation" of the Administrator.[4] In other words, the law provides employers a shield if they commit FLSA violations in reliance upon these types of agency guidance.

WHD has long issued Opinion Letters, Ruling Letters, and Field Assistance Bulletins interpreting the FLSA.[5] Members of the public can request that WHD issue "opinion letters" applicable to fact-specific situations, and the agency specifies that opinion letters signed by the Wage and Hour Administrator may serve as an absolute

[1] 29 USC § 201.
[2] *See* 29 USC § 215(b).
[3] *Id.*
[4] 29 USC § 259.
[5] While the Department can also issue opinion letters regarding the Family and Medical Leave Act (FMLA), this memorandum does not cover those letters in detail. Importantly, the law does not provide the same affirmative defense based on FMLA opinion letters as it does for FLSA opinion letters. *See also* Wage and Hour Division, Final Rulings and Opinion Letters, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (last accessed May 6, 2020) ("Opinion letters issued by the Administrator may be relied upon, pursuant to Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, as a good faith defense to wage claims arising under the FLSA. Except as noted below, the Portal-to-Portal Act does not apply to the FMLA or other statutes enforced by WHD."). Indeed, after discussing the six FMLA opinion letters released thus far in the Trump administration with experts, we understand that none rises to the level of warranting withdrawal at this time. At least one – confirming that time off to attend a meeting to discuss a son's or daughter's Individualized Education Program – was seen to be helpful for workers who have children with special needs. Letter from Administrator Cheryl M. Stanton, Aug. 8, 2019, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_08_08_2A_FMLA.pdf.

defense to FLSA actions pursuant to the Portal-to-Portal Act.[6] Importantly, workers cannot rely on favorable opinion letters in the same way.

Obama Administration

In March 2009, the Obama administration's WHD withdrew twenty opinion letters issued in January 2009 (at the end of the Bush administration) "for further consideration" because they were signed but never placed in the mail for delivery.[7] In withdrawing the letters, WHD stated it would "provide a further response in the near future," but it never did. WHD withdrew no further opinion letters in the Obama administration, and no comprehensive review was done of other letters.

WHD further announced that it would cease issuing opinion letters and instead issue a new form of guidance, Administrator's Interpretations, which would be applicable more generally. WHD's public explanation was that opinion letters are resource intensive and apply only to specific fact patterns. But the decision also stemmed from a perception that employers gamed the system by asking for opinion letters when they expected litigation to commence—and only after their lawyers checked in with WHD officials and knew to expect a favorable ruling.[8]

The Obama administration WHD only published a total of ten Administrator's Interpretations under the FLSA (three of which have been withdrawn by the Trump WHD),[9] two under the FMLA,[10] and two applicable to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[11]

Trump Administration

In June 2017, then-Secretary of Labor Alex Acosta announced the Trump administration DOL would resume issuing opinion letters.[12] In January 2018, the Trump WHD reinstated, without change, seventeen of the twenty last-minute Bush administration opinion letters.[13] Without any explanation other than it "further analyzed" each withdrawn letter, the acting administrator simply reissued "the verbatim text" of these withdrawn opinion letters and asserted that it "is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259."[14]

As of October 1, 2020, the Trump administration had issued a total of 57 opinion letters regarding the FLSA.

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[6] *Final Rulings and Opinion Letters*, Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (last visited Sep. 29, 2020).
[7] See e.g., U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Mar. 2, 2009).
[8] Sharon Block, "An Opinion on WHD Opinion Letters," OnLabor (June 28, 2017), https://www.onlabor.org/an-opinion-on-whd-opinion-letters/. WHD generally takes the position that it will not issue opinion letters when there is litigation or a WHD investigation involving the requester pending, but trade associations have in the past requested and received opinion letters in situations where there was pending litigation involving one or more of its members.
[9] *Administrator Interpretations Letters - Fair Labor Standards Act*, Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa (last visited Sep. 29, 2020).
[10] *Administrator Interpretations Letters - Family and Medical Leave Act*, Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flma (last visited Sep. 29, 2020).
[11] *Administrator Interpretations Letters - Agriculture,* Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/agriculture (last visited Sep. 29, 2020).
[12] News Release: *US DEPARTMENT OF LABOR REINSTATES WAGE AND HOUR OPINION LETTERS, Dep't of Labor, https://www.dol.gov/newsroom/releases/whd/whd20170627 (last visited Sep. 29, 2020).*
[13] Alfred B. Robinson, Jr., "An Early Groundhog Day: DOL Reissues 17 Opinion Letters That Had Been Withdrawn in 2009," Ogletree Deakins (Jan. 8, 2018), https://ogletree.com/insights/an-early-groundhog-day-dol-reissues-17-opinion-letters-that-had-been-withdrawn-in-2009/.
[14] *Id.*

III. Proposed Action

Upon taking office, the next administration could take several executive actions to roll back anti-worker WHD opinion letters issued during the Trump administration, including:

- **Instruct the Wage and Hour Division not to deliver or release any opinion letters that have not yet been sent, and to hold them for further review.**

Upon assuming office, the landing team at the DOL could instruct the WHD not to deliver or release any opinion letters that have not yet been sent, and to hold them for further review. As the Obama administration did in 2009, this would prevent any last-minute opinion letters from taking legal effect.

- **Withdraw six specific anti-worker FLSA opinion letters issued by the Trump administration WHD that rely on questionable interpretations.**

Of the several dozen FLSA opinion letters announced by the Trump administration as of May 2020, six are clearly harmful to workers and can be withdrawn immediately on the basis they rely upon questionable interpretations of WHD's regulations, long standing policy positions, or enforcement practices; or because they exceed the traditional role of opinion letters (e.g. applying to facts beyond those presented), or are in tension with evolving federal case law.

These letters include (see Appendix A for a more detailed analysis of each opinion letter)[15]:

1) FLSA2020-4. This letter—on whether referral bonuses must be involved in employees' regular rate for purposes of calculating overtime—admits that some facts are "left unclear," and then provides a roadmap on how to structure the bonuses such that they need not be included. This step goes beyond the traditional role of an opinion letter.

2) FLSA2019-6. This letter concludes that a platform company's workers ("gig workers") are "independent contractors" rather than employees in broad terms that are inconsistent with evolving case law on these points. (Note: in September 2020, DOL proposed a rule that would codify into regulation an employer-friendly interpretation of the test for determining worker status under the FLSA—please see our separate memo on the proposed rule).[16]

3) FLSA2018-27. This letter eliminates the longstanding "80/20 rule" whereby tipped workers, such as restaurant servers, could not be paid the (lower) minimum wage for tipped workers (currently only $2.13 per hour) if they spent more than 20% of their time in a non-tipped occupation. (Note: in late 2019, DOL proposed a tipped worker rule that would, among other things, cement this interpretation into the Code of Federal Regulations—please see our separate memo on the proposed rule).

4) FLSA2018-23. This letter finds that restaurants in movie theaters are exempt from the FLSA as movie theaters, even though they provide full dining service and do not serve food in the theater itself.

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[15] Note: there are other letters that are extremely technical and should be reviewed more closely by the landing team at the DOL, including: FLSA2018-1, FLSA2018-17, FLSA2018-15, and FLSA2018-12 (involving the administrative exemption to "employee" under the FLSA); FLSA2018-14 (involving a complex salary deduction question); FLSA2018-16 (involving volunteers and joint employment, where the letter cites economic realities as the test); FLSA2018-18 (involving travel time when the job is not on the usual place of business); FLSA2020-13 (involving the professional exemption and highly compensated employee test); FLSA2020-10 (involving the representative period of employees when applying the retail or service commission sales exemption).

[16] 85 Fed. Reg. 60600.

5) FLSA2018-22. This letter declares volunteer graders for a professional association (that used to be paid) to be exempt volunteers.

6) FLSA2018-21. This letter concludes that sales representatives at a technology company platform fall within the "retail or service establishment" exemption to the FLSA and are not entitled to its overtime protections.

Legally, these letters can be withdrawn by issuing a public statement. Withdrawing these opinion letters immediately "for further review" is sufficient to ensure they no longer provide an absolute defense under the Portal-to-Portal Act. The Wage and Hour Division's website explains this accordingly: "However, a withdrawn ruling or interpretation, or the withdrawn portion of a ruling or interpretation, may not be relied upon as an official ruling or interpretation of the Administrator or the Wage and Hour Division for any purpose, including under the Portal-to-Portal Act."[17]

In certain cases it could be helpful to go beyond the notice of withdrawal and formally replace opinion letters with better guidance. An individualized analysis of this question for each of the six anti-worker opinion letters listed above is beyond the scope of this memo. However, upon assuming office, the new administration could consider issuing a new opinion letter, other sub-regulatory guidance, or an interpretive rule through notice and comment.[18]

- **Continue issuing WHD opinion letters despite the Obama Administration halting the practice.**

As noted above, the next administration will have to decide whether to follow the Obama administration's lead and stop issuing opinion letters altogether. On balance, we recommend continuing to issue opinion letters when appropriate, given that they are (individually) a less resource-intensive mechanism for issuing guidance that protects workers' rights.

While opinion letters, taken collectively, can sap significant resources, the management bar is unlikely to submit a large number of requests for opinion letters to a Democratic administration. Meanwhile, we now know that subsequent administrations that are inclined to favor employers will simply revive opinion letters even if the next administration abandons the practice.

- **Review pre-Trump opinion letters and withdraw and replace them if appropriate.**

There are problematic WHD opinion letters that predate the Trump administration. Some of the more notorious opinion letters (involving tipped workers and fluctuating workweeks) have been superseded in recent years—for better or worse—by rulemaking or even legislation.[19] The next administration should review older opinion letters and engage with advocates and attorneys to identify those that should be withdrawn.

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[17] Wage and Hour Division, Final Rulings & Opinion Letters, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (last visited May 6, 2020).

[18] Unlike some (usually more modern) laws, the FLSA provides no general grant of rulemaking authority, but the Department can and does routinely issue interpretive rules through the notice-and-comment process to clarify the meaning of key terms in the statutes. *See* Title 29, Subtitle B, Chapter V, Subchapter B – Statements of General Policy or Interpretation Not Directly Related to Regulations, https://www.ecfr.gov/cgi-bin/text-idx?SID=e84611c7d372fe53e619300670ed78c8&mc=true&tpl=/ecfrbrowse/Title29/29cfrv3_02.tpl#0. While the rulemaking process takes time and resources, when the Department has the authority to issue an interpretive rule, it can do so without awaiting a request from outside stakeholders. In addition, the rulemaking process lends itself toward more lasting changes, since the resulting interpretive rule is codified in the Code of Federal Regulations, and repealing it likewise requires a final rule. This option should be explored to codify important definitions in place of withdrawn opinion letters.

[19] *See, e.g.,* Wage and Hour Division, Updating Regulations Issued Under the Fair Labor Standards Act Final Rule, 76 Fed. Reg. 18,832 (Apr. 5, 2011), https://www.govinfo.gov/content/pkg/FR-2011-04-05/pdf/2011-6749.pdf; National Employment Law Project, Restaurant Workers Win Ownership of Their Tips

IV. Justification

While many of these opinion letters seem narrow and technical, they effectively strip workers of their core employment protections under the FLSA. Withdrawing them will prevent employers from using them as a defense in litigation over the FLSA, and may even clear the way for private litigation that was previously foreclosed. In addition, it may allow the agency to take better positions in amicus briefs down the line. Moreover, withdrawing these opinion letters sends a signal to employers that the administration will strongly enforce FLSA protections, which could have a broader deterrent effect. Cracking down on wage-and-hour violations has significant equity implications: study[20] after study[21] shows that the workers who suffer wage-and-hour violations are disproportionately Black and brown workers, immigrants, women,[22] and others who are too often marginalized by our policies.

While it will have a fairly significant impact, withdrawing the six opinion letters identified is relatively straightforward and should not require substantial resources. WHD's Office of Policy and the Solicitor's Fair Labor Standards Division will need to review the proposed withdrawals. On the other hand, producing new opinion letters—in response to requests from advocates or workers—could require more time, and should be balanced against the other work that the same staff would be taking on (*i.e.*, regulations).

[20] Annette Bernhardt et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Law in America's Cities," NELP (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.
[21] "The Social and Economic Effects of Wage Violations: Estimates for California and New York," Eastern Res. Grp. (December 2014), https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf.
[22] David Cooper and Teresa Kroeger, "Employers steal billions from workers' paychecks each year," Econ. Pol'y Inst. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

VI. Appendix A

Below find detailed summaries of the six opinion letters, noted above,[23] that a new administration should prioritize withdrawing. While each discussion includes an analysis of the legal and policy justifications for rescission, from a legal perspective, WHD need not explain these justifications when it actually withdraws these opinion letters.

[23] *See* Section III.(2).

1. FLSA 2020-4 (Referral Bonuses Exemption)

Description of the Letter/Issue Presented

FLSA2020-4, which answers whether referral bonuses must be included in certain employees' regular rates for the purpose of calculating overtime pay, goes beyond the traditional role of an opinion letter by commenting on issues beyond the facts presented. The letter starts by admitting that some facts are left "unclear," and subsequently provides a roadmap for how to structure the bonuses such that they need not be included.

Policy Background

WHD enforces a number of worker protection laws, including the FLSA. In part, the FLSA requires most employers to pay most employees a premium rate for overtime, which is one-and-one-half times a worker's regular rate of pay for hours worked in excess of forty each week.[24] The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee" with various exclusions, such as "sums paid as gifts."[25]

Legal Analysis/Justification for Withdrawal

This letter ventures beyond its delegated authority. WHD does more than answer the question directly, by hypothesizing a variety of ways the inquiring company could circumvent FLSA regulation of referral bonuses. WHD letters must be "based exclusively on the facts" the inquirer has presented,[26] consistent with the idiosyncratic purpose of the FLSA, which was "designed to give specific minimum protections to *individual* workers and ensure that *each* employee covered by the Act would receive a fair day's pay for a fair day's work . . . .".[27]

Here, the inquiring company aims to divide the referral bonuses into two installments, awarding the first when the referred employee is hired, and the second when the referred employee reaches her one-year anniversary at the firm. The WHD uses the first paragraph to explain why the first installment need not be included, and devotes the rest of the two-page opinion to analyzing the second. But WHD takes two sentences to answer the question directly: ". . . the second installment would essentially be a longevity bonus . . . a longevity bonus constitutes remuneration and must be included in the regular rate, unless it is subject to a statutory exclusion."[28] The remainder of the opinion hypothesizes situations where "the second installment could be excludable from the regular rate," including: (1) "if the referring employee were eligible to receive the second installment regardless of whether [] she is employed after one year," or (2) as a "gift" under §207(e)(1).[29] The letter devotes an entire page to analyzing the potential outcomes of the latter situation, because "whether your client must include the second installment of the referral bonus depends *on a fact that your letter left unclear*."[30]

FLSA2020-4 takes two sentences to answer the question directly based on the facts at hand, and more than a page to propose different ways the company could structure its bonuses to fall outside the scope of FLSA regulation, depending on a variety of unknown facts. Accordingly, FLSA2020-4 should be withdrawn because this letter opines beyond the facts presented, and indeed does so for a majority of the discussion.

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[24] 29 U.S.C. § 207(a)(l).
[25] 29 U.S.C. § 207(e).
[26] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter 2020-4 (Mar. 26, 2020).
[27] *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 739 (1981) (quotations omitted).
[28] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter 2020-4 at 1 (Mar. 26, 2020).
[29] *Id.* at 3-4.
[30] *Id.* at 4 (emphasis added).

2. FLSA 2019-6 (Gig Workers)

Description of the Letter/Issue Presented

The question submitted to WHD asked whether service providers working for a virtual marketplace company (VMC) are employees or independent contractors under the FLSA. The WHD reviewed the workers' status under the "economic realities test" and determined that the service providers are independent contractors under the FLSA, and therefore not entitled to its protections, including minimum wage and overtime.

The opinion letter is especially concerning for the rights of employees, including those employed by companies other than the addressee, because it classifies the addressee as a VMC, and then defines VMC to mean an "online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services."[31] This broad definition encompasses a large and growing group of American employers in the "sharing economy" who may attempt to rely on this opinion letter to defend against FLSA litigation, claiming that they operate a "referral service."

Policy Background

This letter is part of a coordinated strategy by virtual marketplace companies (VMCs), like Uber, Lyft, and Handy, to ensure that workers who provide services through their platforms are classified as independent contractors.[32] VMCs misclassify their workers as independent contractors in order to avoid labor and employment law requirements. Among the rights and protections afforded to employees but *not* to contractors under federal law are: the right to organize and bargain collectively; minimum wage and overtime protections; access to unemployment insurance (this has changed temporarily with the passage of the CARES Act); employer contributions to Social Security and other retirement funds; and anti-harassment and discrimination protections.[33] Well-known gig economy companies like Uber, Lyft, and Handy, as well as large companies not traditionally associated with the gig economy like Hilton, Marriott, and Amazon, are engaged in a multi-year, well-funded campaign to deregulate the workplace by misclassifying employees as independent contractors.[34] Indeed, this opinion letter does not even represent the extent of their successes; in September 2020, DOL issued a proposed rule revising the test for determining employee status to make it easier for employers to classify their workers as independent contractors.[35] (See our separate memo on that regulation for more information).

Analysis shows that 10% of jobs in the United States and 20% of jobs projected to be added to the United States economy between 2016 and 2026 could be affected by efforts to exempt gig workers from basic employee protections.[36] Not only does gig work represent a large, and growing, proportion of the economy, but this effort to strip workers of their rights by misclassifying them has equity implications as well. Gig work is more prevalent among African Americans and Latinos than among whites. Further, workers who say that income from gig work is "essential" (rather than "nice to have") are more likely to have household incomes below $30,000, lack education beyond college, and be nonwhite.[37]

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[31] Wage and Hour Division, Opinion Letter FLSA 2019-6, 2018 (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf.
[32] NATIONAL EMPLOYMENT LAW PROJECT, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT (2019), available at https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf [hereinafter NELP REPORT].
[33] *Id.* at 2.
[34] *Id.* at 8.
[35] 85 Fed. Reg. 60600.
[36] *Id.* at 11.
[37] Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RESEARCH CENTER, (November 17, 2016), https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing.

Legal Analysis/Justification for Withdrawal

There are two main legal justifications for withdrawing this letter. First, the WHD neglected to analyze the six factors of the prevailing "economic realities" test in the context of the broader "suffer or permit" standard, which defines the scope of coverage under the FLSA. Second, in its application of the "economic realities" test, the WHD erroneously defined the employer as a "referral service" and ignored key facts in determining that the workers are independent contractors, including that the company disciplines workers if they fail to meet performance standards and sets workers' default rate of pay.

In its Application of the "Economic Realities" Test, the WHD Failed to Consider the Broader Context of FLSA's Goals.

When Congress enacted the FLSA, it replaced the common-law control test for employment with the statute's "suffer or permit to work" test, broadening the definition of an employee.[38] The Supreme Court has recognized that the "suffer or permit" test was "specifically designed to ensure as broad of a scope of statutory coverage as possible."[39] Rather than focus on the manner and measure of control that the employer has over the employee, the FLSA definitions emphasize the broader economic realities of the working relationship. To operationalize this concept, the Supreme Court developed a multi-factor "economic realities" test to determine whether a worker is economically dependent on the employer and is, therefore, an employee.

While the "economic realities" test is a helpful guide for legal analysis, "the ultimate inquiry under the FLSA is . . . whether the worker is economically dependent on the employer or truly in the business for him or herself."[40] Instead of mechanically applying the test as a checklist, the fact pattern should be taken and considered as a whole, qualitatively.[41] Therefore, the WHD must approach employee classification questions and "economic realities" analysis with an eye toward the broader goals of the FLSA.

In Addition to its Failure to Consider the Broader Context of the FLSA's Purpose and Broad "Employee" Definition, the Opinion Letter's "Economic Realities" Analysis of the VMC's Fact Pattern Ignored Important Key Facts that Would Have Weighed in Favor of Defining the Company's Workers as Employees.

The factors considered in the "economic realities" test are:[42]

(1) the nature and degree of the potential employer's control
(2) the permanency of the worker's relationship with the potential employer
(3) the amount of the worker's investment in facilities, equipment, or helpers
(4) the amount of skill, initiative, judgment, or foresight required for the worker's services
(5) the worker's opportunities for profit or loss
(6) the extent of integration of the worker's services into the potential employer's business

With regard to the sixth factor, the opinion letter suggests that the workers are not "integral" to the company in question by defining the company's business exceedingly narrowly as a "referral service":

> [The company] offers a finished product to its service providers; its business operations effectively terminate at the point of connecting service providers to consumers and do not extend to the service provider's actual provision of services. In other words, the service providers are not an integral part of

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[38] Wage and Hour Division, Administrator's Interpretation No. 2015-1 (July 15, 2015), http://www.fissuredworkplace.net/assets/Administrator_Interpretation_on_Misclassification_2015.pdf
[39] *Id.*
[40] *Id.*
[41] *Id.*; While the Trump administration did rescind the Obama-era Administrator's Interpretation, the Department of Labor conceded that the mere withdrawal of the guidance "does not change the legal responsibilities of employers" under the FLSA "as reflected in the department's long-standing regulations and case law." *see* US Department of Labor, News Release: US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance, June 7, 2017, https://www.dol.gov/newsroom/releases/opa/opa20170607.
[42] Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947).

> [the company's] referral service; they are consumers of that service from [the company] and negotiate with [the company] over the terms and conditions of using that service.[43]

By this telling, the platform company exists as something like a high-tech classified-ads section—albeit one that sets default prices and could remove listings if they are poorly rated.[44] While we do not know which company sought this opinion letter, it is not clear that workers or consumers think of the average platform company as a separate entity unrelated to the quality of the services provided—which is why platform companies jealously guard their rights to terminate workers with low customer ratings. To the contrary, these platforms can and do benefit substantially by becoming synonymous with the services they provide. At minimum, the Acting Administrator's determination that the workers are "not operationally integrated into [the company's] business" is questionable.

With regard to the first factor of control, the opinion letter recognized that the VMC assigns workers to jobs and disciplines or even terminates workers who fail to meet the company's rigorous performance standards, for instance, as evidenced by low consumer ratings—but "only in these instances to maintain the integrity of its virtual marketplace."[45] The opinion letter ignores this fact to claim that the VMC "does not inspect a service provider's work for quality."[46] This is clearly erroneous, because the letter also states that a "service provider" will be terminated if it "receiv[es] an aggregate consumer rating below a certain minimum threshold."[47] The "integrity of its virtual marketplace" justification holds no water, as case law under the FLSA suggests that an employer has no less "control" over a worker simply because it is trying to make its customers happy.[48]

The fifth factor considers a worker's opportunity to make managerial decisions resulting in profit or loss, and weighs in favor of classifying the workers as employees.[49] The opinion letter determined that the workers in question had the opportunity for profit and loss even though the company set default prices, because they could "choose different types of jobs with different prices, take as many jobs as they see fit, and negotiate the prices of their jobs."[50] But the opportunity for loss is a key consideration as well.[51] There is no indication in the facts provided that the workers in question have a real opportunity for loss, and the WHD does not even bother to hypothesize how the workers could suffer a loss.[52]

Because the opinion letter failed to consider the goals of the FLSA when it applied the "economic realities" test and it erred in its application of that test, it should be rescinded.

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[43] Wage and Hour Division, *supra* note 1, at 10.

[44] From this position, it is a short logical leap to say that hamburgers are not integral to the business of McDonald's, but that they are only one menu option that the company can offer to consumers who seek fast food. Taken to its extreme, perhaps all work could be abstracted down to the business of "customer service," with no products or services being integral as long as the customer walks out happy.

[45] Wage and Hour Division, *supra* note 1, at 3.

[46] *Id.* at 8.

[47] *Id.* at 3.

[48] *Id.* at 13-14. ("Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied. However, control exercised over a worker, even for any or all of those reasons, still indicates that the worker is an employee."); *See also* Scantland v. Knight, 721 F.3d 1308, 1316 (11th Cir. 2013)("If the nature of a business requires a company to exert control over workers to the extent that [the employer] has allegedly done, then that company must hire employees, not independent contractors.").

[49] *Id.* at n. 7.

[50] *See* Wage and Hour Division, *supra* note 7, at 9.

[51] *See* Wage and Hour Division, *supra* note 1, at 8; See *also, e.g.,* Dole v. Snell, 875 F.2d 802, 810 (10th Cir. 1989) (possibility of loss is a risk usually associated with independent contractor status, but there was no way for cake decorators to experience a loss, and possible reduction in earnings was not the same as a loss); Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1536 (7th Cir. 1987) (migrant farm workers had no possibility for loss of investment, only loss of wages, indicating that they were employees).

[52] Wage and Hour Division, *supra* note 1, at 9 ("Your client sets default prices, but it allows service providers to choose different types of jobs with different prices, take as many jobs as they see fit, and negotiate the price of their jobs.").

3. FLSA 2018-27 (80/20 Rule)

Description of the Letter/Issue Presented

The question submitted to the Wage and Hour Division (WHD) asked WHD to reissue the opinion letter issued in the final days of the Bush administration (and quickly withdrawn for "further consideration" by the Obama administration two months later), which repealed the longstanding "80/20 rule" for tipped workers. [53] In 2018, the Acting Administrator of WHD agreed to do so, offering no explanation for reissuing the opinion letter and repealing the 80/20 rule other than that the division had "further analyzed" the 2009 opinion letter.[54]

The 80/20 rule states that employees who spend more than 20% of their time during a workweek on non-tipped activities cannot be treated as tipped employees for purposes of the federal minimum wage.

Policy Background

In 1966, Congress extended federal minimum wage protections under FLSA to cover most service and retail workers, but at the same time established a special tipped worker minimum wage.[55] Under that system, as long as employers pay workers who "customarily and regularly receive tips" a base cash wage (stuck at $2.13 per hour since 1991), they may credit tips received toward the remainder of the overall minimum wage (currently $7.25 under federal law). As a result, employers have an incentive to classify workers as tipped workers so that tips can subsidize their wages.

As both a practical necessity *and* as a result of employer misconduct, tipped workers also frequently perform tasks that do not generate tips. DOL's FLSA regulations since 1967 have distinguished between (1) employees performing two different jobs and (2) employees that perform one job that requires performing non-tipped "related activities." In the former case, the employee must be paid the federal non-tipped minimum wage ($7.25) for time spent doing non-tipped work. In the latter, the employee is paid the "tipped minimum" wage ($2.13) for all hours worked, which can be subsidized using tips in order to reach the regular federal minimum wage ($7.25).[56] This can depress earnings if employees are classified as tipped workers and paid only $2.13 per hour, but are required to do significant amounts of "related activity" that does not generate tips.

In response to this perverse incentive, from 1988 through 2008, the DOL maintained written guidance establishing a clear 80/20 rule. The rule stated that employees who spend more than 20% of their time during a workweek on non-tipped activities cannot be treated as tipped employees (and paid the base cash wage of $2.13 per hour) for their time spent on non-tipped work.[57] The Department used this bright-line rule consistently—and the courts accepted it—for three decades.[58]

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[53] *See* Wage and Hour Division, Opinion Letter FLSA 2018-27, 2018 WL 5921455 (Nov. 8, 2018), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_11_08_27_FLSA.pdf.

[54] *Id.* at 1.

[55] *See* 29 U.S.C. § 203(m). For more history on the tip credit, see Rajesh D. Nayak & Paul K. Sonn, Restoring the Minimum Wage for America's Tipped Workers (Aug. 2009), https://rmw.nelp.org/wp-content/uploads/sites/2/2016/08/Restoring-Minimum-Wage-Americas-Tipped-Workers.pdf.

[56] 29 C.F.R. § 531.56, *codified by* 32 Fed. Reg at 13,575, 13,580-81 (Sep. 28, 1967), https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1967/9/28/13571-13582.pdf#page=5.

[57] *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988).

[58] In its comments opposing the Department's recent proposed rule, the National Employment Law Project provided a substantial number of cases: "*See, e.g.*, Marsh v. J. Alexander's LLC, 905 F.3d 610, 629 (9th Cir. 2018); Fast v. Applebee's Int'l, Inc., 638 F.3d 872, 879 (8th Cir. 2011); Harrison v. Rockne's Inc., 274 F. Supp. 3d 706, 712 (N.D. Ohio 2017); Romero v. Top-Tier Colorado LLC, 274 F. Supp. 3d 1200, 1207 (D. Colo. 2017); McLamb v. High 5 Hosp., 197 F. Supp. 3d 656, 663 (D. Del. 2016); Knox v. Jones Grp., 201 F. Supp. 3d 951, 961 (S.D. Ind. 2016); Stokes v. Wings Inv., LLC, 213 F. Supp. 3d 1097, 1102 (S.D. Ind. 2016); Flood v. Carlson Restaurants Inc., 94 F. Supp. 3d 572, 584 (S.D.N.Y. 2015); Irvine v. Destination Wild Dunes Mgmt., Inc., 106 F. Supp. 3d 729, 735 (D.S.C. 2015); Alverson v. BL Rest. Operations LLC, No. 16 Civ. 00849, 2017 WL 3493048, at *5 (W.D. Tex. Aug. 8, 2017); Osman v. Grube, Inc., No. 16 Civ. 802, 2017 WL 2908864, at *5 (N.D. Ohio July 7, 2017); Thomas v. Bayou Fox, Inc., No. 15 Civ. 623, 2017 WL 2374706, at *3 (M.D. Ala. May 31, 2017); Eldridge v. OS Rest. Servs., LLC, No. 17 Civ. 798, 2017 WL 2191084, at *3 (M.D. Fla. May 18, 2017); Goodson v. OS Rest. Servs., LLC, No. 17 Civ. 10, 2017 WL 1957079, at *6 (M.D. Fla. May 11, 2017); Barnhart v. Chesapeake Bay Seafood House Assocs., L.L.C., No. 16 Civ. 1277, 2017 WL 1196580, at *6 (D. Md. Mar. 31, 2017); White v. NIF Corp., No. 15 Civ. 322, 2017 WL 210243, at *4 (S.D. Ala. Jan. 18, 2017); Bowe v. HHJJ, LLC, No. 16 Civ. 1844, 2017 WL 56401, at *1-2 (M.D. Fla. Jan. 5, 2017); Langlands v. JK & T Wings, Inc., No. 15 Civ. 13551, 2016 WL 2733092, at *3 (E.D. Mich. May 11, 2016); Crate v. Q's Rest. Grp. LLC, No. 13 Civ. 2549, 2014 WL 10556347, at *4 (M.D. Fla. May 2, 2014); Holder v. MJDE Venture, LLC, No. 08 Civ. 2218, 2009 WL 4641757, at *4 (N.D. Ga. Dec. 1, 2009)." National Employment Law Project

The opinion letter issued in 2009 and reissued in 2018 sought to do away with the longstanding 80/20 rule, claiming that the rule caused confusion for employers. The 2009 opinion letter itself cited a single district court case to claim that the 80/20 rule caused confusion for employers and scrapped the guideline.[59] Almost all courts faced with the issue since have declined to give deference to the opinion letter, noting that the letter is an inadequately considered reversal from previous agency interpretation, and continued to apply the 80-20 rule. Perhaps as a result, DOL is preparing to promulgate a rule which would codify the 80/20 rule repeal.[60] The NPRM, issued in October 2019, proposes to amend regulations to reflect the position of the opinion letter.[61]

If courts defer to the proposed rule, it would have a significant negative impact on tipped workers, who are already among the most vulnerable of workers. One analysis estimated that workers could lose more than $700 million every year under the rule, as employers transition positions from non-tipped to tipped.[62] Because non-tipped jobs in restaurants are more likely to be held by people of color, the move could disproportionately and negatively affect communities of color.[63]

It also could be particularly problematic due to the COVID-19 crisis. As restaurants reopen, any ambiguity regarding the authority of the 80/20 rule could incentivize employers to delay hiring non-tipped workers and instead rely on tipped workers, who they can pay the $2.13 minimum wage, to carry out non-tipped work (i.e. maintenance, cleaning, etc.).[64] Additionally, as restaurants rely more heavily on delivery and takeout than in-person dining, they may require tipped workers to spend time on activities that do not generate the same amount of tips.

Legal Analysis/Justification for Withdrawal

This opinion letter can be withdrawn on the basis that it provided insufficient justification for the reversal of the 80/20 rule and almost every court has declined to defer to the WHD's interpretation.

The 2018 letter offered no evidence of "authoritative and considered" judgment, writing simply that the WHD had "further analyzed [the 2009 letter]."[65] The 2009 letter, which was official policy for a total of six weeks, claimed that the rule "resulted in some confusion," but only pointed to a single case to demonstrate a disagreement about the implications of the rule.[66] Moreover, the case the opinion letter highlights is unpersuasive, because it considered a highly specific fact pattern and was decided at the summary judgment stage,[67] rendering 80/20 analysis "unnecessary."[68]

Not only have they been able to effectively apply the 80/20 rule for more than three decades, but also courts across the country have declined to grant deference to the 2018 opinion letter because of the lack of justification for reversal and concern for the chaotic legal landscape that the reversal would create.[69] The Ninth Circuit

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Comments in Response to the Proposed Rulemaking: Tip Regulations Under the Fair Labor Standards Act 5 (Dec. 11, 2019), *available at* https://www.regulations.gov/document?D=WHD-2019-0004-0453.

[59] *See* Wage and Hour Division, Field Operations Handbook § 30d00(e) (Dec. 9, 1988).

[60] See 84 Fed. Reg. 53,956, 53,977 (Oct. 8, 2019), https://www.federalregister.gov/documents/2019/10/08/2019-20868/tip-regulations-under-the-fair-labor-standards-act-flsa.

[61] *Id.* at 53,963.

[62] ECONOMIC POLICY INSTITUTE, WORKERS WILL LOSE MORE THAN $700 MILLION ANNUALLY UNDER PROPOSED DOL RULE (2019), zccc [hereinafter EPI PROPOSED RULE ARTICLE].

[63] *Id.*

[64] EPI PROPOSED RULE ARTICLE.

[65] *See* Wage and Hour Division, *supra* note 22 at 1.

[66] *Id.* at 2.

[67] *See* Foster v New Apple, Inc., No. 0:16-CV-3705-BHH, 2017 WL 10504645, at *6 (D.S.C. Aug. 8, 2017).

[68] Pellon v. Bus. Representation Int'l, Inc., 528 F. Supp. 2d 1306, 1315 (S.D. Fla. 2007), aff'd, 291 F. App'x 310, 311 (11th Cir. 2008).

[69] *See* NELP *supra* note 28 at p.5, citing the following cases: "Belt v. P.F. Chang's China Bistro, Inc., 401 F. Supp. 3d 512, 533 (E.D. Pa. 2019) (analyzing the ambiguity if the Department removes all temporal limits on non-tipped work); Spencer v. Macado's, Inc., 399 F. Supp. 3d 545, 553 (W.D. Va. 2019) ("the DOL offered no 'evidence of any thorough consideration for reversing course' on the 80/20 Rule"); Esry v. P.F. Chang's China Bistro, Inc., 373 F. Supp. 3d 1205, 1210 (E.D. Ark. 2019) (noting abolishing the 80/20 Rule is an "about face" for the Department); Cope v. Let's Eat Out, Inc., 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019) ("Aside from expressing the DOL's desire to clarify the FOH sections addressing the tip credit, the DOL does not

explained, in a decision two months before the 2018 opinion letter, that the 80/20 rule is consistent with "nearly four decades of interpretive guidance and with the statute and the regulation."[70] Since the opinion letter was issued, district courts across the country have declined to grant the letter deference, because the DOL "offered no evidence of any thorough consideration for reversing course,"[71] and because of the "uncertainty and ambiguity" that would result.[72]

While courts have not tended to give much deference to the 2018 opinion letter, withdrawing the letter is still a good idea in light of the administration's plan to issue a final rule officially repealing the "80/20 rule". In any litigation surrounding the forthcoming regulation, business groups and conservative states' attorneys general defending the rule could point to the opinion letter as evidence of precedential support, or at least departmental inconsistency, which may strengthen their hand. Further, if the new administration rolls back the final rule codifying "80/20" repeal, it should also withdraw the opinion letter so as to prevent employers from using it as a defense against litigation from their employees.

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offer reasoning or evidence of any thorough consideration for reversing course."); Flores, 2019 WL 5454647, at *6 (the Department's removal of temporal limits on non-tipped works created "uncertainty and ambiguity"); Callaway v. DenOne LLC, No. 18 Civ. 1981, 2019 WL 1090346, at *7 (N.D. Ohio Mar. 8, 2019)."

[70] Marsh v. J. Alexander's LLC*,* 905 F.3d 610, 625 (9th Cir. 2018).

[71] Spencer v. Macado's, Inc., 399 F. Supp. 3d 545, 553 (W.D. Va. 2019).

[72] Flores v. HMS Host Corp., 2019 WL 5454647 (D. Md. 2019), at *6.

4. FLSA 2018-23 (Restaurants in Movie Theaters)

Description of the Letter/Issue presented

The question submitted to the WHD asked whether the motion picture theater exemption in Section 13(b)(27) of the Fair Labor Standards Act (FLSA) applies to "food service operations of motion picture theaters."[73] The question was from an enterprise that installed several full-service restaurants in its movie theaters. In his response, the Acting Administrator of the WHD decided that the employer's "food services operations are sufficiently integrated with its theater operations" so as to qualify for the exemption.[74] As a result, the opinion letter explains, employees are not entitled to overtime protections under the FLSA.[75]

This opinion letter is broadly (dangerously so) applicable, as movie theater chains are increasingly adding "enhanced food option[s]" to their establishments across the country.[76]

Policy Background

Employees covered by the FLSA must receive overtime pay of at least one-and-a-half times their regular rate of pay for hours worked in excess of forty hours per week.[77] However, Section 213(b)(27) of the FLSA exempts "employee[s] employed by an establishment which is a motion picture theater"[78] from overtime pay. Lack of overtime protection contributes to low pay for movie theater employees: in 2015, the average annual pay for motion picture theater employees was $13,345 (exceeding the poverty wage by only $1,575).[79]

While food service workers are also often subject to low pay and wage theft, they generally do qualify for overtime pay under the FLSA.[80] This opinion letter permits a movie theater owner, who attached a restaurant to some of their theaters, to continue to claim *all* of their employees as exempt from overtime rules.

Legal Analysis/Justification for Withdrawal

There are two primary legal justifications for withdrawing this opinion letter. First, the opinion letter fails to acknowledge the "scope" requirement of exemption considerations, and thus grants an exemption that is discordant with the statutory exception. Second, the evolution of this exemption in statute and in historical practice has tended towards narrowing, rather than the expansion implied by this opinion letter.

In its statement of the exemption for motion pictures, the opinion letter diligently defines certain terms, the definitions of which seem to support its position, but simply ignores others that weigh against granting the exemption. In full, the statute exempts from its overtime requirements "any employee employed by an establishment which is a motion picture theater."[81] The opinion letter ignores the regulation that defines employment "by" to mean "an employee…must be employed by his employer in the work of the exempt establishment itself *in activities within the scope of its exempt business*."[82] The type of work required to operate a full-service restaurant (and arguably an in-theater dining service) is not likely "within the scope" of the exempt

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[73] *See* Wage and Hour Division, Opinion Letter FLSA 2018-23, 2018 WL 4096964 (Aug. 28, 2018), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_23_FLSA.pdf.
[74] *Id.*
[75] *Id.* at 3.
[76] Vince Dixon, *What Movie Theaters Are Learning From Restaurants*, EATER, (May 19, 2017), https://www.eater.com/2017/5/19/15653872/amc-movie-theater-concession-menu-fast-food.
[77] 29 U.S.C. §207(a)(1).
[78] 29 U.S.C. § 213(b)(27).
[79] U.S. BUREAU OF LABOR STATISTICS, TED: THE ECONOMICS DAILY, A LOOK AT EMPLOYMENT AND WAGES IN THE FILM INDUSTRY, 2017, https://www.bls.gov/opub/ted/2017/a-look-at-employment-and-wages-in-the-film-industry.htm
[80] Assuming the enterprise has an annual dollar volume of sales of at least $500,000. *See* Wage and Hour Division, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA), Rev. July 2009, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs14.pdf.
[81] 29 U.S.C. § 213(b)(27).
[82] 29 C.F.R. § 779.308.

business of a movie theater.[83] The opinion letter falls back on a previous opinion letter to insist that the "nature" of the business determines whether establishment-based exemptions apply.[84] Even applying that criterion, a full-service restaurant is different in nature from a movie theater, especially given that the opinion letter notes that a movie ticket is not an absolute prerequisite for dining in the restaurant.[85]

Finally, the opinion letter's position is discordant with the FLSA's overarching aims and the historical evolution of the movie theater exemption. The exemption was included in the 1938 FLSA because, at the time, lawmakers could not conceive of a movie theater business model that included many workers besides professional employees like projectionists.[86] The movie theater industry transformed during the twentieth century to include many low wage positions—so much so that the minimum wage exemption for movie theater employees was removed in 1974.[87] Unfortunately, the overtime exemption remains. Even if the movie theater exemption does apply to in-theater food operations in movie theaters, the opinion letter's position of including full-service restaurant employees is far too broad.

[83] To illustrate, the regulation cites the following cases: Wessling v. Carroll Gas Co., 266 F. Supp. 795 (N.D. Iowa); Oliveira v. Basteiro, 18 WH Cases 668 (S.D. Texas). See also, Northwest Airlines v. Jackson, 185 F. 2d 74 (CA-8); Walling v. Connecticut Co., 154 F. 2d 522 (CA-2) certiorari denied, 329 U.S. 667; and Wabash Radio Corp. v. Walling, 162 F. 2d 391 (CA-6).
[84] *See* Wage and Hour Division, *supra* note 42, at 2.
[85] *Id.* at 1.
[86] Kate Gibson, *AMC Theatre workers press for holiday and overtime pay*, CBS NEWS, (Dec. 4, 2019), https://www.cbsnews.com/news/amc-theatre-workers-call-for-holiday-and-overtime-pay-from-cinema-chain.
[87] Katie Kilkenny, *Movie Theater Employees Take Aim at Overtime Pay Exemption*, HOLLYWOOD REPORTER, (Jan 16, 2020), https://www.hollywoodreporter.com/news/movie-theater-employees-take-aim-at-overtime-pay-exemption-1270178.

5. FLSA 2018-22 (Volunteers)

Description of the Letter/Issue Presented

The question submitted to the Wage and Hour Division (WHD) asked whether graders of professional examinations who work once a year "for a one- to two-week period" qualify as either "volunteers" or "employees" under the Fair Labor Standards Act (FLSA). Volunteers are not covered by the FLSA, and thus are not protected by the Act's minimum wage requirement.

The question was submitted by a nonprofit entity that planned to stop paying graders for their work. The nonprofit claimed graders were motivated to serve by the opportunity to give back and the "professional achievement" of being selected as a grader, and proposed to continue paying for the graders' transportation, accommodations, and meals during their service. The WHD determined the workers qualified as volunteers.

Unless repealed, this letter could have broad implications in other contexts where companies are attempting to circumvent FLSA protections by designating part-time workers as volunteers.

Policy Background

Subject to certain exemptions not applicable here, under the FLSA, an employer must compensate its "employees" at a rate at least equal to the minimum wage for every hour worked, with time and a half for every hour worked over forty in a workweek.

The Supreme Court, however, has made it clear that the FLSA was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); see also *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 300 (1985). According to the Department of Labor (DOL), this is grounded in the FLSA's recognition of "the generosity and public benefits of volunteering and allows individuals to freely volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service." FLSA206-18.

For such a "volunteer" relationship to exist, Supreme Court precedent and DOL regulations require that: (1) no employee relationship, and (2) individuals volunteer their services without "coercion or undue pressure." See *Tony and Susan Alamo Foundation v. Secretary of Labor*; see also 29 C.F.R. § 553.101. The test for employment, even in the context of allegedly voluntary activity, is "one of 'economic reality.'" See *Tony and Susan Alamo Foundation v. Secretary of Labor*, quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S., at 33.

Critically, the Supreme Court has held this test applies regardless of whether the workers in question assert they are volunteers. As the Court noted, "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." See *Tony and Susan Alamo Foundation v. Secretary of Labor.*

Legal Analysis/Justification for Withdrawal

This opinion letter can be withdrawn on the basis that it failed to apply the proper test to determine whether an "employee" or "volunteer" relationship exists.

In finding that the workers in question are "volunteers" for purposes of the FLSA, the opinion letter relies on the self-described "motivations" of the workers, including their alleged desire to "[promote] the highest standards of ethics, education, and professional excellence, to "[gain] the personal and professional" benefits of being a Grader, and to "give back to the profession." 2018 WL 4562932 at *1 (August 28, 2018). However, as noted above, Supreme Court precedent and DOL regulations require a more exhaustive inquiry, including a determination of whether an employee relationship exists and whether the individuals in question volunteer their services without "coercion or undue pressure." See *Tony and Susan Alamo Foundation v. Secretary of Labor*; see also 29 C.F.R. § 553.101.

In this letter, WHD failed to examine either question. This is particularly troubling given a cursory examination of the "economic realities" test would show the workers in question are in fact "employees" under the FLSA. According to the Supreme Court, individuals "who engage in … activities in expectation of compensation" are covered employees under the FLSA." See *Tony and Susan Alamo Foundation v. Secretary of Labor.* Here, the workers in question were being paid a fee before the nonprofit requested this opinion on whether they could eliminate that compensation. Clearly, they were working in "expectation of compensation," and were thus employees under the FLSA. According to WHD's own guidance, an entity cannot use volunteers to "displace regular employed workers or perform work that would otherwise be performed by regular employees." See Wage and Hour Division, FS 14A (Aug. 2015).

In addition, FLSA2018-22 violates the purpose of the FLSA. The Act is remedial and "humanitarian in purpose," and is meant to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 597 (1944). The FLSA should be broadly interpreted and applied to effectuate its goals. *See Tony,* 471 U.S. at 296. Accordingly, FLSA2018-22 could be repealed.

6. FLSA 2018-21 (7(i) Retail Establishment Exemption: Tech)

Description of the Letter/Issue Presented

This opinion letter was written in response to a technology platform company that asked whether its sales representatives qualified for the "retail or service establishment" exemption from the FLSA overtime protections.[88] The company sells "a technology platform to merchants that enables online and retail merchants to accept credit card payments from their customers from a mobile device, online, or in person."[89] The opinion letter grants the exemption, concluding that the company satisfies each of the requirements of the regulatory test.

This opinion letter is particularly important to withdraw because it relies on a recent Supreme Court case to broaden the 7(i) exemption to apply to a fast-growing type of company that does not logically fit the exemption's scope.

Policy Background

The FLSA generally requires employers to pay employees overtime, at a rate of one-and-a-half times the regular rate of pay, for hours worked in excess of forty hours.[90] The FLSA, however, does provide certain exemptions, including one for employees: (a) who are employed by a retail or service establishment, (b) who receive a regular rate of pay greater than one-and-a-half times the minimum wage, and (c) for whom more than half of their compensation represents commissions on goods or services.[91]

Acting at the behest of employers, WHD has repeatedly acted to expand the scope of the numerous statutory exemptions from FLSA overtime protections.[92] In May 2020, the Department of Labor, without notice and comment, promulgated a final rule, which rescinded a 1961 interpretive rule that provided a non-exhaustive list of types of establishments that do not meet the "retail concept" standard, as required by the regulations.[93] This final rule is likely to increase the number of companies that seek this exemption, now that their "type" is no longer blacklisted by DOL guidance.[94]

This 2018 opinion letter seeks to expand the 7(i) exemption further by granting it to a technology platform that provides services to retailers.

Legal Analysis/Justification for Withdrawal

This opinion letter can be withdrawn on the grounds that it did not properly apply the legal tests required to qualify an entity for the exemption, largely because WHD lacked the necessary information to do so.

The opinion letter finds that the tech company qualifies as a "retail or service establishment" for the purposes of the exemption. An establishment is considered a retail or service establishment if: (1) it engages in the making of sales of goods or services, (2) 75% of its sales of goods or services are recognized as retail in the particular industry (as opposed to wholesale), and (3) less than 25% of its sales are sales for resale.[95] The establishment satisfies the first requirement if it "'sells goods or services to the general public,' 'serves the everyday needs of

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[88] Wage and Hour Division, Opinion Letter FLSA 2018-21, 2018 (Aug. 28, 2018).
[89] *Id.* at 1.
[90] 29 U.S.C. § 207.
[91] *Id.*
[92] For instance, issuing opinion letters widening the movie theater exemption under FLSA.
[93] Wage and Hour Division, Final Rule, Partial List of Establishments that Lack or May Have a "Retail Concept" Under the Fair Labor Standards Act, 85 F.R. 29867, 29869 (May 19, 2020), https://www.federalregister.gov/documents/2020/05/19/2020-10250/partial-lists-of-establishments-that-lack-or-may-have-a-retail-concept-under-the-fair-labor#p-12.
[94] Peter J. Wozniak and Mark Wallin, *New DOL Rulemaking Clarifies Overtime Exemption for Retail Employees*, The National Law Review, (May 20, 2020), https://www.natlawreview.com/article/new-dol-rulemaking-clarifies-overtime-exemption-retail-employees.
[95] Wage and Hour Division, *supra* note 18, at 2 quoting 29 C.F.R. § 779.313.

the community,' 'is at the very end of the stream of distribution,' disposes its products in 'small quantities,' and 'does not take part in the manufacturing process.'"[96]

However, in the letter, WHD failed to request (or deliberately omitted) vital information at the heart of these inquiries, preventing a proper assessment of whether the sale of the company's platform is "at the very end of the stream of distribution" or is retail as opposed to wholesale. If the company earns most of its revenue by collecting a percentage of each transaction completed via the platform, as similar businesses like Stripe and Square do, then the employees' sale of the platform itself is *not* "at the very end of the stream of distribution."[97] Rather, the revenue is generated at the point of transaction and not at the point of sale of the platform. In finding that the sales of the platform are "retail sales, not wholesale sales," the opinion letter attempts to draw an analogy to *Alvarado v. Corporate Cleaning Servs., Inc.,* in which the Seventh Circuit explained that "it would be absurd to suggest that a dealer in motor vehicles, when it sells a truck to a moving company, is 'wholesaling' the truck because the buyer will doubtless try to recover the cost of the purchase in the price he charges for his moving services, which utilize the truck."[98] Assuming that the company's business model is like that of Stripe or Square, however, any increase in price on goods or services offered by buyers of the platform would not be due to their need to cover the price of the one-time platform purchase. Rather, it would be a *new* cost applied to each transaction to pay for the service of intermediation between merchant, customer, and credit card company for that specific transaction. The opinion letter does not include sufficient information to make these determinations, and therefore cannot appropriately apply the test for the "retail and service establishment" 7(i) exemption.

Additionally, the platform offered by the company is more analogous to industries which have no concept of retail selling, because it is a platform which *enables* retail, not retail itself. In rejecting the argument from a loan

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