At the conclusion of the hearing, participants who did not provide written testimony were provided with the opportunity to supplement oral testimony with responses to the specific questions outlined in the pre-hearing email.

- **Restaurant Occupation Wage Order**
  - Purpose determine a minimum wage for occupations in the restaurant industry. We want to guarantee that they will take home a certain guarantee each week.

  - Commissioner Egan (11/28/49) addressed the members of the First Restaurant Wage Board noting that a cost of living survey and a survey of the restaurant industry, the results of which were to be used by the newly appointed board to “establish a minimum wage in the industry. So far the industry is different from any other industry for which we have established a minimum wage. None of the other industries are identifiable with tipping as much as the restaurant industry.”

  - The Minimum Wage Division conducted a survey in the restaurant and eating and drinking establishments to find out just what the conditions are in regards to meals, wages, tipping, etc. [folders of the survey presented to each board member]. You will notice in the report that we have used the term “restaurant occupation” and not restaurant industry. For purposes of the study, the CT DOL defined it as “occupation” [nineteen occupations]

  - Advised the Board that they had the opportunity to determine a reduced minimum wage for the occupation of waiter and waitress since the employees in that occupation customarily receive gratuities. This was later referred to as a “standard steady source of income”.

PA 19-1 also provided that such regulations shall be in accordance with the Fair Labor Standards Act, 29 USC 203(m)(2) and 29 CFR 531.56(e), as interpreted by Section 30d00(e) of the federal Department of Labor's Field Operations Handbook, prior to November 8, 2018, which was previously referred to as the "80/20 rule."

- Whether the proposed regulations should be drafted broadly to address aspects of the “80/20” rule with a “bright-line” test that is easily understood and implemented by the restaurant industry and if so, what should that “bright line” test be?

  Applying the 80/20 rule when an employee moves from one occupation (example waitress) to another occupation (expo, hostess, assistant manager) for the “hours” (not 15 minute intervals) as set forth in Sec. 31-62-E4 is in accordance with the intent and breath of the regulation. What
is not appropriate and could never be administered without a minute my minute accounting is to
move beyond the intent of the regulation to interpret 80/20 to restrict the amount of time a
service employee may spend on tasks set forth in US DOL O*Net under the waitress occupational
code. Moreover, consideration should be given to the long standing practice of duties as
prescribed in O*Net as well as the manner in which the US DOL is striving to make the law
administrable and easy to follow by both employees and employers.

The US DOL has announced that such an interpretation (earlier one referenced in PA 19-1) is
withdrawn (published 12.5.17 at 82 FR 57395) and superseded with NPRM Tip Regulations under
the FLSA, WHD DOL, Proposed Section 531.56(e) –Dual Jobs, to reflect recent guidance explaining
that an employer may take a tip credit for any amount of time that an employee in a tipped
occupation performs related, non-tipped duties contemporaneously with his or her tipped duties,
or for a reasonable time immediately before or after the tipped duties. 29 CFR 531.56(e). See
FAB 2019-2, at *2 (Feb. 15, 2019) and FLSA 2018-27, 2018 WL at *3-4 (Nov. 8, 2018). The
Department believes this policy is consistent with the plain statutory text, which permits
employers to take a tip credit based on whether an employee is engaged in a tipped “occupation,”
not whether the employee is performing certain tasks/duties within the tipped occupation. In its
recent guidance, in addition to examples contained in the CFR, US DOL will use the Occupational
Information Network (O*Net) to determine whether a tipped employee’s non-tipped duties are
related to their tipped occupation.

O*Net is a comprehensive database of worker attributes and job characteristics, and is available
to the public online at www.onetonline.com. This is based upon the Standard Occupational
Classification system. Incidentally this electronic databased supersedes the US DOL Dictionary of
Occupational Titles referenced by the members of the CT WHD in discussing the restaurant
occupational study and referenced as the go to source for both public and the government for
guidance on occupations (1949 transcripts of the Restaurant Wage Board).

CT DOL WHD adoption of the US DOL guidance is fully supported in the historical record of the
Minimum Fair Wage for Restaurant Occupations.

The 80/20 rule is an enforcement tool adopted by the CT DOL (previously used by US DOL)
under the misconception that Regulation Sec. 31-62-E4 entitled “Diversified employment
within the restaurant industry” was intended to restrict service employees’ performance of
duties. Rather, as will be evident from the history of the restaurant wage order, this
regulation was never intended to dictate the tasks a service employee may perform in order
to continue to be considered a service employee as defined in Sec. 31-62-E2 entitled
“Occupation”.

Sec. 31-62-E4 was never intended to limit the tasks service employees may perform but
rather, to ensure when an employee is employed for “hours” as a service employee and
“hours” as a non-service employee the time so spent must be segregated. Failure of the
employer to do so results in no allowance for gratuities being applied as part of the minimum wage.

Various interpretations have ensued, many of which suggest Section 31-62-E2 entitled “Definition” part (c) “Service Employee means any employee whose duties relate solely to serving of food and/or beverage to patrons seated at tables or booths, and to the performance of duties incidental to such service, and who customarily receive gratuities” should be interpreted as the CT DOL WHD intending in 1949, when the only minimum wage orders were industry specific, to micro-manage the duties a service employee may only perform if the employer is to pay a reduced minimum wage. The arguments have mushroomed into suggested interpretations that a waitress can only perform tasks/duties at her assigned tables or booths; working beyond that footprint or pouring coffee or cutting a garnishment to be used by another server is alleged to be diversified employment requiring full accounting by the employer. Is it even remotely possible that this was the intent of the law when servers were never required to share information on their tips with their employers, time card machines were rarely used let alone requiring employers and employees to account for every task performed?

No. It's important to understand the environment and circumstances that existed at the time the first restaurant wage board was established in accordance with CT statute. It was 1949, a time when only 4 other industry wage orders had been promulgated in CT and at a time when CT did not have a minimum wage for all other employees. The sole purpose of each mandatory wage order was to establish a minimum wage for occupations as well determine the deductions an employer may take in calculating the net wage. As Attorney General Blumenthal stated in his legal opinion to the CT DOL, one must consider the environment at the time the law was created. During 1949 when originally drafted and evident in every CT minimum wage order since then, the purpose of a minimum wage order is to ensure workers have a wage which is a livable wage.

The title of the Order “Minimum Fair Wage Rates for Persons Employed in the Restaurant and Hotel Restaurant Occupations” is the umbrella under which each section must be read.

Sec. 31-62-E4, must be read in light of the scope of the authority vested in the first and second Restaurant Wage Boards, the Commissioners’ directive in promulgating a minimum wage for occupations in the restaurant industry and in consideration of the circumstances and environment at the time the regulation was created. It is not only appropriate, but necessary to consider the purpose or purposes of the regulation in order to determine its meaning. In this instance it is the intent of the Restaurant Wage Boards and Commissioners Egan and Ricciuti, as well as the CT Wage and Hour Division that must be considered.

Participants of the Restaurant Wage Boards included three representatives of employees (labor union representatives and a waitress), three representatives of restaurant employers,
three public participants as well as, members of the CT DOL, inclusive of WHD. While we can not ask the members their intent, we have much stronger evidence of the intent sixty to seventy years ago. This is through contemporaneous transcripts of every meeting and public hearings as well as exhibits referenced by members in arriving at the minimum fair wage for restaurant occupations which has been preserved in the CT State Library.

The restaurant wage board considered CT Cost of Living studies and occupational surveys as explained; “WHD survey in the 19 restaurant and eating and drinking occupations to find out just what the conditions are in regards to meals, wages, tipping, etc.” Commissioner Egan pointed out to the members that the restaurant industry is much different from any other industry previously convened because none of the other industries are identifiable with tipping as much as the restaurant industry.

Throughout the meeting transcripts, hearings and exhibits the focus and distinction had been

- whether there should be two minimum Wage orders; one for the restaurant occupations with a reduced minimum wage for waiter and waitress occupations
- the distinction in tips earned by waitresses serving at tables and booths as opposed to other occupations such as counter-girls where tips are negligible or non-existent (1st wage board conclusion)
- the amount of deductions allowable from the employees’ wages for meals, lodging, and uniforms
- consideration of US DOL guidance and neighboring states restaurant wage orders (source of the language in CT DOL wage order)
- protection for servers who do not earn enough gratuities during the week by having the employer make up the difference between her reduced minimum wage and the restaurant minimum wage
- ensuring that when a waitress is engaged in “diversified employment” she is paid for the “hours” she works in a non-service occupation at the minimum restaurant wage. If an employer fails to keep track of the time in each occupation, no allowance is to be granted for the gratuities from the minimum wage for any of the time worked
- post promulgation of the minimum wage for restaurant occupations, the Commissioner reconvened the board to consider concerns expressed by employers about counter girls who earn significant tips which is comparable to waitresses. Rather than wait six months post enactment to amend the regulation, the board opined that in those instances it could be open to interpretation that their tips warrant reclassification as a service employee.

In contrast, what was not considered or discussed:

- tasks or duties of a waiter or waitress
• concerns by any member of the board or person speaking at the public hearings or corresponding with the board or direction from the Commissioner or CT WHD of any inkling of concern or limitation on duties (tasks) to be performed by a service employee
• Second Wage Board summarily accepted the language of Secs 31-62-E2 Definitions and 31-62-E4 without objection or discussion.

• Whether the proposed regulations should attempt to exhaustively classify each and every restaurant duty as either a “service” or “non-service” duty?
No – It has never been the intent of the drafters of the CT Restaurant Minimum Wage order to micro-manage which duties a service employee may perform or whether he/she should be paid minimum wage for the minutes spent performing tasks. The broad description was not meant to limit what a service employee could perform but to ensure that the customary restaurant practice of performing a sundry of duties, was clear. Throughout the transcripts there are reminders of the importance of ease of administrability of the final wage order. If the micro management was the intent, wouldn’t they have discussed it?

I recommend that CT DOL WHD use the O*Net database which supersedes the US DOL Definition of Occupational Titles used by the US and CT DOL as well as private industries, as well as administerable. This is consistent with the Wage Boards intent and is easily followed by employers and employee. It also allows for the contemporaneous and timely updates to tasks which benefits both parties.

O*Net is not a directive on the tasks to be performed by every server but rather a culmination of tasks as evidenced by the restaurant practices of a diverse industry. One must keep in mind that these regulations apply to restaurants of every size, from the largest of chains to the smallest family owned establishment with very few employees.

It should be noted that there is no other occupation where the CT DOL micro-manages an industry by dictating the minuet duties/tasks of an employee. Consider how many occupations there are and yet no other occupation has such governance. This was never intended. There is not one occupation or employment where the tasks have not varied and evolved over time. The strained interpretation precludes team work and employees from determining the best time to perform side work so as not to interfere with servicing customers. This accounting would require employees to spend additional time on recordkeeping.

It’s been voiced that a service employee should not freshen or clean up the bathroom, yet this is one of the tasks on O*Net. If the argument is that it’s unclean and not safe, one must consider that any employee who uses the facilities is required to wash their hands before returning to work. Nothing less would be expected is someone freshens up a bathroom. If performing this task is offensive, this will be addressed between the employee and employer. Paying the minimum wage without a tip credit for the minutes performing the freshening
doesn’t change the employees view of the assignment. There is no other occupation where the CT DOL gets involved. I had a relative quit from a gym because she was asked to clean up the ladies room...and that is what an employer may face if such tasks are assigned. It is not appropriate for the CT DOL to suggest that one occupation can freshen a bathroom and another may not. In a very small food establishment, this allows the employer and employee to come to a meeting of the minds on duties just as every other occupation handles it.

Whether the segregation of “service” and “non-service” duties is a necessary component of the tip credit analysis in order to comply with the “80/20” rule?

There is extensive dispute and controversy on what is a service and a non-service. Since it was never discussed in any of the transcripts of meetings, exhibits, public hearings and submissions to the CT DOL, there is no source to ascertain how to categorize these. It is argued that an employee performance of a non-service duty that has yet to be defined, warrants a penalty if the employer does not have records to prove the amount of time on such a task. This supports the boards intention of diversified employment being intended for instances where an employee changes his/her occupation for hours.

This cannot be administered by employers and the CT (or US) DOL WHD in this manner. There is no evidence to suggest or imply that the intent of the definition of a service employee was to require such segregation and accounting of time to pay the service employee the minimum wage without credit for gratuities for the arguable items that fall under each category. Every person I have spoken to who has been employed in a restaurant occupation of waiter or waitress disagrees that items should be segregated as such. Side work has always been considered a part of the occupation and varies by the places they have worked. Not one employee wants to keep track of every minute of the day. Aside from being impossible they see it as negatively impacting their ability to provide excellent customer service. An employee would prefer to wait on their customers and perform their side work intermittently when it does not interfere with serving customers. Creating such buckets will be impossible to administer and cause harm to not only the industry but the employees who earn tips.

This was never the original intent of the law nor should it be this way going forward. Service and non-service duties was intended by the drafters to mean service and non-service occupations. Within the testimony of the wage board participant interchanged the words duties and occupations when discussing diversified employment. Everyone of those conversations pertained to instances when the waiter/waitress moves from that occupation to another within the restaurant industry. As a side note, within each wage order is a section that speaks to “employment under other wage orders” See Sec. 31-62-E5 of the Restaurant Wage Order and Sec. 31-62-D10 of the “Minimum Fair Wage Rates for Persons Employed in Mercantile Trade”. Notice how the CT DOL uses the words “employment” and “occupation” interchangeably.
The US DOL is also proposing to amend § 531.56(e) to reflect recent guidance that an employer may take a tip credit for time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with or a reasonable time immediately before or after performing the tipped duties.

The Department has in the past provided enforcement guidance on whether and to what extent an employer can take a tip credit for a tipped employee who is performing non-tipped duties related to the tipped occupation.

Previously, the Department advised that an employer may not take a tip credit for the time an employee spent performing related duties that do not produce tips if that time exceeded 20 percent of the employee’s workweek. However, this policy was difficult for employers to administer and led to confusion, in part because employers lacked guidance to determine whether a particular non-tipped duty is "related" to the tip-producing occupation. One court described it as "infeasible," observing that the policy would "present a discovery nightmare" and require employers to "keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." Pellon v. Bus. Representation Int’l, Inc., 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), aff’d, 291 F. App’x 310 (11th Cir. 2008). The Department believes that such a situation would help neither employer nor employee. See WHD Opinion Letter FLSA 2018-27, 2018 WL 5921455, at *3 (Nov. 8, 2018)

- Are there any “non-service” duties which due to their nature may never be included in the “80/20” rule calculation, i.e., cleaning the bathrooms, shoveling snow, performing janitorial cleanup of offices, etc.?

No. This will invite further litigation. Employer/employee responsibilities will differ based upon the type of restaurant, hours of service, number of employees etc. Job descriptions are general duties and not all inclusive. What employment doesn’t expand beyond the general job description? O*Net provides a reference point and should not be adjusted as it will cause confusion. Employers are cognizant of the inherent limitation (beyond O*Net) that play out in the employment arrangements. At the same time, if an employer and employee agree upon tasks, and the service employee continues to make sufficient tips to make at least the minimum wage for the hours as a server in a week, the CT DOL should not restrict this. If that were the true intent, then shouldn’t the CT DOL limit every occupation other than a janitor from cleaning a bathroom? It’s not the difference in the wage but rather the task employees may be opposed to which is beyond the scope of the CT WHD. Under no instance should an employer and employee be required to analyze time spent in 15 minute intervals.

- Does the definition of “service employee” in Conn. State Agencies Regs. § 31-62-E2(c) need to be modified to accommodate the requirements of the “80/20” rule? If so, how should it be amended?
Yes, the regulations purpose and the intent of the drafters was to distinguish the distinction between an occupation where tips are traditionally earned and sufficient to account for the gap between the restaurant minimum wage and non-service employee who typically earned no or very little in tips.

Moreover, if that regulation is repealed as opposed to clarified (recommended) a new regulation must be adopted to ensure that employees are compensated properly when they are employed in different occupations.

§ 31-62-E2(c) - “Service employee” means any employee whose duties relate solely to the serving of food and/or beverages to patrons seated at tables or booths, and to the performance of duties incidental to such service, and who customarily receives gratuities.

In order to be considered “service” work, must there be a present opportunity to earn a gratuity?

Most of this has been addressed above. It should be noted that this definition was not intended to limit what a server could perform but rather describes that servers perform other duties.

Some have gone so far as to read this regulation to mean that only duties performed at the service employees assigned tables and booths can be considered duties incidental to such service. Arguments are made that service employees cannot work as a team but rather each one is autonomous. If an employee brings a cup of coffee to patrons not assigned to the server, is this a non-service duty? What about when an employee sees a guest waiting to be seated and she brings them to a table that is not assigned to her but another server? What if a server sees an order up and offers to bring it to another servers customer? How could this have been the intent in this day and age, let alone 1949 and 1958?