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VALERIE NETTLETON *v.* C & L DINERS, LLC
(AC 44554)

Bright, C. J., and Alvord and Moll, Js.

Syllabus

Pursuant to statute (§ 31-60 (b)), the Labor Commissioner shall adopt regulations that carry out the purposes of the minimum wage laws, and such regulations shall entitle employers, as part of the minimum fair wage, to a tip credit by including gratuities in an amount equal to a certain percentage of the minimum fair wage per hour for persons who are employed in the restaurant industry and who regularly and customarily receive gratuities.

The plaintiff, who had been employed as a server at a restaurant owned and operated by the defendant, sought damages from the defendant, claiming that it violated state minimum wage laws and regulations by failing to segregate her service and nonservice duties, to record properly the amount it claimed as a tip credit in the wage record, and to have her sign a weekly tip credit statement. At the time the plaintiff was employed by the defendant, the applicable wage regulations (§§ 31-62-E3 and 31-62-E4) provided that, for gratuities to be recognized as part of the minimum fair wage, the employer should record the amount received in gratuities claimed as credit on a weekly basis as a separate item in the wage record and obtain a weekly statement signed by the employee attesting that she had received in gratuities the amount claimed as credit. In addition, although the regulations did not define service or nonservice duties, the allowance for gratuities was to be permitted only for the time an employee worked in service duties, which was required to be segregated and recorded from the employee's time spent working in nonservice duties. The defendant required the plaintiff to perform side work during her shifts as a server, including handling to-go orders and preparing certain foods, and it claimed the tip credit for all of the plaintiff's shifts without ever recording or segregating nonservice work. In her complaint, the plaintiff sought penalty damages pursuant to statute ((Supp. 2016) § 31-68 (a) (1)), which at that time provided that an employee who was paid less than the minimum fair wage could recover twice the amount owed less any payment actually received, unless the employer could establish that it made such underpayment with a good faith belief that it was in full compliance with the law. The defendant asserted good faith as a special defense. Both parties moved for summary judgment on the plaintiff's complaint and the defendant's special defense. Before the trial court issued a decision, the Labor Commissioner, through the Department of Labor, modified the regulations to amend § 31-62-E3, to repeal § 31-62-E4, and to amend another regulation (§ 31-62-E2 (d)) to define "duties incidental to service" as the performance of twenty-three specific tasks. The department also added a regulation (§ 31-62-E3a), known as the 80/20 rule, which provides that an employer is not required to segregate a service employee's time spent performing nonservice duties unless the employee performs such nonservice duties for more than two hours or for more than 20 percent of the employee's shift, whichever is less. Thereafter, the court granted the defendant's request to file a supplemental memorandum of law, in which it claimed that the new regulations applied retroactively. In her reply memorandum, the plaintiff claimed that, as the effective date of the new regulations was after all of the events at issue, the plain language precluded retroactivity. The court subsequently rendered summary judgment for the plaintiff but denied her motion as to penalty damages, granted the defendant's motion as to its good faith defense and awarded damages to the plaintiff. On the defendant's appeal and the plaintiff's cross appeal to this court, *held*:

1. The trial court improperly rendered summary judgment for the plaintiff on her claims that the defendant violated § 31-62-E3 (b) and (c) of the regulations by failing to record on a weekly basis the amount claimed as a credit in the wage record and by failing to have her sign a weekly tip credit statement attesting that she received tips in the amount of

the tip credit claimed by the defendant as such noncompliance did not give rise to a private cause of action under § 31-68 (a): although the defendant did not comply with the record keeping requirements of § 31-62-E3 of the regulations, and compliance with the regulation was a factor reasonably within the control of the defendant, other relevant factors to be considered in making a determination as to whether a provision's requirements are mandatory or directory favored construing the record keeping provisions as directory, including the language of § 31-62-E3, which did not expressly invalidate the taking of a tip credit and was stated in affirmative terms unaccompanied by negative language, the purpose of the requirements, which were designed to secure order, system and dispatch in paying employees and for convenience and not substance, the full regulatory scheme, which did not suggest an intent to impose mandatory requirements as to the format of the required records, and the fact that holding the record keeping requirements to be mandatory would result in a windfall to the plaintiff as she never claimed that she received less than the applicable statutory minimum fair wage during any week in the course of her employment; accordingly, the defendant's noncompliance with the regulation did not invalidate the tip credit and give rise to a private cause of action under § 31-68 (a) (1).

2. The defendant could not prevail on its claim that the trial court incorrectly concluded that the defendant violated § 31-62-E4 of the regulations when that court decided that the plaintiff's side work duties were not incidental or related to her service duties:

a. Because the meaning of "service duties" in § 31-62-E4 was susceptible to more than one reasonable interpretation, this court considered extratextual evidence, including examples from the department's informal guidance, which were instructive, though not dispositive, as to whether a particular task was a "service duty."

b. The definition of "duties incidental to service" in § 31-62-E2 (d) of the regulations did not apply retroactively: the regulatory history, including the department's responses to public comments that it sought to "afford predictability and reduce the need for interpretation" of duties incidental to service, indicated that the department intended to provide a more precise definition of the term; moreover, circumstances surrounding the amendment, including that the new definition was added at the same time that the department formally adopted the 80/20 rule and repealed § 31-62-E4 of the regulations, suggested that the department sought to change rather than clarify existing regulations.

c. The trial court properly determined that there was no genuine issue of material fact as to whether the plaintiff performed certain nonservice duties on a regular basis: although there was a genuine issue of material fact as to whether certain tasks, such as cleaning and restocking, constituted service duties, other tasks, such as assisting take-out customers and preparing food, were nonservice duties as a matter of law, and there was uncontroverted evidence, including deposition testimony from the plaintiff, the defendant's district manager, and the general manager of the restaurant at which the plaintiff worked that the plaintiff regularly performed those duties without the defendant segregating the time she spent on them.

d. Contrary to the defendant's claim, the trial court properly determined that the de minimis doctrine, which allows employers, in recording working time, to disregard insubstantial or insignificant periods of time beyond scheduled working hours that cannot as a practical matter be precisely recorded for payroll purposes, did not apply: the defendant failed to satisfy its burden to come forward with evidence to negate the reasonable inferences to be drawn from the plaintiff's evidence as its bare assertion before the trial court that the amount of time the plaintiff spent on nonservice work was de minimis was insufficient; moreover, the department's regulation provided that, if employers were not able to segregate service from nonservice time, they must pay the full minimum wage for the employee's entire shift, and the undisputed evidence established that the plaintiff performed nonservice duties every shift for her two years of employment with the defendant.

3. The trial court improperly rendered summary judgment for the defendant on its good faith defense: although the defendant claimed that undisputed evidence established that it took steps to learn and comply with the law, including consulting with counsel and relying on guidance from the department allowing it to claim tip credit for nonservice work

performed by the plaintiff for less than 20 percent of her shift, the advice the defendant cited indicated that its counsel informed the defendant that its practices of requiring service employees to prepare food and wait on take-out customers did not comply with regulations, and conflicting evidence existed as to whether the defendant's policies actually complied with the department's 80/20 guidance.

Argued September 15, 2022—officially released June 6, 2023

Procedural History

Action to recover damages for the defendant's alleged violations of minimum wage laws and regulations, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, where the court, *Moukawsher*, *J.*, granted in part the motions for summary judgment filed by the plaintiff and the defendant; subsequently, the court, *Moukawsher*, *J.*, granted the plaintiff's motion for judgment and rendered judgment in accordance with its decision, from which the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

David R. Golder, with whom were *Carolyn A. Trotta*, and, on the brief, *Allison P. Dearington*, for the appellant-cross appellee (defendant).

Richard E. Hayber, with whom were *Michael Petela* and *Thomas Durkin*, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, C. J. Pursuant to Connecticut wage laws, an employer may claim a credit for gratuities received by service employees in the restaurant industry as a percentage of the minimum fair wage (tip credit) it would otherwise be required to pay, and the Labor Commissioner (commissioner), acting through the Department of Labor (department), is tasked with adopting regulations regarding the tip credit. See General Statutes § 31-60 (b);[1] see also Regs., Conn. State Agencies § 31-62-E1 et seq. (March 8, 2015).[2] The defendant, C & L Diners, LLC, appeals, and the plaintiff, Valerie Nettleton, cross appeals, from the judgment of the trial court rendered in favor of the plaintiff on her claims for violations of the minimum wage regulations. The court rendered summary judgment for the plaintiff on her complaint alleging that the defendant violated §§ 31-62-E3 and 31-62-E4 of the Regulations of Connecticut State Agencies and for the defendant on its good faith defense to the plaintiff's claim for penalty damages pursuant to General Statutes (Supp. 2016) § 31-68 (a).[3] On appeal, the defendant claims that the court improperly concluded that (1) § 31-68 (a) provides a private cause of action for a recordkeeping violation under § 31-62-E3 of the regulations and (2) the "side work" performed by the plaintiff while working as a server constituted "nonservice" work under § 31-62-E4 of the regulations. In her cross appeal, the plaintiff claims that the court improperly concluded that there was no genuine issue of material fact that the defendant established its good faith defense. We agree with the defendant's first claim and the plaintiff's claim and, accordingly, reverse in part the judgment of the trial court and remand the matter for further proceedings.[4]

The record reveals the following relevant facts and procedural history. The defendant owns and operates several Denny's restaurants in Connecticut, Massachusetts, and Rhode Island. The plaintiff was employed by the defendant as a server at its restaurant in Westbrook, Connecticut from October 26, 2016, through November 21, 2018. When the plaintiff was hired in 2016, the minimum wage was $9.60 per hour, and she understood that she would earn $6.07 per hour, plus tips. When the minimum wage increased to $10.10 per hour in 2017, the plaintiff earned $6.38 per hour, plus tips.

The defendant uses "DINE," a digital payroll system, to record the number of hours worked by its employees and the amount each server earns in tips; the system automatically tracks each server's credit card tips, but each server must manually enter the amount of cash tips received during his or her shift before leaving for the day. At the end of each server's shift, a manager reviews the credit card and cash tips recorded in the system, pays the server in cash for the credit card tips received, and provides the server with a "tip slip" listing

the amount of tips earned during the shift, which the server signs. The defendant also requires that each server sign a biweekly "Sign Off Report," which provides the hours worked by the employee, including their clock in and clock out times for each day, and the amount earned in cash tips and credit card tips during the pay period.

While working as a server, the plaintiff, in addition to being assigned a section of tables to serve, was assigned "side work" to complete during her shifts, which included rolling silverware; cleaning syrup bottles; sweeping her section; cleaning the juice machine; cleaning the soda machine; cleaning all surfaces in the server aisle; making and preparing coffee; cleaning the coffee pots; filling the jelly and sugar caddies; cleaning glass racks from the dishwasher; refilling to-go cups, lids, and boxes; setting up her section's tables with silverware; filling ketchup bottles; wiping down the windowsills and booths in her section; cleaning and stocking the salad bar; and changing out sanitizer and cloths. The plaintiff was unable to estimate how much time she spent on each individual task. When asked during her deposition if she could estimate how much time she spent performing side work generally, she initially estimated 30 to 40 percent of her shift but then stated: "I can't specify to how much time I spent on any specific side work task because it depends. It would depend on a lot. I know I spent a lot of time performing side work." In addition to side work, the plaintiff also would cash out other servers' customers, seat customers at tables, handle to-go orders, and heat up chocolate lava cake or apple crisp in a microwave. The defendant pays servers at the same rate for their entire shift, including the time spent performing side work.

In November, 2018, the plaintiff initiated the underlying action against the defendant pursuant to § 31-68 (a). Although the plaintiff initially commenced the action as a putative class action on behalf of herself and other servers, she subsequently withdrew the class allegations in September, 2019, and she filed the operative amended complaint in October, 2019. In the first count, the plaintiff alleged that the defendant violated § 31-62-E4 of the regulations by failing to segregate her service and nonservice duties (E4 claim).[5] In the second count, she alleged that the defendant violated § 31-62-E3 (b) and (c) of the regulations by failing to record on a weekly basis the amount claimed as a credit in the wage record and by failing to have her sign a weekly "tip credit statement" attesting that she received tips in the amount of the tip credit claimed by the defendant (E3 claims).[6] The plaintiff also sought penalty damages pursuant to § 31-68 (a) (1). The defendant filed an answer and special defenses, asserting, among other things, that it had a good faith belief that it complied with the applicable law.

In January, 2020, the plaintiff filed a motion for summary judgment as to her complaint and the defendant's good faith defense. The plaintiff also filed a memorandum of law in support of the motion with several exhibits, including copies of the plaintiff's personnel file and wage records and excerpts from transcripts of depositions of herself; Herman Li, the defendant's managing member; Patty Cillo, the defendant's district manager; and Lynda Correira, the general manager of the Westbrook restaurant where the plaintiff worked.

As to her E3 claims, the plaintiff argued that there was no dispute that the defendant failed to record the amount of the tip credit claimed "on a weekly basis as a separate item in the wage record" in violation of § 31-62-E3 (b) of the regulations and failed to obtain "weekly a statement signed by the employee attesting that [she] has received in gratuities the amount claimed as credit for part of the minimum fair wage" in violation of § 31-62-E3 (c) of the regulations. As to her E4 claim, the plaintiff argued that the undisputed evidence established that she performed side work during every shift and that such side work constituted "nonservice work," as it was performed "away from the tables."

In March, 2020, the defendant also moved for summary judgment on the plaintiff's complaint and its good faith defense. As to the E3 claims, the defendant claimed that § 31-60-2 of the Regulations of Connecticut State Agencies[7] "directly contradicts [§] 31-62-E3 (c) and allows compliance if there is 'substantial evidence' that the money and tips claimed was received by the employee, and [the defendant] here has provided more than substantial evidence [establishing that fact] . . . ." (Emphasis omitted.) The defendant also claimed that the plaintiff failed to allege any harm, i.e., unpaid wages, resulting from the alleged recordkeeping violation and that a technical violation of the recordkeeping requirements is not actionable. As to the E4 claim, the defendant argued that the side work performed by the plaintiff was "either service work or 'incidental to' or 'related' to her service [duties]" and, therefore, did not need to be separately recorded to preserve the defendant's ability to claim the tip credit. In the alternative, the defendant claimed that the plaintiff's E4 claim failed because the defendant complied with the department's enforcement policy regarding § 31-62-E4 of the regulations, pursuant to which a tip credit may be taken so long as any nonservice duties account for less than 20 percent of the service employee's total working time during each shift (80/20 rule). The defendant also claimed that "per [department] guidance and Second Circuit law, [any] potential damages [were], at most, de minimis."

The parties filed memoranda in opposition to the motions for summary judgment and reply memoranda in support of their motions, primarily repeating their

respective arguments. The court, *Moukawsher*, *J.*, held a remote hearing on the motions on August 13, 2020, and took the matter under advisement. Before the court issued a decision, the relevant regulations were amended pursuant to legislation passed during a special session on July 22, 2019. See Public Acts, Special Sess., July 22, 2019, No. 19-1 (Spec. Sess. P.A. 19-1). Section 5 of Spec. Sess. P.A. 19-1 provides in relevant part: "[T]he Labor Commissioner shall post on the eRegulations System a notice of intent to adopt regulations . . . concerning employees who perform both service and nonservice duties and allowances for gratuities permitted or applied as part of the minimum fair wage pursuant to section 31-60 of the general statutes. . . . Such notice shall also provide for the repeal of section 31-62-E4 of the regulations of Connecticut state agencies upon the effective date of regulations adopted pursuant to this section. Regulations adopted pursuant to this section shall be: (1) In accordance with the Fair Labor Standards Act, 29 [U.S.C. §] 203 (m) (2) and 29 [C.F.R. §] 531.56 (e), as interpreted by [§] 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,' and (2) effective when posted to the eRegulations System web site by the Secretary of the State."

The department complied with that directive and posted the amended tip credit regulations, effective September 24, 2020. See Regs., Conn. State Agencies § 31-62-E1 et seq. (September 24, 2020). The department repealed § 31-62-E4 of the regulations and added § 31-62-E3a of the regulations, which provides that an employer is not required to segregate a service employee's time spent performing nonservice duties unless the employee performs such nonservice duties for more than two hours or for more than 20 percent of the employee's shift, whichever is less.[8] The department also amended § 31-62-E2 of the regulations, defining "duties incidental to such service" as the performance of twenty-three specific tasks; see Regs., Conn. State Agencies § 31-62-E2 (d) (September 24, 2020); and § 31-62-E3 of the regulations, changing the recordkeeping requirements set forth in subsections (b) and (c) by replacing the weekly reporting of gratuities with reporting "on a daily, weekly, or bi-weekly basis." See Regs., Conn. State Agencies § 31-62-E3 (September 24, 2020).[9]

On September 25, 2020, the defendant sought permission to file a supplemental memorandum of law addressing the impact of the new regulations on the present case, which the court granted after a hearing. In its supplemental memorandum, the defendant claimed that the new regulations applied retroactively because the department simply clarified the prior regulations by specifying what constitutes compliance with the recordkeeping requirements under § 31-62-E3 of the

regulations and by defining "duties incidental to service" as used in the regulations. In her reply memorandum, the plaintiff claimed that, because the effective date of the regulations is September 24, 2020, "[t]he plain language precludes retroactivity . . . ."

The trial court issued its memorandum of decision on December 11, 2020, rendering summary judgment in favor of the plaintiff, but denying her motion as to penalty damages, and denying the defendant's motion as to liability, but granting its motion as to its good faith defense. The court first determined that the defendant's records did not account for the taking of the tip credit on a weekly basis, as required by § 31-62-E3 of the regulations as it was written at all relevant times and, therefore, that the defendant was not allowed to take the tip credit. The court reasoned that "the regulations require employers to keep two records before they may take a tip credit against the mandatory minimum wage: 'record on a weekly basis as a separate item in the wage record' . . . 'the amount received in gratuities claimed as a credit for part of the minimum fair wage' [and] 'obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage.'

"Unfortunately, [although] [the defendant] keeps tip records, it doesn't keep the required tip records. First, it has a system called 'DINE' that requires servers each day to report cash tips and verify tips charged by credit card. If the system were only cumulative it might meet the requirement because employees could see on this wage record on a weekly basis the tips claimed for the credit. . . . Second, [the defendant's] employees are presented biweekly with a 'Sign Off Report.' It lists the biweekly total cash and credit card tips. If it showed a weekly breakdown, it too might comply. But it doesn't.

"[The defendant] claims that not complying with the words of the regulation shouldn't matter. It says that what matters is that it can show [that the plaintiff], between tips and employer payments, always earned at least the minimum wage, and that ensuring she gets the minimum wage is what the regulations are about. Put another way, [the plaintiff] wasn't harmed, so she can't complain. If only the regulations said this, [the defendant] would be right. But they don't. They don't say to combine what [the defendant] paid with what tips [the plaintiff] received to ensure that the combination of both provided [her] with the minimum wage. They do not turn on whether [the plaintiff] was 'harmed.'

"Instead, § 31-62-E3 [of the regulations] says that: 'Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . .' This means that when the provisions aren't complied with, the gratuities aren't recognized at all. The server keeps the gratuities, and the minimum wage must be paid to the server

without regard to the gratuities.

"[The defendant] claims the regulation at § 31-60-2 should be read as relieving [it] of this mechanism by allowing it to substitute 'substantial evidence' of compliance. But . . . this section also says that [the defendant] must additionally comply with all of the other regulations, one of which—§ 31-62-E3—expressly and without qualification conditions its right to take the credit on bookkeeping compliance. . . .

"Contrary to [the defendant's] thinking, the law is mechanical. The court is given no discretion. If [the defendant] failed to keep the required records, it wasn't allowed to take the tip credit. While [the defendant] thinks this is pointless, the regulation can easily be seen as imposing for enforcement purposes a simple weekly record that the employee, the employer, the [department], and the court can all look at to see if the credit taken equals the tips earned. It imposes a stiff if simple penalty. The court hasn't the power to change it.

"While both sides have spent time discussing differing views in other nonbinding court decisions, reviewing guidance from the department, and considering agency practices, none of these things matter. When the words in the regulations unambiguously require weekly records that must be the court's sole focus."

The court next determined that the side work performed by the plaintiff was nonservice work and that, because the defendant failed to segregate the time spent on side work from the time spent on service duties, the defendant improperly claimed the tip credit pursuant to § 31-62-E4 of the regulations. Finally, the court concluded that the defendant's "undisputed activities, in light of the circumstances prevailing, establish[ed] that a reasonable fact finder could only conclude that it believed in good faith that it was complying with the law." Accordingly, the court granted the plaintiff's motion for summary judgment as to liability on both counts of her complaint but denied her motion as to penalty damages pursuant to § 31-68 (a) (1) (B). The court also denied the defendant's motion for summary judgment as to liability but granted its motion as to its good faith defense.

On January 4, 2021, the plaintiff moved for judgment in accordance with the court's decision in the amount of $10,437.12, which included $9137.33 in damages and $1299.79 in interest calculated at 4.5 percent per annum pursuant to General Statutes § 37-3a.[10] The court granted the motion and rendered judgment for the plaintiff in that amount on February 10, 2021. This appeal and cross appeal followed. Additional facts will be set forth as necessary.

Before addressing the parties' claims, we first set forth our standard of review. "Because the decision to grant a motion for summary judgment is a question of

law, our review of the trial court's decision is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 709, 159 A.3d 1149 (2017), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018).

I

The defendant first claims that the court improperly rendered summary judgment for the plaintiff on her E3 claims. Specifically, the defendant claims that the court misconstrued the relevant statutes and regulations in concluding that § 31-68 (a) authorized a private cause of action for a recordkeeping violation under § 31-62-E3 of the regulations when there is no attendant failure to pay wages. The defendant argues that § 31-62-E3 of the regulations is directory, not mandatory, such that a purely technical violation of the regulation does not invalidate the tip credit and give rise to a private cause of action under § 31-68 (a).[11] For her part, the plaintiff claims that the court properly determined that compliance with the regulations is a condition precedent to taking the tip credit and that an employer's failure to comply is therefore actionable under § 31-68 (a). We agree with the defendant.

The defendant's claim requires that we construe the wage statutes and regulations. "Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . This principle applies with even greater force to an agency's interpretation of its own duly adopted regulations." (Citations omitted; internal quotation marks omitted.) *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 200 Conn. 489, 496–97, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S. Ct. 781, 93 L. Ed. 2d 819 (1986). Nevertheless, "[b]ecause we do not have the benefit of either a prior judicial or a time-tested agency construction of the applicable provisions, we construe the statutes and regulations in a plenary fashion. . . . Moreover, because regulations have the same force and effect as statutes, we interpret both [in accordance with General Statutes § 1-2z]." (Citation omitted; footnote omitted.) *Williams* v. *General Nutrition Centers, Inc.*, 326 Conn. 651, 657, 166 A.3d 625 (2017). Section 1-2z provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratex-

tual evidence of the meaning of the statute shall not be considered." In addition, "[w]e also note that the minimum wage law should receive a liberal construction in order that it may accomplish its purpose." (Internal quotat617ztion marks omitted.) *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 259, 253 A.3d 13 (2020).

Before turning to the regulatory language, we first set forth the following background regarding the tip credit regulations. "In 1958 . . . the department issued a revised wage order for restaurant employees that for the first time recognized that gratuities could count toward the minimum wage under certain circumstances. . . . The 1958 wage order contained definitions of service and nonservice restaurant employees . . . that are substantially identical to those presently contained in § 31-62-E2 (c) and (d) of the Regulations of Connecticut State Agencies. . . . It also provided that [g]ratuities received *by a service employee* may be allowed as part of the minimum fair wage . . . .

"[I]n 1980, the legislature replaced the discretionary phrase [the commissioner] *may* recognize, as part of the minimum fair wage, gratuities . . . for persons employed in the hotel and restaurant industry . . . General Statutes (Rev. to 1979) § 31-60 (b); with the mandatory language [the commissioner] *shall* recognize . . . ." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of Labor*, 325 Conn. 72, 82–83, 155 A.3d 1255 (2017).

Currently, "[§] 31-60 (b) begins by authorizing the commissioner to adopt such regulations . . . as may be appropriate to carry out the purposes of [the minimum wage statutes]. It concludes by providing that [t]he commissioner may provide, in such regulations, modifications of the minimum fair wage herein established . . . for such special cases or classes of cases as the commissioner finds appropriate to prevent curtailment of employment opportunities, avoid undue hardship and safeguard the minimum fair wage herein established." (Internal quotation marks omitted.) Id., 89. Thus, "the statutory language reasonably can be read to delegate to the department the authority to carve out exceptions to the tip credit in order to accomplish the remedial purpose of the minimum wage law, which is to require the payment of fair and just wages." (Internal quotation marks omitted.) Id., 88–89.

We now turn to the regulations that were in effect when the plaintiff was employed by the defendant. Section 31-62-E3 of the regulations provided in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record even though payment

is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage. Such statement shall contain the week ending date of the payroll week for which credit is claimed. Gratuities received in excess of twenty-three percent of the minimum fair wage . . . per hour, need not be reported or recorded for the purpose of this regulation."

The plaintiff brought the underlying action pursuant to § 31-68 (a), alleging that, because the defendant failed to maintain records pursuant to § 31-62-E3 of the regulations, the defendant was not entitled to claim the tip credit and, therefore, she was not paid the full minimum fair wage to which she was entitled under the wage order. The defendant concedes that it did not maintain the precise records required under the regulations but contends that § 31-62-E3 of the regulations is directory and, therefore, its noncompliance does not invalidate the tip credit and give rise to a private cause of action.[12]

Although the regulation uses the term "shall," our Supreme Court has explained "that the use of the word shall, though significant, does not invariably create a mandatory duty. . . . Indeed, [the court] frequently ha[s] found statutory duties to be directory, notwithstanding the legislature's use of facially obligatory language such as shall or must." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757, 104 A.3d 713 (2014); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 597, 181 A.3d 550 (2018) ("that the language of the rule only uses the word 'shall,' and does *not* also contain the 'more permissive' word 'may,' further suggests that the use of the word 'shall' therein is directory" (emphasis in original)).

Thus, in determining whether a provision's requirements are mandatory or directory, we look to other relevant considerations, which include: "(1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any

legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance. . . .

"The first two factors are addressed to the statutory text. A reliable guide in determining whether a statutory provision is . . . mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision. . . . By contrast, where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions. . . . Furthermore, a requirement stated in affirmative terms unaccompanied by negative words . . . generally is not viewed as mandatory." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 758–59.

Section 31-62-E3 of the regulations does not expressly invalidate the taking of the tip credit, and it is stated in affirmative terms unaccompanied by negative language: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . ." In contrast, § 31-62-E4 of the regulations is stated in negative terms and expressly invalidates actions that fail to comply with its requirements: "If an employee performs both service and nonservice duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, *no allowances for gratuities may be applied as part of the minimum fair wage*." (Emphasis added.) The juxtaposition of these provisions in consecutive regulations concerning the tip credit favors construing § 31-62-E3's recordkeeping requirements as directory, as "[i]t is a well established rule of statutory interpretation that, when a statute concerning one subject contains a particular provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *D'Angelo Development & Construction Co.* v. *Cordovano*, 278 Conn. 237, 246, 897 A.2d 81 (2006).

Further, as noted by the defendant, the statutory and regulatory scheme sets forth a specific penalty for the failure to maintain the required records, which also supports construing the recordkeeping requirements in § 31-62-E3 of the regulations as directory. Specifically, General Statutes § 31-69 (c) provides for a civil penalty for an employer's failure "to keep the records required under this part or by regulation made in accordance with this part" and § 31-62-E15 of the Regulations of Connecticut State Agencies provides that an employer

who fails to keep the required records "shall be subject to the penalty provided in section 31-69 of the Connecticut General Statutes."

The plaintiff, however, contends that the penalty referenced in § 31-62-E15 of the regulations applies only to the recordkeeping requirement of § 31-62-E14 of the Regulations of Connecticut State Agencies—not § 31-62-E3—and that § 31-62-E15 "nowhere indicates that it is the exclusive penalty, consequence or remedy." Therefore, according to the plaintiff, "[t]he regulations merely add a penalty as an additional consequence of an employer's failure to maintain employment records." We are not persuaded by the plaintiff's arguments.

First, § 31-62-E14 of the regulations specifically references the records required to be kept under § 31-62-E3 of the regulations. See Regs., Conn. State Agencies § 31-62-E14 (a) ("'true and accurate records' means accurate legible records for each employee showing . . . (10) separate itemization on payroll records of each allowance (meals, lodging, *gratuities*) used as part of the minimum fair wage [and] (11) statements signed by employee in accordance with section 31-62-E3 when credit for gratuities is claimed as part of minimum fair wage" (emphasis added)). Second, although there is no indication that the penalty imposed under § 31-69 and referenced in § 31-62-E15 of the regulations is the exclusive remedy for a violation of the recordkeeping provisions in § 31-62-E3 of the regulations, "where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions." *Electrical Contractors, Inc.* v. *Insurance Co. of the State of Pennsylvania*, supra, 314 Conn. 759. Accordingly, we conclude that the first two factors favor construing the recordkeeping provisions in § 31-62-E3 of the regulations as directory.

Turning to the third factor, whether the requirements at issue relate to a matter of substance or one of convenience, our Supreme Court has explained that the focus of this inquiry is "whether the prescribed mode of action is the essence of the thing to be accomplished . . . . If it is a matter of substance, the statutory provision is [generally held to be] mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory . . . ." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 598.

The defendant argues that "[t]he recordkeeping regulations regard . . . matters of convenience and order (i.e., tracking the payment of wages and tips), not the substance or essence of the matter (i.e., the actual payment of wages and tips)." The plaintiff contends that "[t]he essence of [§ 31-62-E3 of the regulations] is to

ensure that restaurants do not take a tip credit from the weekly tips of its servers without involving those servers in a procedure that ensures that enough tips were earned to cover the tip credit claimed. If restaurants choose to disregard these procedures, then they owe the full minimum wage. If they pay less, then they may be sued for damages." We agree with the defendant.

As our Supreme Court has explained, pursuant to § 31-60 (b), the department has "the authority to carve out exceptions to the tip credit in order to accomplish the remedial purpose of the minimum wage law, which is to require the payment of fair and just wages." (Internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 88–89. The department issued a wage order for § 31-62-E1 of the Regulations of Connecticut State Agencies that provides in relevant part: "Wage Order: (a) Rate: The following minimum wages are ordered . . . $9.60 per hour on 1-1-16; and $10.10 per hour on 1-1-17 except those persons employed under this wage order as service employees (waitpersons) shall be paid . . . $6.07 per hour plus gratuities on 1-1-16; and $6.38 per hour and gratuities on 1-1-17. . . ."[13] To ensure that service employees are properly compensated in accordance with § 31-62-E1 of the regulations, subsections (b) and (c) of § 31-62-E3 of the regulations required that "*the amount received in gratuities claimed as credit for part of the minimum fair wage* shall be recorded on a weekly basis as a separate item in the wage record" and that "each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities *the amount claimed as credit for part of the minimum fair wage*." (Emphasis added.)

The purpose of these provisions is to ensure that service employees receive the amounts claimed as a credit toward the minimum fair wage by their employers. As the plaintiff stated in her memorandum of law in support of her motion for summary judgment, the rule requiring a signed statement "ensures that servers are not underpaid wages." To be sure, an employee's acknowledgment that she has received the amount claimed as the tip credit is a matter of substance. At the same time, however, the requirements that the acknowledgment be written, as opposed to digital, and that it be done weekly, as opposed to daily, are "designed to secure order, system and dispatch in the proceedings . . . ." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 598. For this reason, the form in which the records are kept is not "the essence of the thing to be accomplished"; (internal quotation marks omitted) id.; but, rather, a means to accomplish the end, which is "payment of fair and just wages." (Internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of*

Labor, supra, 325 Conn. 89; see also *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 725, 941 A.2d 309 (2008) ("the wage statutes were designed to [effectuate] the statutory policies of compensating employees and deterring employers from failing to pay wages" (internal quotation marks omitted)). Accordingly, this factor also supports the defendant's construction of the regulations.

As to the fourth factor, whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme demonstrate an intent to impose a mandatory requirement, we note that there is limited regulatory history regarding § 31-62-E3 of the regulations. Nevertheless, given that the regulations reference the penalty provision in § 31-69 for failure to maintain the required records and that, unlike § 31-62-E4 of the regulations, § 31-62-E3 does not expressly invalidate actions that fail to comply with its requirements, we conclude that the full regulatory scheme does not suggest an intent to impose mandatory requirements as to the format of the required records.

As to the fifth factor, whether holding the recordkeeping requirements to be mandatory would result in an unjust windfall for the party seeking to enforce the duty, it bears emphasis that the plaintiff has not alleged that she earned less in gratuities than the amount claimed as a credit by the defendant in any given week. Despite the absence of such an allegation, the plaintiff would be entitled to more than $10,000 in damages and interest simply because the defendant did not maintain the required records on a weekly basis, rather than on the daily and biweekly bases in which they were kept. Thus, holding the recordkeeping requirements under § 31-62-E3 (b) and (c) of the regulations to be mandatory would result in an unjust windfall for the plaintiff. Our Supreme Court's decision in *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008), on which the defendant relies, is instructive on this point.

In *Weems*, the defendant employer claimed that, under General Statutes § 31-71e, which provides that "[n]o employer may withhold or divert any portion of an employee's wages unless . . . (2) the employer has written authorization from the employee for deductions on a form approved by the commissioner" the requirement that an employer use a form approved by the commissioner was directory "because it is drafted in affirmative, rather than negative terms, and does not explicitly provide a penalty or a right of action for noncompliance, or provide guidance for the department's decision to approve or deny a particular form." Id., 789.

Our Supreme Court agreed that the requirement was directory, reasoning that the statute did not "expressly invalidate deductions made on unapproved forms, and

the only penalty provision that arguably [was] implicated by the failure to seek department approval . . . [did] not invalidate the transaction, but provides merely for fines, a term of imprisonment or both. . . . Moreover . . . an interpretation of § 31-71e requiring the automatic invalidation and refund of *any* wage deductions made on unapproved forms conceivably could result in unwarranted windfalls for employees . . . . Although it is well established that the wage collection statutes are remedial in nature, namely, intended to prevent the employer from taking advantage of the legal agreement that exists between the employer and the employee . . . and should be construed liberally in the employees' favor . . . that construction does not require windfalls for technical violations." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 792–94.

The plaintiff contends that *Weems* is distinguishable from the present case because compliance with the recordkeeping requirements in § 31-62-E3 of the regulations is a condition precedent to taking the tip credit. In support of her contention, the plaintiff relies on *Engle* v. *Personnel Appeal Board*, 175 Conn. 127, 394 A.2d 731 (1978).

Notably, the plaintiffs in *Weems* also relied on *Engle* in support of their argument that § 31-71e's requirement that an employer use a form approved by the commissioner was mandatory. See *Weems* v. *Citigroup, Inc.*, supra, 289 Conn. 793 n.26. Our Supreme Court, however, "disagree[d] with the plaintiffs' reliance on *Engle* v. *Personnel Appeal Board*, supra, 175 Conn. 129–30, in which [the] court concluded that, under General Statutes § 5-209, the approval of the state personnel commissioner was mandatory before a state employee could be compensated at a higher rate for performing tasks attendant to a higher job classification for more than sixty days. The statutory language in question provided: Any state employee who is assigned, by his appointing authority, duties and responsibilities of a job classification higher than the class in which he is placed, on a continuous basis for a period of more than sixty working days, shall be compensated for such time in excess of sixty days at a rate in the higher class which shall not be less than one step in that class above his existing rate of pay, *provided such payment shall be approved by the personnel commissioner*. Service in a higher classification under this section shall not constitute permanent status in such class. . . . [In *Engle*, our Supreme Court] rejected a state employee's claim that the [personnel] commissioner's approval was not necessary for her to be paid at a higher level, stating that [a]dopting the plaintiff's position would effectively eliminate the proviso from the statute. The statute expressly makes payments contingent on approval by the personnel commissioner; if [that] commissioner is powerless to withhold approval once the work has been per-

formed, then the proviso is meaningless. . . . The court further noted that the proviso was important to the essence of the civil service statutes, which were intended to give the personnel commissioner . . . broad powers to administer the state personnel system and was to supervise carefully any changes in employee placement, as well as to limit provisional and emergency appointments. . . . Requiring the approval of the personnel commission avoided the possibility of all appointing authorities from using § 5-209 to circumvent other requirements of the State Personnel Act, and perhaps even subvert the goals of the merit system." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, supra, 793–94 n.26.

Our Supreme Court concluded that the facts involved in *Engle* were distinguishable from those involved in *Weems* for two reasons. Id., 794 n.26. "First, § 31-71e (2) lacks the explicit proviso language of § 5-209. Second, the essence of the wage statutes is to protect employees from being taken advantage of by their employers. . . . If the employee has knowingly and voluntarily consented to the deduction at issue, and even benefited from it, then invalidating deductions because of a technical violation does not further the purpose of the wage collection statutes." (Citation omitted.) Id.

The same reasoning applies in the present case. At the end of each shift, the defendant required each server to record and verify in its digital payroll system, which automatically tracked the credit card tips received by each server, the amount they received in tips; the server entered any cash tips received and confirmed the amount of credit card tips received. The servers also signed a biweekly report stating the amount of tips the server earned, listing separately the credit card and cash tips. Thus, the plaintiff confirmed the amount she received in tips at the end of each shift and at the end of each pay period. Significantly, she does not allege in her complaint and has never claimed that the defendant claimed a tip credit in an amount greater than the amount she received in tips in any week. Nor has she ever claimed that she did not receive the applicable statutory minimum fair wage during any week in the course of her employment. Accordingly, as in *Weems*, the plaintiff here "knowingly and voluntarily consented to the deduction at issue" and, therefore, invalidating those deductions due to a technical violation of the regulation would not further the purpose of the wage order. Id.

Finally, the sixth factor favors the plaintiff because compliance is reasonably within the control of the defendant, as the defendant controls its recordkeeping practices and the format of its records. Nevertheless, this is the only factor that does not support the defen-

dant's construction of the regulation, and we are not persuaded that this factor outweighs the other factors. See *Doe* v. *West Hartford*, 328 Conn. 172, 186–87, 177 A.3d 1128 (2018) ("although we agree with the defendants that ensuring that a marshal fulfills the statutory endorsement requirement is, to some degree, within the control of a plaintiff, we nevertheless disagree that this circumstance is enough to overcome the other considerations weighing in favor of a conclusion that the endorsement requirement is directive").

Thus, in balancing all the relevant factors, we conclude that the recordkeeping requirements in § 31-62-E3 (b) and (c) of the regulations are directory and, therefore, that the defendant's noncompliance with those requirements does not invalidate the tip credit and does not give rise to a private cause of action. Accordingly, the court improperly rendered summary judgment for the plaintiff on her E3 claims.[14]

II

The defendant next claims that the court improperly rendered summary judgment for the plaintiff on her E4 claim. We are not persuaded.

In support of her motion for summary judgment on her E4 claim, the plaintiff relied on two of the department's publications regarding the tip credit in the restaurant industry: a 2015 booklet published by the department; see Conn. Dept. of Labor, Wage and Workplace Standards Division, "Basic Guide to Wage and Hour and Related Laws Regarding the Restaurant Industry" (2015) (Guide); and a printout from the department's website dated August 31, 2018, titled "Gratuities in the Restaurant Industry" (department's website).[15]

The Guide discusses the phrases "duties relating solely to the service of food and/or beverages" and "patrons seated at tables or booths" used in the definition of "service employee" in § 31-62-E2 (c) of the regulations. As to the duties relating solely to service, the Guide provides that "[e]ach task performed by a [server] must be analyzed to establish whether . . . it can be classified as 'service' to determine if a tip credit is appropriate. This means that a tip credit . . . can be taken only for [servers] only during the time for which they are actually serving patrons at tables or booths, or performing closely related duties, and when they are receiving gratuities. Examples of tasks which are classified as service duties (tip credit appropriate): Taking food and beverage orders from patrons at tables or booths; [c]onveying the order to the kitchen or bar; [p]icking the order up and delivering it to the patron; [p]rocessing the patron's payment for the meal to a register or cashier; [c]learing the tables/booths when the patron leaves; [c]leaning the immediate service area; [r]esetting the table/booths for new patrons; [r]efilling condiment containers for the service person's own sta-

tion; [w]rapping silverware in napkins for the service person's own station; [v]acuuming/sweeping the floor surrounding the service person's own station; [f]illing a patron's drink order from a soft drink dispenser or coffee station; [c]utting a slice from a pie in a dessert display case, placing it on a plate, and bringing it to a patron; [and] [b]ringing dirty dishes and silverware to a dishwashing area. . . . Examples of tasks which are [nonservice] duties (tip credit not appropriate): General cleaning of the establishment; [p]reparing food for patrons (cooking, peeling, cutting, mixing, etc.); [o]perating a dishwashing machine; [s]hoveling snow from a sidewalk; [s]weeping the parking lot; [and] [w]ashing windows. The Restaurant Wage Order requires that the tip credit can be taken only while the employee performs service duties, or functions incidental to service duties." Guide, supra, pp. 10–12.

As to the phrase "patrons seated at tables or booths," the Guide provides in relevant part: "Restaurants having a take-out section in addition to table/booth service are not entitled to a tip credit on employees who staff the take-out area, or on those who staff the take-out area in addition to serving patrons at tables and booths." Id., 13.

In addition, the Guide set forth the department's enforcement policy regarding § 31-62-E4 of the regulations, stating: "Since classifying specific duties (service versus [nonservice]) for purposes of having the employee segregate them on a time record is often difficult, the division has initiated an enforcement policy which will make detailed classification largely moot. We will allow use of a tip credit if these [nonservice] (and/or questionable service-related) duties comprise 20 [percent] or less of the service person's total working time on a particular shift. As long as these [nonservice] (and/or questionable service-related) tasks are only occasionally performed and are of short duration, the employer need not require the employee to segregate them on the time record or pay the full minimum wage while they are being executed. If it is reasonably clear that the service person spent 80 [percent or more] of his or her time performing service and incidental duties on a given shift, use of the tip credit will not be challenged." (Emphasis omitted.) Id. The Guide further explained: "You should note that this 20 [percent] enforcement policy is not intended to allow an employer to assign a tip credit service person to do [a nonservice] job such as dishwashing or food preparation for 20 [percent] of his or her work time. It is solely intended as a mechanism to provide some protection from a complaint in which an employee seeks payment of the full minimum wage for an entire shift because he or she performed a [nonservice] task for several minutes. The 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a ser-

vice shift.

"An employer is still required to pay the full minimum wage when a [normally] service employee, either by design or change, performs less than the required 80 [percent or more] service duties on a shift. Further, if a [normally] service employee is assigned to perform work which would usually be performed by a [nonservice] employee, the time record must reflect the change in assignment and the full minimum wage must be paid." Id.

The department's website also provided examples of " '[s]ervice' (and closely related) duties," which included the following six tasks: "[t]aking food and beverage orders from patrons"; "[b]ringing the orders to the table or booth"; "[c]leaning up the immediate area of service"; "[f]illing the condiment containers at the tables or booths"; "[v]acuuming their own immediate service area"; and "[r]eplacing the table setting at their own service area." The website also listed the following eight nonservice duties: "[c]leaning the rest rooms"; "[p]reparing food"; "[w]ashing dishes"; "[h]ost or [h]ostess work (Note: each waiter or waitress may show patrons to their seats within their own service area without losing their 'service' classification, but if a waiter or waitress shows all patrons to their seats, there can be no tip credit taken on that employee and the full minimum wage must be paid)"; "[g]eneral set-up work before the restaurant opens"; "[k]itchen clean-up"; "[g]eneral cleaning work"; and "[w]aiting on take-out customers." (Emphasis omitted.)

The plaintiff claimed that, based on the definition of "service employee" in § 31-62-E2 (c) of the regulations and the examples provided by the department in the Guide and on its website, for a task "to be a 'service duty' it must be performed in the 'immediate service area,' otherwise it is a 'nonservice' duty." Relying on the lists of side work produced by the defendant during discovery, the deposition testimony of the defendant's managers, and her own deposition testimony, the plaintiff claimed that "there [was] no factual dispute that this . . . side work was required to be performed and was performed away from the tables . . . ." She noted that her "nonservice duties" included taking "to-go orders, rolling a full bucket of silverware, food prep, cleaning the restaurant, cleaning the kitchen, cleaning and restocking the back of the restaurant, preparing salads, making milkshakes, smoothies, fruit bowls, desserts, cleaning and filling syrup bottles, cleaning the juice machine, cleaning the soda machine, cleaning all surfaces in the server aisle, making coffee, cleaning and stocking the coffee area, transporting glass racks, filling the sugar caddy in the back of the [restaurant], stocking to-go area, hosting, being a cashier, cleaning and stocking butter bar station, cleaning insides [and] outsides of four refrigerators. . . . There is no issue of fact as

to whether these duties were performed, and per our jurisprudence they are not 'incidental to service' because such a broad interpretation of that phrase would swallow the rule."

Conversely, in support of its motion for summary judgment on this claim, the defendant argued that all the side work duties performed by the plaintiff were in accord with the tasks identified as "service duties" in the Guide. The defendant argued that "it is clear that all of the duties the plaintiff listed constitute side work which was absolutely incidental to her service work. [Her] customers sat in debris-free chairs because she kept her section clean; they had jelly for their toast and sugar for their coffees because [she] kept the service caddies full; they ate their eggs and pancakes (which the plaintiff did not cook) with knives and forks because the plaintiff rolled silverware for her tables. None of these duties . . . actually constitutes 'nonservice work' such that a server should not perform it." Notably, although the plaintiff identified handling "to-go orders" as a nonservice duty, the defendant did not address that task in its analysis.[16] In the alternative, the defendant argued that the 80/20 rule as stated in the department's enforcement policy should apply and that any potential damages were de minimis.

Although both parties relied on the department's guidance as to the meaning of service and nonservice duties, the court explained that it agreed "that what appears there seems [to be] a sensible and useful reference, but it does not have the force of law. Instead . . . the plain meaning of the words do."

Prior to 2020, § 31-62-E4 of the regulations provided: "If an employee performs both service and nonservice duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and nonservice duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

Also prior to 2020, the relevant regulations; Regs., Conn. State Agencies § 31-62-E1 et seq. (March 8, 2015); did not define service or nonservice duties. Section 31-62-E2 (c) and (d) of the regulations, however, did define service and nonservice employees as follows: "(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. . . . (d) 'Nonservice employee' means an employee other than a service employee, as herein defined. A nonservice employee includes, but is not limited to, countergirls, counterwaitresses, count-

ermen, counterwaiters and those employees serving food or beverage to patrons at tables or booths and who do not customarily receive gratuities as defined above."

Relying on the plain meaning, the court reasoned that "[n]onservice is obviously the opposite of service. Service plainly involves serving. It is equally plain that serving in a restaurant involves bringing food and drink to customers, including the small things they might consume such as condiments and the like. Things incidental to serving food and drink plainly include finding out what things the customers want to eat and drink, getting customers the things they might eat and drink with, and maintaining a place—a table and its immediate environs—where they might eat and drink.

"These things are plainly part of service, and service is important to the tip credit. The tip credit parameters make sense because they relate to things people are most likely to tip a server for. People are most likely to tip servers for good service. Servers' work doing other things might be useful to keep a restaurant going, but they aren't part of serving. Because they are not part of serving, customers are less likely to focus their largess on the server if—for instance—they find a clean bathroom or eat in a restaurant with a clean kitchen, clean windows, well-washed dishes and tasty food. The [department] sensibly concluded that arranging for things like these is nonservice work not incidental to service. For our purposes here we can call it side work.

"The evidence shows that [the plaintiff] did side work. Undisputed evidence shows that [the plaintiff], like other employees, was required to clean portions of the restaurants away from the tables, prepare food, act as a cashier, act as hostess; stockpile napkins, coffee, condiments, and table settings; fill ice machines and many other activities. The trouble is we don't know how long any of this took. Some twenty-four pages of lists of side work were produced, but there was no record of the time [the plaintiff] or anyone else spent at them. [The defendant] suggests that it would be absurd to require the segregation of a tiny amount of time used for this side work, but [the defendant] hasn't shown that it *was* a tiny amount of time, and [the plaintiff] lists substantial side work activities she regularly performed. We don't know how substantial because [the defendant] has never done anything to quantify or limit the work in such a way that a court might come to its aid and say the work was so insubstantial as to push the requirement that the hours be segregated into absurdity.

"And we certainly can't hold that [the defendant] is saved by its own failure to keep the required records. Our Supreme Court has already disapproved of this illogic in its 2003 decision in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, [265 Conn. 210, 239, 828 A.2d 64 (2003)].

According to *Schoonmaker*, in cases where employers haven't kept legally required wage-related records, employees only have to show they have in fact performed work for which [they were] improperly compensated and [produce] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Once they have done that . . . [t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to provide it, the court may then award damages to the employee, even though the result be only approximate.

"[The defendant] makes much of recent changes in the law in [§ 31-62-E3a of the] Regulations of Connecticut State Agencies (effective September 24, 2020). These regulations adopt a rule that allows an employer to take a tip credit so long as the side work doesn't exceed 20 [percent] of the employee's total time. While some objective guidance is likely helpful in this area, nothing about the enactment of the new regulations can change the plain language of the old regulations. . . .

"[The defendant] says the court should apply the new regulations retroactively. This the court clearly cannot do. These regulations do not clarify the substantive rules. They change them. As our Supreme Court held in . . . *Carr* v. *Planning & Zoning Commission*, [273 Conn. 573, 595–96, 872 A.2d 385 (2005)], changes in the substantive law, unlike changes in court procedure, may not be retroactively applied without offending the constitution.

"[The defendant] in this and much of its other arguments sounds the same theme. The regulations are too mechanical. The penalties are too harsh. The [department] has never enforced them in the way sought here. So, in [the defendant's] view the court should find some rationale to avoid what the lawmakers said and decide for itself what is just. But the court can't do that. A rule maker with legislative authority made the judgment calls reflected in the law. That rule maker has now adjusted them. The court is obliged to respect that power going forward, but it must apply to the past the rules of the past." (Emphasis in original; footnotes omitted; internal quotation marks omitted.)

On appeal, the defendant claims that the court improperly decided as a matter of law that the plaintiff's side work duties were not incidental to or related to her service duties. It argues that the court "failed to articulate which side work duties were nonservice work and instead wrongly conflated the two concepts, presuming that any duty labeled as side work was nonservice work." (Internal quotation marks omitted.) The plaintiff responds that the court properly defined nonservice work and determined that the side work

assigned by the defendant was not service work. She argues that "[i]t is no failure of the court that it did not itemize each task that [the] defendant calls side work and rule which are service and which are nonservice. It ruled that nonservice work was performed by [the plaintiff] and paid at the service task rate. That finding is enough to establish liability under [§ 31-62-E4 of the regulations]." We conclude that the undisputed evidence supports the court's conclusion that the defendant violated § 31-62-E4 of the regulations.

A

As an initial matter, we disagree with the court's conclusion that the "plain meaning" of § 31-62-E4 of the regulations controlled the issue. "In seeking to determine [the] meaning [of a statute or regulation, we] . . . first . . . consider the text of the [regulation] . . . itself and its relationship to other [regulations] . . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citation omitted; internal quotation marks omitted.) *MSW Associates, LLC* v. *Planning & Zoning Dept.*, 202 Conn. App. 707, 725–26, 246 A.3d 1064, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

As previously noted in this opinion, § 31-62-E3 (c) of the regulations defines "service employee" as "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 . . . ." Thus, a service duty is any duty that either "relates solely to" or is "incidental to" the serving of food or drinks to customers "seated at tables or booths."

The defendant relies on the dictionary definition of "incidental," i.e., "happening as a result of or in connection with something more important"; Webster's New World College Dictionary (3rd Ed. 1996) p. 682; and claims that the plain meaning of "incidental to" or "related to" is expansive and, therefore, includes as service duties those tasks identified by the plaintiff as side work. The plaintiff, in contrast, emphasizes the spatial aspect of the language in the definition of "service employee" and on the department's website and claims that any task must take place at the tables and booths or in the server's immediate service area. She argues that "[s]ervice work is work that involves serving customers seated at tables or booths. It simply does not include any other tasks. The defendant's side work was done away from the tables and booths and not in the 'immediate area of service.' "

As demonstrated by the parties' respective interpreta-

tions, the meaning of "service duties" is susceptible to more than one reasonable interpretation. Considering that "service duties" is not defined in the regulations and that the definition of "service employee" includes language that supports the parties' respective positions, both interpretations are reasonable. See, e.g., *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 11–12, 282 A.3d 959 (2022) ("[t]he test to determine ambiguity is whether the statute [or regulation], when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)); *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language of the first sentence of [the regulation] is ambiguous"). Accordingly, we conclude that § 31-62-E4 of the regulations is ambiguous as to which tasks are service duties and, therefore, it is necessary to consider extratextual evidence.

B

Because the court determined that the relevant language was plain and unambiguous, it did not consider extratextual evidence as to the meaning of service duties or duties incidental to service. Thus, although the court noted that the guidance provided by the department was reasonable, it does not appear that the court relied on that guidance in its analysis of the plaintiff's E4 claim. We recognize that an agency's informal guidance is not entitled to deference, as it is not promulgated through the agency's rule-making authority. Nevertheless, our Supreme Court has explained that, when "an agency's interpretation is reasonable and is not contradicted by previous interpretations, [there is] no reason to disregard it entirely, especially if the provision at issue touches on questions of law and policy within the agency's expertise and regarding which this court has little experience." *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 307 Conn. 66 n.18; see also *Crandle* v. *Connecticut State Employees Retirement Commission*, 342 Conn. 67, 82, 269 A.3d 72 (2022) ("[T]he United States Supreme Court recognized that, although interpretations contained in opinion letters do not warrant *Chevron*-style deference, they are entitled to respect . . . to the extent that those interpretations have the power to persuade . . . . This formulation seems consistent with our jurisprudence holding that, although an agency's interpretation of a statute is not binding, it is entitled to deference when it is time-tested and reasonable." (Citations omitted; internal quotation marks omitted.)); see generally *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

In the present case, the provision at issue involves

the payment of the minimum fair wage in a particular industry, which unquestionably is within the department's expertise. See General Statutes § 31-58 (b) (in establishing minimum fair wage, "the commissioner . . . (1) may take into account all relevant circumstances affecting the value of the services rendered, including hours and conditions of employment affecting the health, safety and general well-being of the workers"). The department promulgated the regulation at issue and recognized that additional guidance was necessary to apply it. See *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 90 ("the department . . . has published instructional materials that clearly delineate how it applies the credit to food service workers"). Thus, in applying § 31-62-E4 of the regulations, we conclude that the department's examples in its informal guidance are instructive, though not dispositive, as to whether a particular task is a "service duty."[17]

C

The defendant also argues that the court erred in failing to apply the new definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020), which lists twenty-three tasks that are "incidental to service." The defendant contends that clarifying the "definition of 'duties incidental to service' does not affect any substantive rights." The plaintiff argues that the new definition of "duties incidental to service" effects a substantive change in the law and, therefore, may not be applied retroactively. According to the plaintiff, "under the new [rule], numerous duties that were nonservice under the [department's] prior rule . . . are now 'service' or 'duties incidental to service.' For example, 'rolling silverware,' 'setting up food stations,' 'setting up dining areas,' and 'stocking service areas with supplies such as coffee, food, tableware, and linens' are 'duties incidental to service' pursuant to [§ 31-62-E2 (d) (17) and (18) of the amended regulations]. These tasks occur away from the tables and booths and were nonservice work when [§ 31-62-E4 of the regulations] was in effect." We conclude that the definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020) does not apply retroactively.

"We presume that, in enacting a statute, the legislature intended a change in existing law. . . . This presumption, like any other, may be rebutted by contrary evidence of the legislative intent in the particular case. An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act. . . . An amendment that is intended to clarify the original intent of an earlier statute necessarily has retroactive effect. . . .

"To determine whether the legislature enacted a stat-

utory amendment with the intent to clarify existing legislation, we look to various factors, including, but not limited to (1) the amendatory language . . . (2) the declaration of intent, if any, contained in the public act . . . (3) the legislative history . . . and (4) the circumstances surrounding the enactment of the amendment, such as, whether it was enacted in direct response to a judicial decision that the legislature deemed incorrect . . . or passed to resolve a controversy engendered by statutory ambiguity . . . . In the cases wherein [our Supreme Court] has held that a statutory amendment had been intended to be clarifying and, therefore, should be applied retroactively, the pertinent legislative history has provided uncontroverted support . . . for the conclusion that the legislature considered the amendatory language to be a declaration of the legislature's original intent rather than a change in the existing statute." (Citation omitted; internal quotation marks omitted.) *Praisner* v. *State*, 336 Conn. 420, 429, 246 A.3d 463 (2020).

The defendant focuses on the fourth factor and argues that, "[w]ithout question, [the department] clarified what was meant by 'duties incidental to service' in response to the ambiguities highlighted by recent legislation. . . . The law has long allowed for servers to perform 'duties incidental to service' while earning a tip credit wage and that term has always had broad connotations." Notably, the defendant does not direct our attention to any part of the regulatory history that provides "uncontroverted support . . . for the conclusion that the [department] considered the amendatory language to be a declaration of [its] original intent rather than a change in the existing [regulations]." (Internal quotation marks omitted.) *Praisner* v. *State*, supra, 336 Conn. 429. In fact, the regulatory history supports the opposite conclusion.

For example, Attorney David R. Golder, who represents the defendant in the present case, submitted a written comment regarding the department's proposed changes, suggesting that the list of tasks in the definition of "duties incidental to service" should not be exhaustive. See Conn. Dept. of Labor, Response to Public Comment on Notice of Intent To Adopt Regulations Concerning Allowances for Tip Credit Gratuities Permitted or Applied as Part of the Minimum Fair Wage, Tracking No. PR2020-014 (July 7, 2020) p. 3, available at https://www.cga.ct.gov/2020/rrdata/pr/2020REG2020-014-PUB.PDF (last visited March 28, 2023). In its response, the department concluded "that the list provided is intended to be exhaustive *in an effort to afford predictability and reduce the need for interpretation of duties not so included*." (Emphasis added.) Id., p. 4. Considering that the department's guidance previously had provided various examples of service and nonservice duties in the Guide and on its website, the department's response stating that it sought to "afford predictability

and reduce the need for interpretation" by providing an exhaustive list of twenty-three specific tasks that constitute "duties incidental to service" suggests that it intended to change the existing regulations. Put differently, the department recognized that "duties incidental to service" had been open to interpretation, as evidenced by the department's prior guidance on the issue, and determined that a more precise definition was necessary.

In addition, although the defendant insists that the circumstances surrounding the amendments to the regulations support construing the new definition as clarifying, the defendant ignores the fact that the new definition was added at the same time that the department formally adopted the 80/20 rule and repealed § 31-62-E4 of the regulations, which undeniably changed the existing regulations. Given that the department defined "duties incidental to service" when it promulgated the new 80/20 rule, the circumstances surrounding the amendment suggest that the department sought to change, rather than clarify, the existing regulations.

Consequently, we conclude that neither the regulatory history nor the circumstances surrounding the amendment provide uncontroverted support that the department intended the new definition of "duties incidental to service" to clarify the existing regulations. See *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 186, 927 A.2d 793 (2007) (presumption against retroactive application of legislation "may be rebutted only by a clear and unequivocal expression of legislative intent to the contrary" (internal quotation marks omitted)). In the absence of uncontroverted evidence to the contrary, we presume that the department intended to change the existing regulations. Accordingly, the definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020) does not apply retroactively.

D

Turning to the tasks at issue in the present case, we note that the court determined that several tasks constituted "nonservice" work even though the department's guidance included similar tasks as "service duties." The court concluded that the undisputed evidence established that the plaintiff "was required to clean portions of the restaurants away from the tables, prepare food, act as a cashier, act as hostess; stockpile napkins, coffee, condiments, and table settings; fill ice machines and many other activities." There is a genuine issue of material fact as to whether certain of these tasks are service duties, considering the service duties listed in the department's Guide, which included "refilling condiment containers for the service person's own station," "wrapping silverware in napkins for the service person's own station," and "cleaning the immediate

service area." Guide, supra, pp. 10–11.

For example, the plaintiff testified that she had to "[clean] all surfaces in the server aisle that I worked in that night, which would include all of the counters, all of the machines . . . all of the shelves, the front of the cabinets, the back of the walls, [and] the sink." Viewed in the light most favorable to the defendant as the nonmoving party, there is a question of fact as to whether this task falls within "cleaning the immediate service area" and constitutes a service duty. Likewise, the department's guidance on the classification of service and nonservice tasks could be read to include, as service duties, restocking napkins and coffee and filling ice machines for the server's station.

As the foregoing comparison demonstrates, on the basis of the examples provided in the department's guidance, there is a genuine issue of material fact as to whether certain tasks identified by the court as "nonservice duties" are incidental to the plaintiff's service of patrons seated at tables and booths. The ultimate determination involves a fact intensive inquiry as to the nature of the task, where it is performed, and its relation to the service of patrons at tables and booths. Thus, in many cases, whether the tasks performed by a server are service duties or incidental to such service cannot be determined as a matter of law.[18] The department's use of examples in its guidance reinforces this point—the examples are illustrative because these terms are not reducible to simple definitions due, in part, to the different configurations of restaurants and the variety of food and beverages that are served in such establishments. For this reason, the trier of fact must analyze each task separately to determine whether it is a service duty or incidental to service duties, which will involve comparing the task to those tasks categorized by the department, evaluating the layout of the restaurant to determine where the work is being performed in relation to the plaintiff's station and her tables, and considering the relationship between the plaintiff's serving of patrons with her performance of the task.

Certain tasks, however, may be categorized properly under the regulations as a matter of law. For example, assisting take-out customers and preparing food do not involve serving "patrons seated at tables or booths." Regs., Conn. State Agencies § 31-62-E3 (c). Indeed, preparing the food is what is done *before* it is served. The department's guidance is consistent with this construction of the regulations. The Guide expressly states that "[r]estaurants having a take-out section in addition to table/booth service are not entitled to a tip credit on employees . . . who staff the take-out area in addition to serving patrons at tables and booths." Guide, supra, p. 13. In addition, the Guide lists "[p]reparing food for patrons (cooking, peeling, cutting, mixing, etc.)" as a nonservice duty. Id. The department's website also lists

"[p]reparing food" and "[w]aiting on take-out customers" as nonservice duties.

On appeal, the defendant claims that "[t]he dispute is whether certain of [the] plaintiff's duties were 'incidental to' or 'related to' her service duties. . . . Neither our statutes nor regulations support the conclusion that cutting lemons for drinks or microwaving a pre-made dessert constitutes 'nonservice' work. . . . [Given the expansive definition of incidental], no reasonable interpretation of [the regulations] could yield a conclusion other than that the duties identified by [the] plaintiff as 'side work' are . . . 'connected' or 'related' to serving patrons." The defendant highlights a few of the tasks identified by the plaintiff, which we agree are not categorically excluded from service duties either under the definition of service employee or pursuant to the department's guidance. Notably, however, the defendant fails to address the uncontroverted evidence establishing that the plaintiff was required regularly to assist take-out customers and prepare food.

During her deposition, the plaintiff testified that she was required to prepare and handle "to-go" orders during every shift. The plaintiff also introduced photographs of text messages between her and her manager, Correira, in which the plaintiff complained about assisting take-out customers while being paid below the minimum wage. The messages are dated August 13, 2018, three months before the plaintiff stopped working for the defendant. When asked about the text messages during her deposition, Correira explained that her boss, Cillo, "told [her] to have [the plaintiff] stop taking to-go orders immediately. . . . For the managers to do it until she investigated [the plaintiff's complaint]." Correira explained that the defendant implemented this policy of having the managers handle take-out orders *after* the plaintiff voiced her complaint. Cillo testified that servers process to-go orders "once in a while" and "sometimes," but that the manager on duty "mostly does it . . . especially in a unit like Westbrook." On the basis of this evidence, it is undisputed that the plaintiff regularly assisted take-out customers until she voiced her complaint in August, 2018, although there is a dispute as to how often she was required to do so during each shift.

As to "preparing food," the plaintiff explained: "I am making Cobb salads, fruit salads, Caesar salads. The Cobb salads, there are several different ingredients to those. And I can't just put a cover on it because some of them require the cook to cook the chicken or the beef or the fish to put on the salad. But I am the one who is getting the blue cheese dressing out from underneath the salad bar and putting that in a to-go container for the person to have salad dressing." The plaintiff also testified that she was required to stock the salad bar, which required that she cut slices of cucumber and

stock the various cheeses. Cillo likewise testified at her deposition that servers "do make salads. Yes. They make salads. If somebody orders a chicken Caesar salad, the server puts the salad together, which consists of salad, tomatoes, cucumbers and onions for the most part in our stores, put the dressing on the side, and the cook hands them a plate with the meat, [which] they just put . . . right on the salad." Cillo also agreed that the servers are required to cut fruit. In addition, four of the different "side work" lists produced by the defendant included the directive: "NO EXTRA CUT VEGGIES. THEY SHOULD ALL BE CUT FRESH EACH TIME." Thus, the undisputed evidence also establishes that the plaintiff prepared food.

Consequently, although we agree with the defendant that there are genuine issues of material fact as to the proper characterization of some of the tasks that the plaintiff performed, the undisputed evidence establishes that the plaintiff performed nonservice duties—waiting on take-out customers and preparing food—and that the defendant failed to record the time she spent performing such nonservice duties. For that reason, although we disagree with the court's conclusion that all side work tasks performed by the plaintiff are, as a matter of law, nonservice duties, the court properly determined that there was no genuine issue of material fact that the plaintiff performed certain nonservice duties on a regular basis.

E

Finally, in its reply brief, the defendant claims that the court improperly rejected its de minimis defense.[19] We are not persuaded.

"The de minimis doctrine permits employers to disregard, for purposes of the [Fair Labor Standards Act], otherwise compensable work [w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours. . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. . . . [Federal courts] [consider] three factors in determining whether otherwise compensable time should be considered de minimis*:* (1) the practical administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis." (Citations omitted; internal quotation marks omitted.) *Singh* v. *New York*, 524 F.3d 361, 370–71 (2d Cir. 2008).

"An important factor in determining whether a claim is de minimis is the amount of daily time spent on the additional work. There is no precise amount of time that may be denied compensation as de minimis. No rigid rule can be applied with mathematical certainty. . . . Rather, common sense must be applied to the facts of each case. Most courts have found daily periods of

approximately [ten] minutes de minimis even though otherwise compensable." (Citation omitted.) *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir. 1984).

The United States Department of Labor has issued an interpretative regulation regarding the de minimis doctrine, which provides in relevant part: "In recording working time under the [Fair Labor Standards] Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. . . . This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. . . ." (Citations omitted.) 29 C.F.R. § 785.47.

In the present case, the defendant argued in its motion for summary judgment that "'[e]mployers may 'disregard, for purposes of the [Fair Labor Standards Act], otherwise compensable work "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours."' *Singh* v. *New York*, [supra, 524 F.3d 370] (quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, [66 S. Ct. 1187, 90 L. Ed. 1515] (1946)). 'It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.' *Anderson* v. *Mt. Clemens Pottery Co.*, supra, 692. [The United States Department of Labor] makes clear that a server is still a server even when they perform nontipproducing duties for short amounts of time. See [U. S. Dept. of Labor] Opinion Letter, 2018 WL 5921455, *3 ('some of the time spent by a tipped employee performing tasks that are not listed . . . may be subject to the de minimis rule contained in Wage and Hour's general [Fair Labor Standards Act] regulations at 29 C.F.R. § 785.47'). Accordingly, per [United States Department of Labor] guidance and Second Circuit [case] law, these potential damages are, at most, de minimis."

In its opposition to the plaintiff's summary judgment motion, the defendant repeated its de minimis argument and added that "the . . . Guide makes clear the types of work [the department] considers to be side work involve job duties that take continuous hours and not the minutes and seconds that [the] plaintiff alleges here. (Exhibit A, p. A13) (instructing that side work that takes extensive amounts of continuous time, like 3.5 hours or 5 hours, is nonservice work). For this additional

reason, [the] plaintiff's [E4] claim fails." (Emphasis omitted.) In its reply to the plaintiff's opposition to its motion for summary judgment, the defendant discussed its de minimis defense in two sentences, stating: "At most, the time spent on nonservice work was de minimis. Alternatively, even if [the trial] court finds that some side work is nonservice work and more than de minimis, [the trial] court should employ the 80/20 rule, which has been adopted by the [department]." Significantly, the defendant did not reference any evidence in the summary judgment record regarding how long it took to perform the various tasks identified by the plaintiff and, instead, asserted that the plaintiff's failure to provide estimates of how long it took to perform the tasks was fatal to her E4 claim.

The court acknowledged the defendant's de minimis claim but determined that, pursuant to the burden shifting analysis adopted in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 239, it was the defendant's burden to come forward with evidence to negate the reasonableness of the inferences to be drawn from the plaintiff's evidence and that the defendant failed to satisfy its burden in this regard. Our Supreme Court recently explained that the "burden shifting analysis assists the plaintiff in establishing the *amount* of improperly paid work. . . . Under § 31-62-E4 of the [regulations], the plaintiff has to establish only that she performed nonservice and service work together, not that she performed nonservice work for any specific length of time; *Schoonmaker* does not require plaintiffs to establish with certainty the amount of uncompensated work performed. That having been said . . . *Schoonmaker* does not lower the plaintiff's burden of proving whether she performed such work in the first instance." (Citations omitted; emphasis in original.) *Rodriguez* v. *Kaiaffa, LLC*, supra, 337 Conn. 282–84.

On appeal, the defendant relies on a recent Superior Court decision in which the court, *Schuman, J.*, denied cross motions for summary judgment on claims under § 31-62-E4 of the regulations because it determined that the employer was "entitled to show that . . . [the nonservice] tasks took only a de [minimis] amount of time." See *Rodriguez* v. *Kaiaffa, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-17-6088349-S (September 13, 2021).[20] The entirety of the defendant's discussion of the issue, however, consists of a single paragraph in its reply brief, in which the defendant argues: "Judge Schuman recognized that, even if some of the side work was nonservice work, a de minimis defense is valid under the [Connecticut wage laws]. Judge Schuman declined to decide that inherently factual defense on summary judgment. [The defendant] presented evidence similar to that in *Rodriguez* . . . but the trial court overlooked it, and instead denied [the defendant's] de minimis defense on the ground that it did not have segregated records. This

was error. Indeed, the trial court's own ruling that 'we don't know how long any of this took' suggests that there was a factual issue precluding summary judgment." In support of its claim that it "presented evidence similar to that in *Rodriguez*,"[21] the defendant directs our attention to the plaintiff's deposition in which she stated that a chocolate lava cake or an apple crisp would need to be microwaved for "one minute and fifteen seconds and one minute and thirty seconds . . . ."

In its brief discussion of this issue, the defendant does not set forth a plain statement of the de minimis doctrine or identify the factors courts ordinarily consider in determining whether it applies in a particular case. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.)); see also id., 726 ("[a]lthough the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed"). The defendant provides one citation to the record but fails to explain how evidence of the amount of time it takes to microwave a dessert applies to the nonservice tasks—waiting on take-out customers and preparing food—identified by the court. Given the lack of analysis in the defendant's cursory discussion of this issue, we conclude that this claim is inadequately briefed. See *Bongiorno* v. *J & G Realty, LLC*, 211 Conn. App. 311, 323, 272 A.3d 700 (2022) ("[when] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" (internal quotation marks omitted)); *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015) (when issue "receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

Although we are not required to reach the merits of the defendant's inadequately briefed claim, we nonetheless address it because it was raised before the trial court and addressed by the court in rendering summary judgment for the plaintiff. On the basis of our plenary review of the record, we are not persuaded that there is a genuine issue of a material fact regarding the application of the doctrine in the present case. As previously noted, in determining whether the de minimis doctrine applies, federal courts generally consider: "(1) the prac-

tical administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis." *Singh* v. *New York*, supra, 524 F.3d 371.

Section 31-62-E4 of the regulations appears to address the practical administrative difficulty in recording the time by providing that, "[i]f an employee performs both service and nonservice duties and *the time spent on each cannot be definitely segregated and so recorded*, or is not definitely segregated and so recorded, *no allowances for gratuities may be applied* as part of the minimum fair wage." (Emphasis added.) In other words, the department recognized that it might be difficult to record separately time spent performing nonservice duties and directed employers that, if they cannot segregate and record that time, they must pay the full minimum wage for the employee's entire shift. Moreover, the gravamen of the defendant's argument regarding the administrative difficulty in recording time spent performing nonservice work is that servers perform the nonservice work "while they are simultaneously serving customers." If this explanation were justification to avoid the recording requirements of § 31-62-E4 of the regulations, an employer could subvert the regulations simply by deliberately structuring an employee's work tasks during each shift accordingly.

The second and third factors, the size of the claim in the aggregate and whether the work was performed on a regular basis, also weigh against the application of the de minimis doctrine in the present case. As we concluded in part II D of this opinion, the undisputed evidence established that the plaintiff performed nonservice duties during each shift—waiting on take-out customers and preparing food. The defendant neither disputed that the plaintiff was required to perform these tasks nor submitted evidence regarding how much time the plaintiff spent performing those tasks. Thus, the improperly compensated work was performed regularly, which, given that the plaintiff was employed by the defendant for approximately two years, necessarily increases the size of the claim in the aggregate. See, e.g., *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350, 374 (4th Cir. 2011) ("Each of these employees was being paid at a rate of ten dollars per hour, and each would be entitled to compensation for 10.204 minutes of work per day. Applying these figures to an annual work schedule of [50] weeks, the amount of compensable time per employee is about 42.5 hours per year, which amounts to compensation of about $425 per employee per year. We conclude that this annual amount per employee is significant for an employee earning ten dollars per hour, because that annual amount represents a full week's wages."), cert. denied, 565 U.S. 1241, 132 S. Ct. 1634, 182 L. Ed. 2d 246 (2012); see also *Kosakow* v. *New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 719 (2d Cir. 2001) ("[R]egular arrival for fifteen minutes

of preparatory work would not constitute de minimis activity. It would not be difficult to calculate, in the aggregate it constituted a significant amount of time, and it occurred regularly."); *Lindow* v. *United States*, supra, 738 F.2d 1063 ("[c]ourts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim").

Accordingly, the defendant's bare assertion before the trial court that, "[a]t most, the time spent on nonservice work was de minimis," was insufficient to create a genuine issue of material fact as to the application of the de minimis doctrine in the present case.

III

In her cross appeal, the plaintiff claims that the court improperly rendered summary judgment for the defendant on its good faith defense under § 31-68 (a) (2).[22] We agree.

Section 31-68 (a) provides in relevant part: "If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled . . . by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court."[23] General Statutes (Supp. 2016) § 31-68 (a).

The term "good faith" is "well defined as meaning [a]n honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. . . . It is a subjective standard of honesty of fact in the conduct or transaction concerned, taking into account the person's state of mind, actual knowledge and motives. . . . Whether good faith exists is a question of fact to be determined from all the circumstances." (Internal quotation marks omitted.) *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 368–69, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016).

Similarly, under federal law, "an employer who violates the compensation provisions of the [Fair Labor Standards] Act is liable for unpaid wages and an additional equal amount as liquidated damages. . . . [L]iquidated damages may be remitted if the employer shows to the satisfaction of the court that the act or omission

giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [law]. . . . [T]he employer bears the burden of establishing, by plain and substantial evidence, subjective good faith and objective reasonableness. . . . The burden . . . is a difficult one to meet, however, and [d]ouble damages are the norm, single damages the exception . . . .

"To establish good faith, a defendant must produce plain and substantial evidence of at least an honest intention to ascertain what the [law] requires and to comply with it. . . . Good faith in this context requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the [Fair Labor Standards Act] and then move to comply with them. . . . That [the employer] did not purposefully violate the provisions of the [Fair Labor Standards Act] is not sufficient to establish that it acted in good faith." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Reich* v. *Southern New England Telecommunications Corp.*, 121 F.3d 58, 70–71 (2d Cir. 1997).

In its motion for summary judgment as to its good faith defense, the defendant claimed that the undisputed evidence established that it took steps to learn and comply with the law. The defendant noted that it "set up the operations so that side work constituted less than 20 [percent] of a server's job duties to comply with the 80/20 rule," which Li referenced during his deposition: "I believe that—I think there's an 80/20 rule that applies, [so I] mak[e] sure that . . . they are not spending too much time doing side work instead of [serving] the customers." The defendant also noted that it had hired Jackson Lewis P.C., a law firm specializing in labor law, to represent it in a similar lawsuit in 2006, and that, following that litigation, its attorneys did not recommend that it change its policies. The defendant also argued that it relied on the department's guidance, as its "operations conformed to the 80/20 rule of [side work]."

In her opposition to the defendant's motion, the plaintiff argued, inter alia, that the defendant "articulated no active steps to comply with the law, and there is substantial evidence that the defendant knew it was violating the law but continued to do so. The plaintiff even complained to her general manager Lynda Correira that she had to take to-go orders and was not being paid minimum wage for it. . . . Correira . . . testified that [the defendant] stopped having [the plaintiff] take to-go orders, *but continued to have other servers take to-go orders*." The plaintiff further argued that, "to the extent the [department] ever used the 80/20 rule as an enforcement policy, it explicitly limited its use to rare occasions when nonservice work unexpectedly arose;

the [department] prohibited any reliance upon it when the duties in question are regularly assigned . . . . Here, the defendant's reliance on the enforcement policy would be inappropriate according to the [Guide] because the duties were regularly and routinely assigned. . . . Even if the 80/20 rule were the law (it is not) . . . the plaintiff herself testified she spent 30 to 40 percent of [her] shift on such nonservice work. . . . This is the testimony which should be credited for the purposes of the defendant's motion . . . ."

After the motions for summary judgment had been briefed, the court ordered that "the defendant may submit a supplemental authority, a supplemental exhibit, and a three page memo explaining them. The plaintiff may file a three page response no later than July 20, 2020." The defendant thereafter filed a copy of a memorandum dated May 30, 2006 (2006 memo), that was prepared by its attorneys in connection with the 2006 lawsuit. The 2006 memo discussed the requirements under § 31-62-E4 of the regulations and opined that the defendant's position "that all side work duties necessarily are incidental to customer service" was "supported by federal tip credit law, which envisions a certain amount of side work as functions for which payment of a tip credited wage is appropriate. Based on off-the-record conversations with the Connecticut Department of Labor, we believe that [the] [d]epartment's unofficial interpretation of this regulation comports with the federal law." The 2006 memo also discussed the department's informal guidance concerning service and nonservice duties and set forth the list of such duties from the department's website, which specifically listed "[p]reparing food," "[g]eneral cleaning," and "[w]aiting on take-out customers" as nonservice duties. The defendant also submitted an order from the 2006 case, in which a court denied a motion for class certification. In its accompanying memorandum, the defendant argued that the 2006 memo "made clear to [the defendant] that it had strong defenses to the side work . . . claims."

In her reply memorandum, the plaintiff argued that "[i]t is questionable whether [the 2006 memo] was seen because the [2006] memo is almost fifteen . . . years old, and there is no evidence that any [of the defendant's] witness[es] ever reviewed it at all, let alone within a decade of the relevant period. The [2006] memo does not state anywhere that the defendant's business practices complied with the law, but instead states the arguments [that would be made]. It does not show that counsel advised the defendant [its] policies were compliant."[24]

In rendering summary judgment for the defendant on its good faith defense, the court reasoned as follows. "Much has been made of the [department's] lack of enforcement activity for some [seventy] years. The department's indication that it would not pursue side

work claims amounting to less than 20 [percent] of an employee's times has been pointed out as well. [The defendant] has offered evidence that, against that backdrop, the company relied on the advice of counsel, consulted with its insurer, considered the failure of an enforcement action in Rhode Island, relied on its franchisor, its payroll company, and its payroll technology. Of great significance, [the defendant] itself won a victory in this court on similar wage claims.

"[The plaintiff] says the company should have done more. [She] faults [the defendant] for the extent of its effort and for getting the answer wrong. But no reasonable fact finder could agree. The totality of the circumstances so plainly points the other way as to make summary judgment on this issue appropriate. [The defendant] took a view supported by prior court decisions and in the face of guidance and inactivity by the regulatory agency that it plainly appears to have taken sincerely at face value. . . . It believed it could rely on views of side work like the 80/20 rule. It may have been wrong, but there is no doubt that [the defendant] believed it was right.

"Against this backdrop, the court is convinced that [the defendant's] undisputed activities, in light of the circumstances prevailing, establish that a reasonable fact finder could only conclude that it believed in good faith that it was complying with the law. Therefore, [the defendant] will not be liable for the doubling of the minimum wage authorized as damages under . . . § 31-68 (a) (2)."

In her cross appeal, the plaintiff claims that there are several disputed issues of fact. The plaintiff claims that the defendant's alleged reliance on the advice of counsel is disputed because "[t]he most the [defendant] says is that [its] lawyers did not tell them that they were not compliant."[25] The plaintiff also notes that there is evidence establishing that the defendant continued to require other servers to wait on take-out customers after she complained about waiting on take-out customers and alerted the defendant to the department's website specifically listing that task as a nonservice duty. According to the plaintiff, "[a] jury [could] infer that the defendant did not investigate the plaintiff's E4 complaint" and "did not attempt to learn and comply with the law because their side work so clearly exceeded what the department . . . published was service work." (Internal quotation marks omitted.) The defendant responds that the court properly concluded that the undisputed evidence established that the defendant relied on the advice of counsel and the department's guidance and, therefore, had a good faith belief that it was complying with the law. We agree with the plaintiff.

Although the court's analysis focused on the defendant's reliance on both the advice of counsel and the 80/20 rule, the evidence, viewed in the light most favor-

able to the plaintiff, does not conclusively establish that the defendant acted in good faith. The 2006 memo, which included the guidance from the department's website, does not state that requiring service employees to prepare food and wait on take-out customers complied with the regulations. To the contrary, the guidance reproduced in the 2006 memo specifically identifies these tasks as nonservice duties, which would support the inference that the defendant was aware that it was not complying with the law. In addition, as to the defendant's reliance on the department's enforcement policy regarding § 31-62-E4 of the regulations, there is conflicting evidence regarding whether the defendant's policy actually complied with that rule. As the plaintiff argued in opposing summary judgment on the defendant's good faith defense, the department's enforcement policy states that the 80/20 rule "is not intended to allow an employer to assign a tip credit service person to do [nonservice] job such as dishwashing or food preparation for 20 [percent] of his or her work time. . . . The 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a service shift." Moreover, although the defendant's witness testified that servers spent approximately 10 to 15 percent of their shifts performing side work, the plaintiff testified that she spent approximately 30 to 40 percent of her shift performing side work. Thus, even assuming that the defendant's reliance on the department's enforcement policy was reasonable, there is a genuine dispute as to whether the defendant actually complied with its own understanding of the law. Consequently, we disagree with the court's conclusion that the undisputed evidence establishes that the defendant "believed in good faith that it was complying with the law."

Accordingly, we reverse the judgment of the trial court granting summary judgment for the defendant on its good faith defense under § 31-68 (a) (2) and remand the matter for a trial on the issue of good faith as it relates to the defendant's violation of § 31-62-E4 of the regulations.[26]

The judgment is affirmed as to the summary judgment rendered for the plaintiff on the first count of the amended complaint, and the case is remanded solely for a trial as to the defendant's good faith defense under General Statutes (Supp. 2016) § 31-68 (a) (2) with regard to that count; the judgment is reversed as to the second count of the amended complaint and the case is remanded for further proceedings according to law on that count.

In this opinion the other judges concurred.

[1] General Statutes § 31-60 (b) provides in relevant part: "The Labor Commissioner shall adopt such regulations . . . as may be appropriate to carry out the purposes of this part. Such regulations . . . shall recognize, as part of the minimum fair wage, gratuities in an amount (1) equal to twenty-nine and three-tenths per cent, and . . . effective January 1, 2015, and ending on June 30, 2019, equal to thirty-six and eight-tenths per cent of the minimum

fair wage per hour for persons, other than bartenders, who are employed in the hotel and restaurant industry, including a hotel restaurant, who customarily and regularly receive gratuities . . . ."

[2] Unless otherwise indicated, all references to § 31-62-E1 et seq. of the Regulations of Connecticut State Agencies are to the 2015 version of the regulations, which were in effect at the time of the underlying events.

[3] General Statutes (Supp. 2016) § 31-68 (a) provides in relevant part: "If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under sections 31-58, 31-59 and 31-60 or by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

Unless otherwise indicated, all references to § 31-68 in this opinion are to the version in the 2016 supplement to the General Statutes, which was in effect at the time of the underlying events.

[4] On November 16, 2022, the defendant notified this court that it filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut on November 8, 2022. Pursuant to 11 U.S.C. § 362 (a), the defendant's appeal was stayed until February 14, 2023, when the Bankruptcy Court issued an order granting relief from the automatic stay for this court to issue an opinion in the present case.

[5] Section 31-62-E4 of the Regulations of Connecticut State Agencies, which was repealed effective September 24, 2020, provides: "If an employee performs both service and nonservice duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and nonservice duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

[6] Section 31-62-E3 of the Regulations of Connecticut State Agencies provides in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record even though payment is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage. Such statement shall contain the week ending date of the payroll week for which credit is claimed. . . ."

[7] Prior to September 24, 2020, § 31-60-2 of the Regulations of Connecticut State Agencies, which is among the general provisions in the tip credit regulations, provided in relevant part: "For the purposes of this regulation, 'gratuity' means a voluntary monetary contribution received by the employee from a guest, patron or customer for service rendered. (a) Unless otherwise prohibited by statutory provision or by a wage order gratuities may be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (2) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record, even though payment is made more frequently and (3) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall provide substantial evidence that the amount claimed, which shall not exceed the allowance hereinafter provided, was received by the employee. For example, a statement signed by the employee attesting that wages received, including gratuities not to exceed the amount specified herein, together with other authorized allowances, represents a payment of not less than the minimum fair wage . . . for each hour worked during the pay period, will be accepted by the commissioner as 'substantial evidence' for purposes of this section, provided all other requirements of this and other applicable regulations shall be complied with. . . ."

[8] Section 31-62-E3a of the Regulations of Connecticut State Agencies provides: "(a) On any day that a service employee performs nonservice employee

duties: (1) For two hours or more, or (2) For more than 20 percent of the service employee's shift, whichever is less, the employer shall not claim credit for gratuities as part of the minimum fair wage for that day. (b) If a service employee performs nonservice duties during the course of a day's work in excess of the lesser of subdivision (1) or (2) of subsection (a) of this section, the employer shall segregate and record time spent on nonservice duties to claim a credit for gratuities as part of the minimum fair wage for that day."

[9] Section 31-62-E3 of the Regulations of Connecticut State Agencies (September 24, 2020) provides in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a daily, weekly, or bi-weekly basis in a wage record even though the payment is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any service employee shall obtain substantial evidence as described in Section 30-60-2, such as a daily, weekly, or bi-weekly attestation or statement in electronic or written format demonstrating that the service employee has received in gratuities not less than the amount claimed as credit for part of the minimum fair wage. Such attestation or statement shall contain the week ending date of the payroll week for which credit is claimed. Such attestation or statement may include documentation via an electronic point of service system or any other method that verifies the amount a service employee has received in gratuities for the pay period in question. Such attestation, statement, or substantial evidence shall satisfy the requirements of subsection (b) and this subsection."

[10] During oral argument before this court, the parties agreed that the plaintiff's calculation of damages was the same for her E3 and E4 claims.

[11] General Statutes (Supp. 2016) § 31-68 (a) (1) provides for a private cause of action "[i]f any employee is paid by his or her employer less than the minimum fair wage . . . to which he or she is entitled under [under the minimum wage statutes] or by virtue of a minimum fair wage order . . . ." Whether the plaintiff was paid less than the minimum fair wage to which she was entitled "by virtue of" § 31-62-E3 of the regulations turns on whether § 31-62-E3's recordkeeping requirements are mandatory or directory. That is, if the recordkeeping requirements are directory, the defendant's noncompliance would not invalidate the tip credit and, therefore, the plaintiff would not have been paid less than the minimum fair wage to which she was entitled.

[12] We note that judges of the Superior Court have reached different conclusions as to whether the recordkeeping requirements under § 31-62-E3 of the regulations of are mandatory or directory. Compare *Anderson* v. *Reel Hospitality, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6123912-S (July 26, 2022) (after considering relevant factors, court concluded that § 31-62-E3's recordkeeping requirements are directory), with *McCants* v. *Outback Steakhouse of Florida, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6133189-S (April 20, 2021) (applying same factors and concluding that requirements are mandatory).

[13] We note that the language of this wage order was in effect at the time of the underlying events but that this information is no longer available on the department's website.

[14] Because we agree with the defendant's claim that the recordkeeping requirements are directory, such that the defendant's noncompliance does not invalidate the tip credit, we do not consider the defendant's claim that the court improperly failed to apply the September 24, 2020 amendments to the regulations retroactively in the present case.

[15] This information is no longer available on the department's website.

[16] The defendant noted that the plaintiff identified the following "nonservice duties" during her deposition: "cleaning syrup bottles, filling up glassware racks, restocking bus buckets, as well as other necessary items for service (such as plates, bread, soup cups, napkins and straws, sugars, mints, creamers, etc.), making coffee, sweeping and wiping down the line, wiping down her side stations (including the soda machine, juice machine and coffee maker), cleaning and stocking the salad bar station, keeping the window sills, seats and floors beneath her tables clean, filling or combining condiment jars and salt and pepper shakers, and rolling silverware."

[17] Although we find the department's guidance instructive as to the meaning of "service duty," we are not persuaded by the defendant's argument that any reliance on the department's guidance must compel subsequent

reliance on the department's enforcement policy adopting the 80/20 rule because it is part of the same guidance. Simply put, the department's enforcement policy is not instructive to our analysis of § 31-62-E4 of the regulations, which includes no durational requirement to trigger the employer's obligation to segregate and record nonservice work. Thus, although § 31-62-E4 of the regulations is ambiguous as to the meaning of "service duties," it is not ambiguous as to any durational requirement. Section 31-62-E4 of the regulations expressly requires that any nonservice duties be segregated from service duties and paid at the full minimum wage. If the employer fails to segregate, then no tip credit may be taken for any part of the shift. Accordingly, because the department's enforcement policy finds no support in the text of the regulations, we do not find it persuasive as to the meaning of § 31-62-E4 of the regulations. Cf. *Fast* v. *Applebee's International, Inc.*, 638 F.3d 872, 880 (8th Cir. 2011) ("Because the regulations do not define 'occasionally' or 'part of [the] time' for purposes of [29 C.F.R.] § 531.56 (e), the regulation is ambiguous, and the ambiguity supports the [federal Department of Labor's] attempt to further interpret the regulation. . . . We believe that the . . . interpretation contained in the [Wage and Hour Division's Field Operations] Handbook—which concludes that employees who spend 'substantial time' (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of the regulation." (Citation omitted.)), cert. denied, 565 U.S. 1156, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (2012). The defendant's reliance on the department's 80/20 enforcement policy also is misplaced in light of the Guide's caution that "[t]he 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a service shift." The undisputed evidence in the present case is that the service work identified by the plaintiff was not only predictable but also occurred on a regular basis.

[18] Several trial court decisions have concluded that whether a particular task is a service duty cannot be decided as a matter of law. See *Rodriguez* v. *Kaiaffa, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-17-6088349-S (September 13, 2021) (concluding that genuine issue of material fact existed as to whether side work was incidental to service work); *Stevens* v. *Vito's by the Water, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-15-6062506-S (November 25, 2016) (63 Conn. L. Rptr. 502) (same); *Palmer* v. *Friendly Ice Cream Corp.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-04-4025113-S (May 25, 2010) (49 Conn. L. Rptr. 882) (same); *Bucchere* v. *Brinker International, Inc.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X01-CV-04-4000238-S (November 8, 2006) (same). But see *Anderson* v. *Reel Hospitality, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20- 6123912-S (July 26, 2022) (rendering summary judgment for plaintiffs on claims for violation of § 31-62-E4 of regulations after concluding that tasks performed by plaintiffs were nonservice work as matter of law).

[19] Because this issue was raised for the first time in the defendant's reply brief, the plaintiff did not have the opportunity to respond in her appellee's brief. See *State* v. *Myers*, 178 Conn. App. 102, 106–107, 174 A.3d 197 (2017) ("[I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer." (Citations omitted; internal quotation marks omitted.)). Nevertheless, we consider the defendant's de minimis claim as an argument in support of its preexisting claim that the court improperly rendered summary judgment for the plaintiff on her E4 claim. See *State* v. *Gary S.*, 345 Conn. 387, 414 n.26, 285 A.3d 29 (2022).

[20] In *Rodriguez* v. *Kaiaffa*, supra, 337 Conn. 289, our Supreme Court affirmed the court's granting of class certification. Thereafter, Judge Schuman addressed the parties' claims on the merits.

[21] In *Rodriguez*, the court explained that the defendants in that case "presented evidence that one of the [side work] items, filling the butter cups, took only a few minutes to complete. . . . Other items on the [side work] list include cleaning and refilling the coffee machines and wiping down the milkshake and milk machines." *Rodriguez* v. *Kaiaffa, LLC*, supra,

Superior Court, Docket No. X03-CV-17-6088349-S.

[22] Section 31-68 (a) was amended during a special session on July 22, 2019, after the plaintiff initiated the underlying action. See Spec. Sess. P.A. 19-1, § 6. Relevant to the plaintiff's E4 claim in the present case, the 2019 amendment to § 31-68 added a new subdivision to subsection (a) that specifically addresses claims brought for violations of § 31-62-E4 of the regulations. See Spec. Sess. P.A. 19-1, § 6. Those changes became effective January 6, 2020, and the current revision of General Statutes § 31-68 (a) (2) provides: "Notwithstanding the provisions of subdivision (1) of this subsection, if any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under section 31-62-E4 of the regulations of Connecticut state agencies, such employee shall recover, in a civil action, (A) twice the full amount of such minimum wage or overtime wage less any amount actually paid to such employee by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (B) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to such employee by the employer, with costs as may be allowed by the court. *A good faith belief includes, but is not limited to, reasonable reliance on written guidance from the Labor Department.*" (Emphasis added.)

Thus, under the current revision of the statute, a plaintiff is not entitled to recover attorney's fees for a violation of § 31-62-E4 of the regulations if the employer establishes the good faith defense, which can be based on reasonable reliance on written guidance from the department. Although the defendant argued in its motion for summary judgment that these changes applied to the present case, the trial court did not address the changes to the statute in rendering summary judgment for the defendant on its good faith defense, and the parties have not addressed the issue on appeal. Thus, we do not address that issue.

[23] Prior to 2015, an award of penalty damages under § 31-68 was a matter of discretion. See General Statutes (Rev. to 2013) § 31-68 (a) (providing that employee who was paid less than minimum fair wage "*may* recover, in a civil action, twice the full amount of such minimum wage less any amount actually paid to him by the employer, with costs and such reasonable attorney's fees as may be allowed by the court" (emphasis added)); see also *Ravetto* v. *Triton Thalassic Technologies, Inc.*, supra, 285 Conn. 724 (noting that identical language in General Statutes (Rev. to 2007) § 31-72 "provides for a discretionary award of double damages, with costs and reasonable attorney's fees" (internal quotation marks omitted)). Our Supreme Court explained that, under the previous version of the statute, "it [was] appropriate for a plaintiff to recover attorney's fees, and double damages . . . only when the trial court . . . found that the defendant acted with bad faith, arbitrariness or unreasonableness." (Internal quotation marks omitted.) Id.

Our legislature amended § 31-68 in 2015; see Public Acts 2015, No. 15-86, § 1; to make an award of double damages plus costs and attorney's fees mandatory, unless the employer establishes that the employer had a good faith belief that the underpayment of wages complied with the law.

[24] The plaintiff also argued that, "[i]n the event the court finds the outdated [2006] memo relevant and sufficient to create a genuine issue of material fact on good faith, the court should . . . hold off on good faith until the parties can conduct discovery to minimize delay and prejudice associated with the late disclosure/waiver [of attorney-client privilege]."

[25] We note that the plaintiff also claims that there is no evidence in the record that the defendant was aware of the 80/20 rule. The plaintiff, however, is mistaken. As previously noted in this opinion, Li testified during his deposition that he "believed" there was an 80/20 rule.

[26] Because the defendant has not challenged on appeal the court's calculation of damages on the plaintiff's E4 claim, the only issues to be tried on remand are the plaintiff's claim for double damages and reasonable costs and attorney's fees pursuant to § 31-68 (a) (1). Because the parties have not addressed whether the 2019 amendment to § 31-68 regarding E4 claims applies to the defendant's good faith defense or limits the plaintiff's right to attorney's fees; see footnote 22 of this opinion; we leave that issue for the trial court to address in the first instance.