AFL-CIO

AMERICA'S UNIONS

American Federation of Labor and Congress of Industrial Organizations

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February 5, 2018

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W., Room S-3502
Washington, DC 20210

Re: RIN 1235-AA21, Comments in Response to Proposed Rulemaking: Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Ms. Smith:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) writes in response to the Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM), whereby the Department seeks to rescind portions of tip regulations it issued in 2011 (the 2011 Final Rule) pursuant to the Fair Labor Standards Act (FLSA).[1] We oppose this NPRM in the strongest possible terms and urge the Department to withdraw it.

The AFL-CIO is a voluntary, democratic federation of 55 national and international labor unions that represent more than 12.2 million working men and women, including many for whom tips represent an important element of their compensation. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded with family supporting wages and benefits, and that their workplaces are safe. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system. Therefore, the AFL-CIO is committed to fairness in the workplace and economic security for working people and their families.

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[1] U.S. Dep't of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57,395 (proposed Dec. 5, 2017) [hereinafter "Tipped Workers NPRM"]; U.S. Dep't of Labor, Final Rule, *Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832 (Apr. 5, 2011) [hereinafter "2011 Final Rule"].

The Department of Labor's 2011 Final Rule updating the tip credit regulations was a long-overdue change that harmonized those regulations with intervening statutory changes and legislative history; clarified that tips are the property of the employee and may not be pocketed by employers to bolster their profits or subsidize their operating costs; and strengthened critical wage protections for the working class.[2] The Department's unsupported proposal to rescind the tip regulations in part would weaken these wage protections and undermine the economic security of an already vulnerable worker population. The AFL-CIO therefore strongly opposes the current proposal to rescind parts of the 2011 Final Rule.

An Economic Policy Institute (EPI) study has found that tipped workers in the United States stand to lose an estimated $5.8 billion dollars in tips each year if the Department's rule goes into effect—and women, (because of their predominance in occupations which are tipped such as restaurant servers, bartender, gaming service workers, barbers, hairstylists and other personal appearance workers), would bear the overwhelming share of this loss: $4.6 billion.[3]

While the Department cites legal challenges to the Department's 2011 Final Rule as a primary rationale for its proposed reversal,[4] pending litigation challenging a rule is not a reasoned basis for reversing an agency's prior considered position. This is especially true where one of the two courts of appeals to consider direct challenges to the 2011 Final Rule has *agreed* with the Department's prior view that the 2011 Final Rule is a valid exercise of agency discretion.[5] Nor does the Department's argument that state minimum wage changes since 2011 have reduced the number of employers who may claim a tip credit under the FLSA provide a credible basis for revisiting the 2011 Final Rule.[6] Relying on the enactment of stronger state-law protections to weaken federal standards is a perverse argument that would undermine the fundamental goals of the FLSA, the purpose of which "is to establish a national *floor* under which wage protections cannot drop."[7] It would turn congressional intent on its head for the Department to *lower* federal standards under the FLSA in response to state-law developments that aim to provide *greater* protections for working people.

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[2] U.S. Dep't of Labor, Final Rule, *Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832 (Apr. 5, 2011) (the "2011 Final Rule").

[3] HEIDI SHIERHOLZ ET AL., ECON. POLICY INST. (EPI), WOMEN WOULD LOSE $4.6 BILLION IN EARNED TIPS IF THE ADMINISTRATION'S "TIP STEALING" RULE IS FINALIZED 1 (2018), http://www.epi.org/files/pdf/140380.pdf.

[4] Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,399, 57,402, 57,399.

[5] *Compare Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086-90, *reh'g and reh'g en banc denied*, 843 F.3d. 355, 356 (9th Cir. 2016) (Ninth Circuit upheld the Department's 2011 Final Rule, concluding that the rule permissibly regulated the tip pooling practices of employers who do not take a tip credit) *with Marlow v. The New Food Guy, Inc.*, 861 F.3d 1157, 1162-64 (10th Cir. 2017) (holding that the Department lacked authority to promulgate its tip regulation to the extent it applies to employers who do not take a tip credit). *See also Pennsylvania v. Trump*, Civ. No. 17-4540, 2017 WL 6398465, at *11-12 (E.D. Pa. Dec. 15, 2017) (holding that uncertainty caused by ongoing litigation does not create the kind of good cause needed to avoid notice and comment under the APA). The plaintiffs in the *Oregon Rest. & Lodging Ass'n* case have filed a petition for certiorari with the Supreme Court, and that petition is pending. Petition for Writ of Certiorari, *Nat'l Rest. Ass'n v. Dep't of Labor*, No. 16-920.

[6] *See* Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,401.

[7] *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

The Department should let the judicial challenges run their course before deciding whether to revisit the rule, withdraw its current proposal, and instead focus its energies on advancing policies that strengthen—rather than undermine—the ability of people working in low-wage jobs, including tipped workers, to support themselves and their families. When the Department of Labor was established in 1913, Congress stated its purpose "shall be to foster, promote and develop the welfare of the wage earners of the United States."[8]The Department's proposal to put hard-earned tips in the pockets of employers is inconsistent with that purpose. The Department ignores its protective role in the NPRM by narrowing the protections of the FLSA for tipped workers in a variety of industries including delivery, limousine and taxi, airport workers, parking and valet, personal services and retail, in addition to restaurants and hospitality.

Women—disproportionately women of color—represent nearly two-thirds of tipped workers nationwide.[9] In 32 states, at least 7 in 10 tipped workers are women.[10] Median hourly earnings for people working in tipped jobs hover around $10, including tips,[11] and poverty rates for tipped workers are more than twice as high as rates for working people overall—with tipped workers who are women, and especially women of color, at a particular disadvantage.[12] As recognized in the NPRM, working people in tipped occupations rely on tips as a major source of income;[13] the National Employment Law Project and Restaurant Opportunities Centers United estimate that tips typically represent close to 60 percent of hourly earnings for servers and 54 percent for bartenders.[14] Reducing the amount of tips that working people can take home to their families will undoubtedly harm this already low-paid workforce, especially the women and people of color who disproportionately hold these roles.[15]

Yet this is precisely what the proposed rule would do, by allowing employers to retain employee tips for their own purposes—whatever those purposes may be, including increasing profits. While the NPRM suggests that the Department's rule change is motivated by a desire to allow employers to decrease wage disparities between front of the house and back of house workers

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[8] An Act to Create a Department of Labor, ch. 141, s 1, 37 Stat. 736 (1913)(codified at 29 U.S.C. 551).

[9] Nat'l Women's Law Ctr. (NWLC) calculations based on U.S. Census Bureau, American Community Survey 2016 one-year estimates (ACS 2016) using IPUMS-USA. Women make up 65.5 percent of tipped workers. Figures include employed workers only and use the same definition of tipped workers set forth in SYLVIA A. ALLEGRETTO & DAVID COOPER, EPI & CTR. ON WAGE & EMPLOYMENT DYNAMICS, UNIV. OF CA., BERKELEY, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE 20, 23 (2014), http://s2.epi.org/files/2014/EPI-CWED-BP379.pdf. Women of color are 25.2 percent of tipped workers, compared to 17.5 percent of all workers. NWLC calculations based on ACS 2016 using IPUMS-USA.

[10] *See* NWLC & REST. OPP. CTR. UNITED (ROC UNITED), WOMEN AND THE TIPPED MINIMUM WAGE, STATE BY STATE, https://nwlc.org/resources/tipped-workers/ (last visited Jan. 18, 2018).

[11] *See* ALLEGRETTO & COOPER, *supra* note 8, at 12 (finding median hourly wages of $10.22 for all tipped workers and $10.11 for waiters/bartenders, compared to $16.48 for all workers).

[12] *See generally* NWLC & ROC UNITED, RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (2016), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf.

[13] Tipped Workers NPRM, 83 Fed. Reg. at 57,409 fn 40,41.

[14] IRENE TUNG & TEOFILO REYES, NAT'L EMPLOYMENT LAW PROJECT (NELP) & ROC UNITED, WAIT STAFF AND BARTENDERS DEPEND ON TIPS FOR MORE THAN HALF OF THEIR EARNINGS (2018), http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/.

[15] People of color represent 44.1 percent of the tipped workforce, compared to 36.5 percent of the overall workforce. ROC United calculations based on ACS 2016 using IPUMS-USA.

through tip pooling arrangements, such arrangements are already permissible under existing regulations, when employees voluntarily share their tips. Allowing employers to require redistribution of tips to back of house workers merely provides an incentive for employers to keep base wages low for cooks, dishwashers, and others, subsidized by the earnings from bartenders and wait staff. In addition, the proposed rule itself—which as proposed, applies to all tipped workers, not just those in restaurants or other settings where tip pooling is relevant—simply removes all limits on employer control of employee tips, so long as the employer pays the employee the federal minimum wage.[16]

Evidence already demonstrates that even under current law, employers are illegally pocketing worker tips. One study surveying workers in Chicago, Los Angeles, and New York found that 12 percent of tipped workers had wages stolen by their employer or supervisor.[17] EPI now estimates (conservatively) that under the proposed rule, employers would claim $5.8 billion dollars taken *legally* from their employees, representing 16 percent of tips earned by workers annually.[18] And an astounding $4.6 billion of this $5.8 billion—nearly 80 percent—would be tips earned by women.[19]

Even the slight protection offered by the rule's requirement that employers forego the federal tip credit before taking control of employee tips may prove illusory. As the Department acknowledges in the NPRM, its proposal could allow employers to "circumvent[] the protections of section 3(m) [of the FLSA] . . . [by] utilizing its employees' tips towards its minimum wage obligations to a greater extent than permitted under the statute for employers that take the tip credit."[20] The risk here is clear: money is fungible, and so long as an employer pays its tipped employees the full minimum wage in week one, there is nothing in the proposed rule that would prevent the employer from taking all of the tips earned in week one to subsidize payment of all or some of the minimum wage in week two, and so on. In this scenario, except for the first week of work, an employee's tips are the source of the minimum wage payments and the employer is in effect taking a tip credit without abiding by the protections of section 3(m) of the FLSA. Moreover, the assurance of receiving $7.25 an hour before tips does little to change the employee's dependence on those tips, as the inadequate federal minimum wage leaves a mother supporting one or more children thousands of dollars below the poverty line, even if she works full time.[21]

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[16] NELP & ROC UNITED, DOL'S PROPOSED RULE ON TIPPED WORKERS: LEGALIZING WAGE THEFT IN TIPPED INDUSTRIES (2017), http://www.nelp.org/publication/dols-proposed-rule-on-tipped-workers-legalizing-wage-theft-in-tipped-industries/.

[17] ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 23 (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf.

[18] HEIDI SHIERHOLZ ET AL., EPI, EMPLOYERS WOULD POCKET $5.8 BILLION OF WORKERS' TIPS UNDER TRUMP ADMINISTRATION'S PROPOSED 'TIP STEALING' RULE 1 (2017). http://www.epi.org/files/pdf/139138.pdf [hereinafter SHIERHOLZ ET AL. 2017].

[19] SHIERHOLZ ET AL., *supra* note 2.

[20] Tipped Workers NPRM, 82 Fed. Reg. at 57,402 n.14.

[21] A woman working full time at minimum wage earns just $14,500 annually (assuming 40 hours of work per week, 50 weeks per year). The poverty line for a parent and one child, for example, is $16,543; for a parent and two children, it is $19,337. U.S. Census Bureau, Poverty Thresholds for 2016, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html (last visited Jan. 8, 2018).

In sum, the Department's adoption of the changes proposed in this NPRM will likely result in lower earnings for the already vulnerable tipped workforce, an increased number of women living in poverty, and reduced incentives for employers to raise base wages across the board now or in the future.

Sexual harassment is a pervasive problem in the restaurant industry and in other industries where workers rely on tips to survive.[22] Workers who rely on tips for much of their income may feel forced to tolerate inappropriate behavior from customers, so as not to jeopardize that income. Workers working for tips know, just as the NPRM observes, that tips often "may be more a function of server looks and friendliness [and] the customer mood . . . than they are of aspects of service quality."[23] A study by the Restaurant Opportunities Centers United and Forward Together found that the overwhelming majority of tipped restaurant workers have experienced some type of sexual harassment or assault in the workplace.[24] Equal Employment Opportunity Commission (EEOC) data reveals that workers in the accommodation and food service industry—mostly women—filed more sexual harassment charges than in any other between the years 2005 and 2015.[25]

The proposed rule further entrenches the most problematic aspects of tipped work. Reliance on tips already creates strong financial incentives to accept harassment from customers, which affects the broader culture of restaurants as workplaces. When employers have a direct stake in those tips, as this rule would permit, we can expect even greater employer pressure on tipped front of house workers to accept customer harassment without complaint so as not to risk lower tips, which in turn feeds into a workplace culture of objectification of tipped workers. The proposed rule would make women who depend on tips doubly vulnerable to harassment and exploitation as they try to please the customer in order to earn tips, then the employer in order to keep them.

In a highly unusual move, at least according to what was described in the NPRM, the Department failed to even attempt to quantitatively analyze the costs and benefits of the proposed rule, counter to standard practice and multiple rulemaking authorities.[26] Yet the impact

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[22] *See generally* ROC UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

[23] Tipped Workers NPRM, 82 Fed. Reg. at 57,409.

[24] *See* ROC UNITED & FORWARD TOGETHER, *supra* note 21, at 2 (restaurant workers surveyed report high levels of harassing behaviors from restaurant management (66 percent), co-workers (80 percent), and customers (78 percent)).

[25] JOCELYN FRYE, CTR. FOR AM. PROGRESS, NOT JUST THE RICH AND FAMOUS: THE PERVASIVENESS OF SEXUAL HARASSMENT ACROSS INDUSTRIES AFFECTS ALL WORKERS (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/. In addition, in every year between 2002 and 2016, women working in the accommodation and food services sector filed more sexual harassment charges than women in any other sector. NWLC calculations based on unpublished U.S. Equal Employment Opportunity Commission data on sexual harassment charges by industry for 1996-2016.

[26] *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

of this rule is eminently quantifiable, as shown by the Economic Policy Institute (EPI) which, in less than two weeks, engaged in the analysis that the Department purportedly, would not.[27] It would be arbitrary and capricious for the Department to proceed with this rulemaking without understanding the likely effect of the proposed rule on working people.[28]

However, just days before the comment period for this NPRM closed, an extremely disturbing report appeared indicating that analysis of the costs and benefits in fact occurred, but was discarded. On February 1, 2018 Bloomberg/BNA reported that the Department of Labor "scrubbed an unfavorable internal analysis from a new tip pooling proposal, shielding the public from estimates that potentially billions of dollars in gratuities could be transferred from workers to their employer."[29]Assuming these reports are correct, the Department of Labor should immediately make the underlying data (and the analyses that the Department conducted) available to the public. We call on the Department of Labor to do so immediately and to withdraw the related Notice of Proposed Rulemaking.[30]

The AFL-CIO strongly urges the Department to withdraw the proposed rule, and instead focus its energies on promoting policies that will improve economic security for people working in low-wage jobs and empower all working people with the resources they need to combat sexual harassment in their workplaces.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Yona Rozen at 202-637-5198 or Kelly Ross at 202-637-5075 with questions.

Yona Rozen, Associate General Counsel

Kelly Ross, Deputy Policy Director

[27] *See generally* SHIERHOLZ ET AL. 2017, *supra* note 17.

[28] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

[29] Ben Penn, Labor Dept. Ditches Data on Worker Tips Retained by Business, Bloomberg (Feb. 1, 2018) http://bit.ly/2rWnnSd.

[30] Federal Register, Tip Regulations Under the Fair Labor Standards Act (FLSA) (visited on Jan. 2. 2018), http://bit.ly/2jlbXki.