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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 NW

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:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to protecting the civil and human rights of all persons in the United States, I write in response to the Department of Labor's (DOL) 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).<sup>1</sup> We strongly oppose the DOL's proposed changes to tip regulations (RIN 1235-AA21), urge the Department to withdraw it, and consider the promulgation of this rulemaking an attempted rollback of the civil and human rights of tipped workers throughout our country.

As an organization that is committed to protecting the civil and human rights of all persons in the United States, The Leadership Conference on Civil and Human Rights stands against racial, gender, and economic injustice in all arenas, including the workplace. By proposing to rescind portions of the 2011 Final Rule that clarify employers' obligations to tipped employees under section 3(m) of the FLSA and, in particular, to reverse its position that tips are the property of the employee who earned them, the DOL departs from its longstanding position and threatens the economic security of millions of working people and their families. This will have a disproportionate impact on women – particularly women of color.<sup>2</sup>

<sup>1</sup> U.S. Dep't of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57395 (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. 18832, Apr. 5, 2011. [hereinafter "2011 Final Rule"].

<sup>2</sup> 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 and David Cooper, Economic Policy Institute (EPI) and Ctr. on Wage & Employment Dynamics, "Twenty-Three Years and Still Waiting for Change. Why It's Time to Give Tipped Workers the Regular Minimum Wage." July 10, 2014. Pgs. 20, 23. <http://www.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.

## **I. Request for Withdrawal of the Notice of Proposed Rulemaking**

Given a news report that the Department prepared and then chose to shelve economic analysis demonstrating that workers would lose billions of dollars in pay were the NPRM to be finalized and implemented,<sup>3</sup> immediate withdrawal of the proposed rulemaking is the lawful and reasonable course for the Department to take. The Department deliberately misled the public by claiming in the NPRM that it is “unable to quantify how customers will respond to the proposed regulatory changes” and “currently lacks data to quantify possible reallocations of tips.”<sup>4</sup> In fact, the Department had already performed such quantitative analysis but chose to bury it because it demonstrated that employees who depend on tips to make a living will lose billions of dollars to their employers under the proposed rulemaking. By pursuing this course of action, the Department directly violated its responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible.<sup>5</sup> Moreover, DOL abandoned its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law. The Leadership Conference strongly urges the Department to rescind this NRPM.

## **II. Background on the 2011 Final Rule and DOL’s New Rulemaking**

The Department of Labor’s 2011 Final Rule that updated tip credit regulations was a codification of the Department’s long-established position that tips are the property of workers who receive them, regardless of whether or not the employer pays the minimum wage to employees. The final rule incorporated Wage and Hour’s longstanding position that an employer can use its employees’ tips only in the limited ways prescribed by section 3(m), even when the employer has not taken a tip credit against its minimum wage obligations.<sup>6</sup>

The proposed rule would repeal portions of long-standing Department of Labor regulations that have ensured that tips belong to the people being tipped. Under the proposed rule, as long as tipped workers are paid the minimum wage, employers would be able to legally pocket their tips. This rule will have a disproportionately negative impact on women – particularly women of color, who are overrepresented in the tipped workforce.

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<sup>3</sup> Penn, Ben. “Labor Department Ditches Data on Worker Tips Retained by Business.” *BLOOMBERG BNA*. Feb. 1, 2018. <https://bna.news.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

<sup>4</sup> Tipped Workers NPRM, 82 Fed. Reg. Pg. 57396.

<sup>5</sup> See Exec. Order 13563, 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 12866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. Oct. 4, 1993. Pg. 51735; Sept. 17, 2003. White House Office of Mgmt. and Budget, Circular A-4, Pgs. 18-27

<sup>6</sup> See generally *See 29 C.F.R. 531.52.*” [https://www.dol.gov/whd/FieldBulletins/fab2012\\_2.html](https://www.dol.gov/whd/FieldBulletins/fab2012_2.html). 2011 Final Rule, 76 Fed. Reg. 18832.

The Department puts forth a few rationales for proposing this rollback of its own regulation, each of which is unpersuasive. DOL cites legal challenges to the Department's 2011 Final Rule as a primary rationale for its proposed reversal in the NPRM.<sup>7</sup> However, pending litigation challenging a rule is not a reasoned basis for reversing an agency's prior considered position. This is especially so 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.<sup>8</sup> The Department should let judicial challenges run their course rather than prematurely deciding to revisit the rule.

The Department's argument that minimum wage increases in certain states since 2011 has reduced the number of employers who may claim a tip credit under the FLSA also fails to provide a credible basis for revisiting the 2011 Final Rule.<sup>9</sup> 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."<sup>10</sup> It is turning congressional intent on its head for the Department to propose *lowering* federal standards under the FLSA in response to state-law developments that aim to provide *greater* protections for working people. The Department would be better served by focusing its energies on advancing policies that strengthen the ability of people working in low-wage jobs, including tipped workers, to sustain themselves and their families, rather than working to undermine them.

### III. Potential Impacts of the Proposed Rule

The Leadership Conference supports policies that work for working people in this country. As such, we urge DOL not to eliminate the safeguards that render tips the property of workers.

Under section 3(m) of the FLSA, which provides the definition of a "wage," an employer may in certain circumstances pay its tipped employees just \$2.13 per hour and count tips received by those employees as a credit to satisfy its federal minimum wage obligations. Of the predominantly tipped occupations, waiters and waitresses are the majority of tipped workers, making up by some estimates 60 percent of tipped workers overall.<sup>11</sup> While DOL's NPRM only considers impacts on tipped restaurant workers, many other occupations include tipped workers and would be subject to the implementation of these rules. These occupations include, but are not limited to, massage therapists, barbers and hairdressers, personal care and service workers, and taxi drivers and chauffeurs.<sup>12</sup> Despite the lack of research focusing on the impacts

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<sup>7</sup> Tipped Workers NPRM, 82 Fed. Reg. Pgs. 57396, 57399, 57402.

<sup>8</sup> 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.

<sup>9</sup> See Tipped Workers NPRM, 82 Fed. Reg. Pgs. 57396.

<sup>10</sup> *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

<sup>11</sup> Allegretto, Sylvia & David Cooper. "Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage." July 10, 2014. <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>

<sup>12</sup> May 2016 State Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). Customarily tipped occupations: Massage Therapists; Bartenders; Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers; Waiters and Waitresses; Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop; Food servers, Non-restaurant; Dining Room and Cafeteria Attendants

this proposed rule will have on working people in these other tipped occupations, we can expect to see many of the implications discussed in these comments across all occupations in which workers earn tips.

With this NPRM, DOL proposes a new regime where employers own tips, not workers. If the Department were to enact the proposed rule change, it would not only overturn more than 43 years of state and federal precedent that preserve tips as the property of workers – it would also imperil the economic security of the country’s nearly 6 million tipped workers.

The more wealth that is passed down from generation to generation, the more assets are accumulated over time, resulting in greater financial security.<sup>13</sup> Communities of color have long been at a disadvantage when building wealth and assets; this disadvantage is exacerbated for tipped workers of color whose wages typically fall in the bottom quartile of all U.S. wage earners.<sup>14</sup> The impacts of this proposed rule will increase the racial wealth gap and create yet another barrier to achieving economic security in these communities.

Women and workers of color would be particularly impacted by the proposed rulemaking given their overrepresentation in the tipped workforce. Of the almost 6 million tipped workers in our country:

- Sixty-six percent are women;<sup>15</sup>
- Thirty-seven percent are people of color<sup>16</sup>, including:
  - Eighteen percent of whom are Latino,
  - Ten percent of whom are Black, and
  - Nine percent of whom are Asian American Pacific Islanders; and
- Two percent are people with disabilities.<sup>17</sup>

Median hourly earnings for people working in tipped jobs hover around \$10 per hour, including tips.<sup>18</sup> Tipped workers of color are on average paid less than their counterparts. The median annual income for tipped workers of color is \$14,300. For Black workers, it is even lower at \$12,900/year.<sup>19</sup> 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.<sup>20</sup> As recognized in the NPRM, working people in tipped occupations rely on tips as a major source of income.<sup>21</sup> The National Employment Law Project (NELP) and Restaurant Opportunities Centers United (ROC United) estimate that tips typically represent close to 60 percent of hourly earnings for servers and 54 percent for

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and Bartender Helpers; Gaming Services Workers; Barbers; Hairdressers, Hairstylists, and Cosmetologists; Manicurists and Pedicurists; Shampooers; and Skin Care Specialists; Baggage Porters, Bellhops, and Concierges; Taxi Drivers and Chauffeurs; and Parking Lot Attendants.

<sup>13</sup> Oliver, Melvin and Thomas Shapiro. *Black Wealth/White Wealth. A New Perspective on Racial Inequality*. 2006. New York. Routledge.

<sup>14</sup> Hamilton, Darrick and William Darity Jr. “Shades of Wealth’ in Communities of Color. The Aftermath of the Great Recession, Some Preliminary Results.” September 2014.

<sup>15</sup> 2012-2015 ACS data on gender and race for tipped occupations, ipums.org.

<sup>16</sup> Ibid.

<sup>17</sup> Restaurant Opportunities Centers United (ROC United) calculations based on ACS 2004-2007 using IPUMS-USA, University of Minnesota, [www.ipums.org](http://www.ipums.org).

<sup>18</sup> Allegretto, Sylvia and David Cooper. “Twenty-Three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage.” July 10, 2014. <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>

<sup>19</sup> Ibid.

<sup>20</sup> See generally NWLC & ROC United. “Raise the Wage: Women Fare Better in States with Equal Treatment for Tipped Workers.” Oct. 17, 2016. <https://nwlc-ciw49tixgw5lhab.stackpathdns.com/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf>.

<sup>21</sup> Tipped Workers NPRM, 83 Fed. Reg. Pg. 57409

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bartenders.<sup>22</sup> 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 jobs.<sup>23</sup>

The restaurant industry is one of the largest private sector employers, and the source of employment for many economically and socially marginalized populations.<sup>24</sup> Despite the restaurant industry's continued growth, restaurant workers remain subject to low wages in a static and tiered wage system. The typical restaurant worker in the United States earns approximately \$15,000 per year, or one-third of what the average worker in America earns.<sup>25</sup>

People of color working specifically in the restaurant industry fare even worse. They earn a median annual income of \$13,700.<sup>26</sup> People of color comprise 40 percent of the restaurant workforce, and 44 percent of workers of color in restaurants are earning below a living wage, earning an insufficient income to live locally given their local cost of living.<sup>27</sup> Forty-two percent of restaurant workers earning at or below the minimum wage are people of color.<sup>28</sup>

The poverty rates that tipped workers of color experience are much higher than non-tipped workers. Almost 17 percent of tipped workers of color live in poverty, which is twice the rate of the overall workforce.<sup>29</sup> Nearly 23 percent of Black tipped workers live in poverty, almost 2.8 times the rate of the overall workforce.<sup>30</sup> Overall, restaurant workers of color experience poverty at 2.7 times the rate of the overall workforce.<sup>31</sup>

The Department claims in the NPRM that the change it proposes would address wage disparities between tipped front-of-the-house (FOH) workers and non-tipped back-of-the-house workers (BOH). This is a dubious claim. Tip pooling arrangements are already permissible under existing regulations when employees voluntarily share their tips. But by allowing employers to require redistribution of tips to BOH workers, the Department will create an incentive for employers to keep base wages low for BOH workers, subsidized by the earnings from FOH workers. Moreover, the rule would not require employers to use all or any of the tips to pay BOH workers. Employers could in fact pocket the tips for themselves, or use them for other purposes, including increasing profits. It is highly unlikely that BOH workers would get raises as employers are already paying these non-tipped workers a sufficient wage to satisfy the employer's minimum wage obligations. The proposed rule change will likely only further a race to the bottom for both FOH and BOH workers, with employers pocketing tips from FOH workers and failing to

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<sup>22</sup> Tung, Irene and Teofilio Reyes. "Wait Staff and Bartenders Depend on Tips for More than Half of Their Earnings." January 11, 2018. <http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/>.

<sup>23</sup> 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.

<sup>24</sup> ROC United, Forward Together. "Working Below the Line: How the Subminimum Wage for Tipped Restaurant Workers Violates International Human Rights Standards." Dec. 12, 2015. <http://rocunited.org/publications/working-below-the-line/>

<sup>25</sup> 2012-2015 ACS Data for median wages for tipped workers of color and black workers, and median wages for restaurant workers of color. IPUMS-USA, University of Minnesota, [www.ipums.org](http://www.ipums.org).

<sup>26</sup> Ibid.

<sup>27</sup> Living Wage Calculator. (n.d.). January 26, 2018. from <http://livingwage.mit.edu/>

<sup>28</sup> ROC United. "The Great Service Divide. Occupational Segregation and Inequality in the US Restaurant Industry." Oct. 20, 2014. <http://rocunited.org/publications/the-great-service-divide-national/>

<sup>29</sup> 2012-2015 ACS data for poverty levels for tipped workers color compared to poverty levels of the overall workforce. IPUMS-USA, University of Minnesota, [www.ipums.org](http://www.ipums.org).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.



increase wages in the back of the house. And as previously noted, the rule would apply to all tipped workers, not just those in restaurants or other settings where tip pooling is even relevant. For these tipped workers outside the restaurant industry or where tip pooling is not relevant there is not even a pretext that tips would go anywhere other than to the employer. Where employers choose to pocket workers' tips, tipped workers will see a widespread reduction in take-home wages.

Moreover, evidence already demonstrates that even under current law, employers are illegally stealing tips from workers. This would be exacerbated under the scheme proposed by the proposed rulemaking. A study surveying workers in Chicago, Los Angeles, and New York found that 12 percent of tipped workers had wages stolen by employers.<sup>32</sup> The Economic Policy Institute (EPI) estimates that the tip ownership transfer proposed in the NPRM will result in tipped workers losing between \$523 million and \$13.2 billion in tips, with \$5.8 billion being transferred to employers.<sup>33</sup> This shift will have a disproportionate impact on women and workers of color.<sup>34</sup> Women are projected to lose \$4.6 billion in tips, or 86 percent of the total, and workers of color are projected to lose \$2.3 billion in tips, or 40 percent of the total.<sup>35</sup>

#### IV. History of the Tipped Minimum Wage

It is not possible to understand the dynamics of today's tipped workforce without looking at the history of the tipped minimum wage. The origins of the tipped minimum wage are deeply entwined in our nation's struggles with race and gender equality, while the custom of tipping itself is rooted in the history of servitude.<sup>36</sup>

The practice of tipping proliferated in the United States after the Civil War. At that time, the restaurant and hospitality industry, exemplified by the Pullman Company, hired newly freed slaves without paying them base wages.<sup>37</sup> The effect was to create a permanent servant class, for whom the responsibility of paying a wage was shifted from employers to customers.<sup>38</sup> By 1880, 43 percent of all workers employed in hotels and restaurants were Black. By 1900, 25 percent of all Black workers engaged in non-agricultural labor were employed as servants and waiters, including the vast majority of Black women.<sup>39</sup> In the early 1900s, it is estimated that five million workers in the United States, more than 10 percent of the labor force, were in tip-taking occupations.<sup>40</sup> The FLSA established a bare minimum floor for tipped wages only in 1966. The tipped minimum wage has remained at \$2.13 an hour since 1991.

<sup>32</sup> Berndhardt, Annette., et al. "Broken Laws, Unprotected Workers. Violations of Employment and Labor Laws in America's Cities." 2009. Pg. 23. <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

<sup>33</sup> Shierholz, Heidi, David Cooper, Julia Wolfe, and Ben Zipperer. "Employers would pocket \$5.8 billion of workers' tips under Trump's administration proposed 'tip stealing' rule." December 12, 2017. <http://www.epi.org/files/pdf/139138.pdf>

<sup>34</sup> Ibid.

<sup>35</sup> Shierholz, Heidi., David Cooper, Julia Wolfe and Ben Zipperer. "Women would lose \$4.6 billion in earned tips if the administration's 'tip stealing' rule is finalized." January 17, 2018. <http://www.epi.org/publication/women-would-lose-4-6-billion-in-earned-tips-if-the-administrations-tip-stealing-rule-is-finalized-overall-tipped-workers-would-lose-5-8-billion/>

<sup>36</sup> Azar, Ofer H. "The history of tipping—from sixteenth-century England to United States in the 1910s." *The Journal of Socio-Economics*. Vol. 33, Issue 6. Pgs. 745-764. December 2004.

<sup>37</sup> Bates, B.T. *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*. The University of North Carolina Press. 2001.

<sup>38</sup> Paarlberg, Michael and Teofilo Reyes. "Paying tipped workers better wouldn't lead to fewer restaurant jobs." *The Washington Post*. January 16, 2018. [https://www.washingtonpost.com/news/posteverything/wp/2018/01/16/paying-tipped-workers-better-wouldnt-lead-to-fewer-restaurant-jobs/?utm\\_term=.17fb13b45f73](https://www.washingtonpost.com/news/posteverything/wp/2018/01/16/paying-tipped-workers-better-wouldnt-lead-to-fewer-restaurant-jobs/?utm_term=.17fb13b45f73)

<sup>39</sup> Wright, R.R. Jr. "The Negro in Unskilled Labor." *The Annals of the American Academy of Political and Social Sciences*. Vol. 49, Issue 1. Pgs. 19-27. Sept. 1913.

<sup>40</sup> Azar, Ofer H. "The history of tipping—from sixteenth-century England to United States in the 1910s." *The Journal of Socio-Economics*, Vol. 33, Issue 6. Pgs. 745-764. December 2004.

Despite the existence of a system where tipped workers essentially worked for free and relied almost entirely on tips from customers to pay their wages, some employers have attempted to take tips away from tipped workers throughout the decades. As early as the late 1800s, employers made efforts to claim worker and servants' tips and even charge workers for the right to work.<sup>41</sup> The payment structure that many Black workers were working under became another way to perpetuate servitude, as the employer's freedom to accumulate profit came at the cost of the freedom of workers of color, in particular Black workers, to become financially stable and secure economic and social mobility. This history continues to impact and inform the tipped workforce to this day, where 44.3 percent of wage theft occurs among workers of color.<sup>42</sup>

Since its inception in the United States, the tipped workforce has been exploited by unscrupulous employers. Today, this workforce is disproportionately represented by women of color. Given the current and historical risk of wage theft and pervasive noncompliance with the law in tipped occupations, the Department should aim to propose regulations that provide strong protections against wage theft for tipped workers rather than promulgating regulations that would encourage wage theft and exacerbate the redistribution of wealth away from tipped workers of color such as those contained in the NPRM.

## **V. The Proposed Rule Exacerbates the Vulnerability to Sexual Harassment Faced by Women and LGBTQ Workers in Tipped Jobs**

DOL's proposal may also exacerbate an epidemic of sexual harassment faced by tipped workers. As the #MeToo movement has made clear, sexual harassment and assault is something that far too many people face in our country, and there is no industry that is immune. However, the Equal Employment Opportunity Commission (EEOC) has noted that the restaurant industry is the "single largest" source of sexual harassment claims.<sup>43</sup> Sexual harassment in restaurants is widespread and experienced by all types of workers. A survey by ROC United and Forward Together found that two-thirds of female workers and over half of male restaurant workers have experienced some form of sexual harassment from co-workers, and nearly 80 percent of women and 55 percent of men experienced some form of sexual harassment from customers.<sup>44</sup>

Transgender workers also face discrimination and harassment, often based on their gender identity and perceived sexual orientation. ROC United found that "[t]ransgender workers are two-and-a-half times more likely to report harassing comments about their sexual orientation or gender identity from customers than other coworkers."<sup>45</sup>

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<sup>41</sup> See, e.g., *Zappas v. Roumeliote*, 156 Iowa 709, 137 N.W. 935, 1912 Iowa Sup. LEXIS 233; *Ex Parte Farb*, 178 Cal. 592 (Cal. 1918); *Wilcocks v. Phillips*, 29 F. Cas. 1198, 1843 U.S. App. LEXIS 435, 1 Wall. Jr. 47; Rich, B and M. Blair Wailes. "American Law Reports Annotated Vol. III." 1919. *The Lawyers Co-operative Publishing Company*; Jayaraman, S. "Forked A New Standard for American Dining" 2016. *Oxford University Press*; Azar, O. "The history of tipping—from sixteenth-century England to United States in the 1910s." 2004. *The Journal of Socio-Economics*. Pgs. 745-764.

<sup>42</sup> Cooper, David and Teresa Kroeger. "Employers steal billions from workers' paychecks each year." May 10, 2017.

<https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>

<sup>43</sup> ROC United. "Tipped Over the Edge: Gender Inequity in the Restaurant Industry." Feb. 13, 2012. <http://rocunited.org/publications/tipped-over-the-edge-gender-inequity-in-the-restaurant-industry/>

<sup>44</sup> ROC United. "The Glass Floor: Sexual Harassment in the Restaurant Industry." Oct. 7, 2014. <http://rocunited.org/2014/10/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>

<sup>45</sup> ROC United. "Our Tips Belong to Us: Overcoming the National Restaurant Association's Attempt to Steal Workers' Tips, Perpetuate Sexual Harassment, and Maintain Racial Exploitation." Oct. 23, 2017. <http://rocunited.org/publications/our-tips-belong-to-us/>

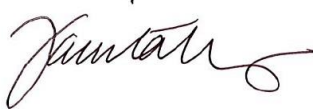
The rampant sexual harassment women and transgender individuals already face, particularly those individuals earning the tipped wage, highlights the financial power and control that management and customers have. Because of the two-tiered system that allows tipped workers to be paid a lesser wage, female tipped workers can feel compelled to put up with inappropriate workplace behavior so as not to risk lower tips. Women workers are at a specific disadvantage, as they make up the vast majority of tipped workers. Nearly 90 percent of tipped women restaurant workers have experienced some form of sexual harassment or assault in the workplace.<sup>46</sup>

The Department's proposed rule would reinforce this financial power dynamic that renders workers vulnerable to sexual harassment in the workplace from customers.<sup>47</sup> Under DOL's proposed rule, employers would own the tips that tipped workers earn. When employers have a direct stake in tips, as this rule would permit, there will likely be greater employer pressure on tipped FOH workers to accept customer harassment without complaint to avoid losing tips. This in turn feeds into a workplace culture of rampant sexual harassment of tipped workers. The proposed rule would make women who depend on tips doubly vulnerable to harassment and exploitation as they first try to please the customer in order to earn tips, and then the employer in order to keep them.

The Leadership Conference on Civil and Human Rights 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 Department of Labor's Notice of Proposed Rulemaking on Tip Regulations Under the Fair Labor Standards Act. If you have any questions, please contact Emily Chatterjee, Senior Counsel, at [chatterjee@civilrights.org](mailto:chatterjee@civilrights.org).

Sincerely,



Vanita Gupta  
President & CEO

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<sup>46</sup> Ibid.

<sup>47</sup> ROC United. "The Glass Floor: Sexual Harassment in the Restaurant Industry." Oct. 7, 2014. <http://rocunited.org/2014/10/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>