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Vanita Gupta

February 2, 2018

Melissa Smith

Director of the Division of Regulations, Legislation and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Ave., NW  
Room S-3502  
Washington, DC 20210

**Withdraw Notice of Proposed Rulemaking (NPRM), RIN 1235-AA21, 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 to you today to demand that the Department of Labor immediately withdraw its Notice of Proposed Rulemaking (NPRM), RIN 1235-AA21, Tip Regulations under the Fair Labor Standards Act (FLSA).

Bloomberg Law reported yesterday that the Department prepared and then buried economic analysis for the NPRM that would have shown that tipped workers would lose billions of dollars in wages if the proposed rule were to be finalized and implemented.<sup>1</sup> This report directly contradicts statements made in the NPRM where the Department asserted that it was “unable to quantify how customers will respond to the proposed regulatory changes” and “currently lacks data to quantify possible reallocations of tips.”

This is outrageous. If true, the Department’s actions contravene numerous authorities that govern federal agency rulemaking, including Executive Order 12866, Executive Order 13563, and guidance from the White House Office of Management and Budget, which says that agencies are required to quantify costs and benefits of their proposed regulations wherever possible.<sup>2</sup> The Department’s actions are contrary to the transparency needed in the rulemaking process to ensure that the regulatory process is fair, reasonable, and consistent with the law.

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

<sup>2</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. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).



All of the tipped workers in our country who would be directly impacted by the dramatic change proposed by the Department deserve to know the full economic impact that this rulemaking would have during the comment period, when public input is possible. The rulemaking process requires that stakeholders have the opportunity to review the Department's good-faith economic analysis, including the assumptions underlying it. And stakeholders also need adequate time to fully respond to such analysis.

The Department of Labor's mission is "[t]o foster, promote, and develop the welfare of the wage earners...of the United States[.]" Concealing the economic analysis underlying this NPRM is nothing less than a betrayal of this mission. For the sake of the integrity of this process, and for the sake of all stakeholders, in particular the tipped workers who will be impacted most significantly by this rulemaking, The Leadership Conference calls on the Department to immediately withdraw this NPRM.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Vanita Gupta  
President & CEO