



December 11, 2019

Submitted via www.regulations.gov

Amy DeBisschop
Acting 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. DeBisschop:

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 person in the United States, I write in response to the Department of Labor's ("the Department") Notice of Proposed Rulemaking (NPRM),¹ whereby the Department seeks to align its tip regulations with the new section 3(m)(2)(B) of the Fair Labor Standards Act (FLSA), enacted in the Consolidated Appropriations Act (CAA) of 2018.

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. We support the legislative compromise reflected in the CAA amendments – which makes clear that tips belong to workers, not their employers – and appreciate the Department's efforts to implement the new law, although we believe that the proposed definition of managers and supervisors should be revised as detailed in our comments below. However, The Leadership Conference is extremely concerned about the portions of this proposal that threaten the economic security of millions of working people and their families. We strongly oppose the Department's proposal to abandon the "80/20 rule" regulating employers' use of the tip credit for non-tipped work as well as the Department's proposal concerning the collection of civil monetary penalties for willful violation of a wide range of labor laws.

I. The Department should clarify that tips – including shared tips – are meant to solely benefit employees who do not hold managerial or supervisory positions, and ensure that the definition of managers and supervisors aligns with this intention.

¹ U.S. Dep't of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 84 Fed. Reg. 53,956 (proposed Oct. 8, 2019) [hereinafter "2019 Tip Rule"].

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In March of 2018, tipped workers across the country won critical new protections in the FLSA with the addition of section 3(m)(2)(B), which states unequivocally that an “employer may not keep tips received by its employees for any purposes.” In this amendment, Congress made abundantly clear that the Department’s prior proposed rulemaking on the subject – which would have resulted in employers *legally* pocketing an estimated \$5.8 billion of their employees’ tips each year² – was contrary to congressional intent. The FLSA now does authorize employers to establish mandatory tip pools between tipped restaurant workers in the “front of the house,” such as bartenders and servers, and those who work in the “back of the house,” such as line cooks and dishwashers. Such a tip pool is only permissible, however, if two conditions are met: 1) the employer pays all employees at least the full minimum wage, before tips (rather than taking a “tip credit” that counts a portion of employee tips toward its minimum wage obligation), and 2) the employer, managers, and supervisors do not keep any portion of employees’ tips.

In the present rulemaking, the Department should make clear that Congress did not authorize employers to simply take a tip credit in another form by reducing the wages it pays “back-of-house” staff, then supplementing them with the earnings of tipped employees. The Department’s suggestion in the proposed rule that such activity is permissible runs contrary to Congress’s intent to ensure that tips inure to the benefit of employees rather than their employers,³ and the Department must ensure that the final rule makes no such suggestion.

The restaurant industry is one of the largest private sector employers, and the source of employment for many working people from communities that have been economically and socially marginalized.⁴ 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 is paid approximately \$15,000 per year, or one-third of what the average worker in America is paid.⁵ People of color working specifically in the restaurant industry fare even worse. They are paid a median annual income of \$13,700.⁶ People of color comprise 40 percent of the restaurant workforce, and 44 percent of workers of color in restaurants are paid below a living wage that is insufficient to meet the basic local cost of living.⁷ Women – disproportionately women of color—represent more than two-thirds of tipped workers nationwide.⁸ In 38 states, at least 7 in 10 tipped workers are women.⁹

² See Shierholz, Heidi et al. *Economic Policy Institute*. “Employers Would Pocket \$5.8 Billion of Workers’ Tips Under Trump Administration’s Proposed “Tip Stealing” Rule.” December 2017. <https://www.epi.org/files/pdf/139138.pdf>.

³ See 2019 Tip Rule, 84 Fed. Reg. at 53957 and 53968 (“because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay “back-of-house” workers (as long as they do not reduce these employees’ wages below the applicable minimum wage”).

⁴ 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/>

⁵ 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.

⁶ Ibid.

⁷ Living Wage Calculator. (n.d.). January 26, 2018. from <http://livingwage.mit.edu/>

⁸ Women make up 69 percent of tipped workers. Women of color are 28 percent of tipped workers, compared to 18 percent of all workers. NWLC calculations based on U.S. Census Bureau, American Community Survey 2017 one-year estimates (ACS 2017) using IPUMS USA. Figures include all workers employed in a set of predominantly tipped occupations identified by the Economic Policy Institute (EPI). See Dave Cooper, Zane Mokhiber & Ben Zipperer, EPI, Minimum Wage Simulation Model Technical Methodology (Feb. 2019), <https://www.epi.org/publication/minimum-wage-simulation-model-technical-methodology/>.

⁹ See NWLC, WOMEN IN TIPPED OCCUPATIONS, STATE BY STATE (May 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/06/Tipped-workers-state-by-state-2019.pdf>.

Median hourly earnings for people working in common tipped jobs like restaurant server and bartender are less than \$11, including tips,¹⁰ 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, particularly vulnerable to economic insecurity.¹¹ Almost 17 percent of tipped workers of color live in poverty, which is twice the rate of the overall workforce.¹² Nearly 23 percent of Black tipped workers live in poverty, almost 2.8 times the rate of the overall workforce.¹³ Overall, restaurant workers of color experience poverty at 2.7 times the rate of the overall workforce.¹⁴ Reducing the pay 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.

Preventing employers, managers, and supervisors from participating in tip pools intended to benefit lower-paid employees is at the core of the legislative compromise in the CAA, and it is critical to ensure that the terms “manager” and “supervisor” are appropriately defined. While we agree that the executive duties test at 29 C.F.R. § 541.100(a)(2)–(4) outlines core principles of managerial and/or supervisory responsibilities, we are concerned that the Department’s proposed definition of managers and supervisors could be interpreted overbroadly to exclude individuals who in fact should be permitted to participate in tip pools. An employer might incorrectly identify as a supervisor, for example, a more experienced line cook who “manages” the line and “customarily and regularly directs the work” of two other cooks – but who spends most of their time cooking, and is paid only \$28,000 a year. These workers lack the bargaining power and authority that the statute intended to attribute to the managers and supervisors who should be excluded from tip pools.

Indeed, the “fair day’s pay for a fair day’s work” promised by the FLSA “can only be guaranteed if employers’ ability to take the tip credit is limited to when their employees are actually ‘engaged in a tipped occupation.’”¹⁵ As the Department recognizes, the FLSA at section 3(m) only permits employers to take a tip credit for those who are a “tipped employee,” defined at section 3(t) as an “employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips” – a definition that requires further explanation to ensure that employers understand when an individual employee is employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage). With a stronger definition of managers and supervisors, the proposed rule’s provisions implementing the FLSA’s revised section 3(m) will take important steps to ensure that employers fairly compensate their tipped employees.

¹⁰ Median hourly wages, including tips, are \$10.47 for waiters and waitresses and \$10.84 for bartenders, the two largest groups of tipped workers. See U.S. Dep’t of Labor, Bureau of Labor Statistics, May 2018 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/current/oes_nat.htm (last visited Nov. 21, 2019). Tipped workers in other occupations have similarly low wages, such as gaming services workers (\$10.07), barbers/hairdressers/hairstylists/cosmetologists (\$11.94), and other personal appearance workers (\$11.94). *Id.*

¹¹ See generally Morgan Harwood, Jasmine Tucker & Julie Vogtman, NWLC, ONE FAIR WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (May 2019), <https://nwlc-ciww49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/05/Tipped-Worker-New-2019-v2.pdf>.

¹² 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.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); see also, e.g., *Belt*, 2019 WL 3829459 at *25.

II. The Department should incorporate the 80/20 rule in the dual jobs regulation, not repeal it.

With the modifications noted above, the proposed rule's provisions implementing the FLSA's revised section 3(m) will take important steps to ensure that employers fairly compensate their tipped (and non-tipped) employees. The proposed amendments to the "dual jobs" regulation codifying the Department's repeal of the "80/20 rule" does just the opposite, however, and will particularly harm the women and people of color who comprise the majority of the tipped workforce. The Department should abandon its effort to enshrine its ill-conceived guidance in formal regulations, and instead affirm or strengthen the longstanding 80/20 rule, which is aligned with the overarching goal of the CAA amendments to the FLSA: to improve economic security for tipped workers.

Notwithstanding the 80/20 rule's consistent use and acceptance by employers, courts, and the Department itself over a 30-year period, the Department now asserts that the 80/20 rule "was difficult for employers to administer and led to confusion."¹⁶ The alternative proposed in this rule, however – which the Department recently issued in guidance¹⁷ and seeks to formalize here – is sure to produce far greater confusion. As multiple courts have already recognized in refusing deference to the identical policy in guidance, replacing the longstanding 80/20 standard with vague "reasonable time" language removes any meaningful temporal limit on the time spent on non-tipped duties for which an employer may claim a tip credit.¹⁸ Indeed, the proposed rule only supplements the vague temporal terms in the existing dual jobs regulation – "occasionally," "part of [the] time," and "takes a turn" – with a "reasonable amount of time" standard that is equally vague and overly broad. If 20 percent is not a "reasonable" limit, what is? The lack of a bright line answer to that question will sow confusion for employers and employees alike and could be abused even by well-intentioned employers.

A 20 percent limit on related but non-tipped duties for which an employer may take a tip credit provides concrete guidance to both employers and employees that is "tremendously useful in evaluating whether employees are in fact employed in a tipped 'occupation.'"¹⁹ The Department employed this standard in the dual jobs context for three decades, and also uses "a 20 percent threshold to delineate the line between substantial and nonsubstantial work in various contexts within the FLSA."²⁰ The Department has offered no explanation for repeal, other than the fact that the rule may be confusing – an explanation that is groundless given the greater confusion that a more vague rule will surely engender, as explained above. Overall, the components of this proposed rule run counter to the avowed purpose of this rulemaking, the FLSA, and the Department: to protect working people and their wages. The Department's decision to abandon decades of consistent agency policy without a rational explanation is arguably arbitrary and

¹⁶ As evidence of this, the Department cites to *Pellon*—a case that actually decided that determining the validity of the 80/20 rule was "unnecessary" given the facts of the case. *See Pellon v. Bus. Representation Int'l*, 528 F.Supp.2d 1306, 1314 (S.D. Fla. 2007).

¹⁷ [U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2018-27, 2018 WL 5921455 (Nov. 8, 2018); Field Operations Handbook § 30d00(f)(1)-(5) (Feb. 15, 2019); Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019).

¹⁸ *See, e.g., Flores v. HMS Host Corp.*, No. 8:18-CV-03312-PX (D. Md. Oct. 23, 2019); *Belt*, 2019 WL 3829459 at *25; *Spencer v. Macado's, Inc.*, No. 6:18-CV-00005, 2019 WL 2931304, at *6 (W.D. Va. July 8, 2019); *Esry v. P.F. Chang's China Bistro, Inc.*, 373 F. Supp. 3d 1205, 1210-11 (E.D. Ark. 2019); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019).

¹⁹ *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 735 (D.S.C. 2015).

²⁰ *Fast*, 628 F.3d at 88

capricious in its own right,²¹ particularly considering the lack of intent to quantify the human impact of these proposed changes.

As the Department concedes, tipped employees could “lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage.”²² A server who formerly could spend no more than 1.2 hours of a six-hour shift, on average, doing non-tipped work like rolling silverware, cleaning tables, or sweeping floors can now be required to spend two hours – or four hours, or whatever the manager deems “reasonable” – doing such side work, foregoing tipped income while still being paid just \$2.13 an hour.²³ This scenario has already played out in workplaces across the country in which unscrupulous employers ignored their obligations under the 80/20 rule.²⁴ With the regulatory barriers to abuse of the tip credit – and tipped employees – all but removed, millions of working people will undoubtedly be required to do more work for less pay.

“Back-of-house” employees will also lose out under the Department’s amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on “related” tasks like cleaning and food prep that have traditionally been performed by “back-of-house” staff, that will drive down wages for – or even eliminate – back-of-house positions in restaurants.²⁵ Given the overrepresentation of people of color and women in “back-of-house” positions, this change will have grave implications for the economic security of these communities, who stand to be shortchanged as a result of this proposal.²⁶ The proposal will have damaging impacts beyond the restaurant industry, too, since it applies equally to all tipped employees.²⁷ And by incentivizing employers’ use of the tip credit – and introducing further ambiguity into when use of the tip credit is in fact permissible – the proposed rule will make people who depend on tips to make a living even more vulnerable to wage theft.²⁸

²¹ While the arbitrary and capricious standard is a narrow one, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” A reviewing court may conclude that a rule is arbitrary and capricious if, for example, the agency has “offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Manufacturers Assoc. of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). Moreover, “[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action.” *Pfaff v. United States Dep’t of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

²² 2019 Tip Rule, 84 Fed. Reg. at 53,972.

²³ Even if an employer ensures that an employee’s total compensation (including tips) amounts to the minimum wage, the employer is not excused from its obligation under the FLSA to pay at least the minimum wage, without a tip credit, for any time the employee spends in a non-tipped occupation—an obligation the Department’s proposal will encourage employers to evade.

²⁴ See generally *supra* note 11.

²⁵ The Department acknowledges this possibility as well; see 2019 Tip Rule, 84 Fed. Reg. at 53,972.

²⁶ Use of the phrase “back-of-the-house” and “front-of-the-house” employees, in itself, can best be described as thoughtless and dehumanizing, and should have no place in the discussion of how our federal government regulates the pay of tipped workers. These phrases are reminiscent of terms used for enslaved people who were labeled as either “house slaves” or “field slaves.” Certainly, proposed regulations in 2019 should be reflective of the value we currently place in all individuals in the workforce for their humanity, dignity, and necessary contribution to our country’s economy, regardless of whether they work in the forefront or behind the scenes.

²⁷ The Department of Labor defines a tipped employee as any employee engaged in an occupation in which they customarily and regularly receive more than \$30 a month in tips. Although the federal government has not established a strict classification structure that defines which occupations are eligible to receive tips, the Bureau of Labor Statistics has identified a variety of industries and occupations most likely to have tipped employees, including restaurants, bars, and casinos; hotels; automobile parking (valet); local passenger transportation (taxis, tour bus, limousine services); beauty salons and barber shops, and passenger railroad services. <https://www.govdocs.com/tipped-workers-united-states/>

²⁸ Back-of-house employees will also lose out under the Department’s amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on “related” tasks like cleaning and food prep that have traditionally been performed by back-of-house staff,

Despite the Department's admission that its proposed rule could lead to reduced income for a range of tipped and non-tipped employees, it fails to provide sufficient economic analysis to quantify the costs of its proposal to working people, or to provide an analysis of regulatory alternatives that may be less harmful. This is a dangerous trend that we have seen across several proposals coming out of the Department of Labor. In failing to provide a thorough analysis, the Department directly violates its responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible²⁹ – and abandons its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law. The Economic Policy Institute, which conducted the type of analysis that the Department claims it cannot, estimates that tipped workers will lose \$683 million each year if the Department's rule goes into effect.³⁰

III. The Department must not use this rulemaking to make it harder to hold employers accountable for willful violations of labor laws.

Finally, in redefining willfulness, the Department is using the need to implement new provisions of the FLSA as a pretext to *weaken* worker protections – in this case, far beyond the context of tipped occupations. In assigning civil monetary penalties to willful violations of the new FLSA section 3(m)(2)(B), Congress surely did not presume that the Department would then redefine willfulness to an unreasonable standard that characterizes an employer's decision to ignore advice from the Department as a mere factor to be considered rather than what it is: clear evidence that an employer knew it was violating labor laws and chose to proceed with the violation – evidence that should therefore be sufficient to deem an employer's conduct "knowing," as defined by the "willful" language in existing FLSA regulations. The existing regulations similarly make clear that an employer's conduct is "in reckless disregard of the requirements of the Act" if the employer failed to make adequate inquiry into whether its conduct was compliant. These longstanding, bright line rules promote consistency in application and certainty for employers.

IV. Conclusion

The Department should do what Congress intended it to do in this regulation: implement the new provisions of the Fair Labor Standards Act in a way that ensures working people who are paid tips – and, in appropriate cases, their colleagues – receive the economic benefit of those tips. For the reasons discussed above, the current proposed rule runs counter to Congress's intention to improve economic security for working people and serves only to enable employer abuses, contrary to the mission of the Department.

that will drive down wages for—or even eliminate—back-of-house positions in restaurants. The Department acknowledges this possibility as well; *see* 2019 Tip Rule, 84 Fed. Reg. at 53,972. The proposal will have damaging impacts beyond the restaurant industry, too, since it applies equally to all tipped employees.

²⁹ *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).

³⁰ Shierholz, Heidi and Cooper, David. *Economic Policy Institute*. "Workers Will Lose More than \$700 Million Annually Under Proposed DOL Rule." November 2019. <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

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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 Gaylynn Burroughs, Senior Counsel, at burroughs@civilrights.org.

Sincerely,

A handwritten signature in dark ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Vanita Gupta
President & CEO