



The Leadership Conference
on Civil and Human Rights

August 23, 2021

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

RE: Comments on Regulatory Information Number (RIN) 1235-AA21: Tip Regulations under the Fair Labor Standards Act: Partial Withdrawal

Dear Ms. DeBisschop:

On behalf of The Leadership Conference on Civil and Human Rights (“The Leadership Conference”), a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the rights of all persons in the United States, we write in support of the above-referenced Department of Labor (“Department” or “DOL”) proposed rulemaking. The proposed rule clarifies that an employer may only take a tip credit when employees perform work that produces tips or a non-substantial amount of work that directly supports tip-producing work, and defines “substantial amount of time” as more than 20 percent of all hours worked during the workweek or exceeding 30 continuous minutes.

Importance of tipped work rules to The Leadership Conference

Raising wages is more than a question of economics. It’s a question of values that forces us to grapple with whether we as a nation value the people who drive our economy — especially as our nation continues to grapple with a global pandemic that laid bare the inequities at its heart. During the public health and economic crisis of the last 18 months, millions of tipped workers around the country gained a newfound status as “essential workers.” Despite this, they continue to be vulnerable to exploitative wage practices. The Leadership Conference believes in one fair minimum wage for all workers. We support this rulemaking as an important step in the right direction that will offer protections to tipped workers as we work towards that future.

The origins of the tipped minimum wage are deeply entwined in our nation’s history of racial and gender inequality. The custom of tipping itself is rooted in the history of slavery¹ and escalated in the United States after the Civil War. At that time, restaurant and hospitality

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¹ 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.

firms like the Pullman Company hired newly freed slaves without paying them base wages.² The effect was to create a permanent servant class, for whom the responsibility of paying a wage was shifted from employers to customers.³ Having to depend on tipping kept African Americans in an economically and socially subordinate position. The Fair Labor Standards Act established a bare minimum floor for tipped wages only in 1966, and the federal tipped minimum wage has remained at \$2.13 an hour since 1991.

These inequities continue today, between tipped and non-tipped workers, and amongst tipped workers. Even before the pandemic, the disparities were stark. A 2016 study found that people of color are more likely to work in the tipped workforce and live in poverty than their White counterparts.⁴ The take-home wages of people of color who work in restaurants are 56 percent less than their White colleagues. The median annual income for tipped workers of color is \$14,300. For Black working people, it is even lower at \$12,900 per year.⁵ Women — disproportionately women of color — represent more than two-thirds of tipped workers nationwide, and are even more likely to experience poverty than their male counterparts.⁶ Poverty rates for people who work for tips are more than twice as high as rates for working people overall — with female tipped workers, especially women of color, at a particular disadvantage.⁷

Due to the historic and contemporary inequities created by the system of tipped work, the ability of employers to pay workers a subminimum wage of \$2.13 per hour should be highly scrutinized and only narrowly permitted. The Department routinely identifies significant wage violations in industries with large concentrations of tipped workers, where employers have been able to violate rules with near impunity.⁸ Strengthening protections for people working in tipped jobs should be a priority for the Department, and this proposed rule takes important steps to do so.

Restore the “80/20 rule”

Under the longstanding “80/20 rule,” DOL guidance provided that employers could not pay a tipped employee the \$2.13/hour subminimum wage for time beyond 20% of the workweek that the employee spends on tasks that are related to their job but do not produce tips. In the restaurant context, for example, if a server spent 12 hours in a 40-hour workweek on “side work” — like rolling silverware or setting tables — their employer would be required to pay the full minimum wage for at least four of those hours,

² Bates, B.T. *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*. The University of North Carolina Press. 2001

³ 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-restaurantjobs/?utm_term=.17fb13b45f73

⁴ Gallagher Robbins, Katherine and Julie Vogtman. “Low-wage jobs held primarily by women will grow the most over the next decade.” April 2016. <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/04/Low-Wage-Jobs-Held-Primarily-by-Women-Will-Grow-the-Most-Over-the-Next-Decade.pdf>

⁵ Oatman, Maddie. “The racist, twisted history of tipping.” *Mother Jones*. May/June 2016.

<https://www.motherjones.com/environment/2016/04/restaurants-tipping-racist-origins-saru-jayaraman-forked/>

⁶ See *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, *Nat’l Women’s Law Ctr.* (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf>.

⁷ NWLC & ROC United. “Raise the Wage: Women Fare Better in States with Equal Treatment for Tipped Workers.” Oct. 17, 2016. <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf>.

⁸ See generally, e.g., David Weil, *Improving Workplace Conditions Through Strategic Enforcement* (May 2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

because eight hours of side work reaches the 20% limit. Under the Trump administration, however, the Department removed this crucial limit, allowing employers to pay just \$2.13/hour for non-tipped work as long as those duties are done “contemporaneously with tipped duties or for a reasonable time immediately before or after performing the tipped duties.”⁹ But the Department did not define “reasonable time,” giving unscrupulous employers free rein to abuse the rule and making enforcement difficult.

The Economic Policy Institute estimated in 2019 that elimination of the 80/20 rule would allow employers to capture more than \$700 million annually from workers,¹⁰ a number that has likely gone up as shifts in employer and consumer behavior during the pandemic — such as restaurants increasing carry-out and reducing dine-in service — have created much more non-tipped work in establishments that employ tipped workers. This loss would be especially harmful for women and people of color who are both disproportionately represented in the tipped workforce and have borne the brunt of the pandemic’s devastating impacts. Tipped workers face high enough barriers as is, barriers that radiate along racial and gender lines. The last thing the Department ought to have done is facilitate additional wage exploitation by their employers.

We support the Department’s restoration in the proposed rule of the 20% limit on related, non-tipped work for which an employer can pay a tipped employee less than the full minimum wage.

Clear guidelines around timing of non-tipped work

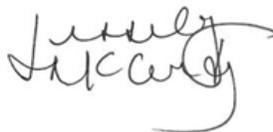
The Department recognizes that a lack of bright-line rules makes compliance with and enforcement of the limitations on use of the tipped wage difficult. The proposal sets a threshold of 30 minutes of non-tipped work as an appropriate limit for determining when an employee is no longer performing work that is incidental to producing tips, and has therefore ceased being in a tipped occupation and must be paid at least the full minimum wage. We support bright-line rules to enhance clarity and compliance with minimum wage and overtime rules.

Thank you for your attention to these comments. If you have any questions, please contact Gaylynn Burroughs, senior policy counsel, at burroughs@civilrights.org.

Sincerely,



Wade Henderson
Interim President & CEO



Jesselyn McCurdy
Interim Executive Vice President of Government Affairs

⁹ See WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018).

¹⁰ Heidi Shierholz & David Cooper, *Workers Will Lose More Than \$700 Million Annually Under Proposed DOL Rule*, Econ. Policy Inst. (Nov. 30, 2019), <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.