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Submitted via www.regulations.gov

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, DC 20210

RE: Comments on Proposed Delay of Effective Date, Tip Regulations Under the Fair Labor Standards Act (FLSA), RIN 1235-AA21

Dear Ms. DeBisschop:

The Leadership Conference on Civil and Human Rights (“The Leadership Conference”) submits these comments in response to the Department of Labor’s (“the Department”) proposal to delay the effective date of the rule entitled Tip Regulations Under the Fair Labor Standards Act (“Tip Rule”), published in the Federal Register on December 30, 2020, to April 30, 2021 to allow the Department additional opportunity for review and consideration of the rule.

The Leadership Conference supports the Department’s proposal to delay the effective date of the Tip Rule. As a coalition of more than 220 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, The Leadership Conference has long maintained that civil and human rights are inextricably linked to economic security and that working people — and in particular those who have been economically marginalized — should be paid fairly and enjoy the fullest protection of our federal labor and employment laws. We are deeply concerned that the Tip Rule would improperly narrow the protection of the Fair Labor Standards Act (FLSA) for tipped workers, undermining the economic security of millions of working people, including women and people of color, who not only make up the majority of the tipped workforce but are also among those hardest hit by the current pandemic. It is therefore critically important that the Department delay implementation of this rule to allow for additional opportunity for review and consideration.

As we detailed in our [December 11, 2019 comment letter](#) to the Department, the Tip Rule’s rescission of the longstanding “80/20 rule” directly threatens the economic security of tipped workers. Under the 80/20 rule, when an employee spends more than 20 percent of their time during a workweek on activities that do not produce tips, the employee is no longer

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considered a tipped employee and must be paid the full minimum wage. Notwithstanding the 80/20 rule’s consistent use and acceptance by employers, courts, and the Department itself over a 30-year period, the Department would replace the 80/20 standard with a more confusing standard that lacks concrete guidance to both employers and employees on when an employer may take a tip credit. The result of this confusion would be diminished capacity of tipped workers to earn tips — as employers can require tipped workers (still receiving a \$2.13 per hour subminimum wage) to spend more and more time on nontipped duties — and potentially fewer nontipped jobs, as employers can pay tipped employees less money to spend more time on “related” tasks, incentivizing the use of tipped workers at a subminimum wage rather than employment of a nontipped worker at the full minimum wage. In short, the Tip Rule translates into less money for many working people already receiving low wages, and because women and people of color make up a majority of tipped workers, the Tip Rule would exacerbate an economic crisis for these workers in particular.

Data collected before the current pandemic show that more than two-thirds of tipped workers are women, and women of color are disproportionately working in tipped jobs, representing 28 percent of tipped workers compared to 18 percent of all workers.¹ More than one-third of tipped workers are mothers, and nearly half are single moms.² Poverty rates for tipped workers, however, are more than twice as high as for working people overall,³ with poverty rates for women working in tipped occupations at over 2.5 times the rate for working people overall and Black and Latina women experiencing higher poverty rates than White women.⁴ 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. In the context of the current pandemic, this harm is exacerbated for people of color who, because of systemic racism and decades of discrimination, are more likely to suffer from underlying health conditions that put them at increased risk of death or serious complications from COVID-19, but who also already have fewer resources to rely on if they become ill with the virus.

In addition to disadvantaging low-wage and tipped workers, the Tip Rule would also make it more difficult to hold employers accountable for violations of the FLSA. The Tip Rule’s redefinition of “willfulness” improperly narrows the reasons for assessing civil monetary penalties against employers who violate the law. This redefinition would ultimately weaken worker protections and should be reviewed by the Department.

¹ Calculations by the National Women’s Law Center 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, Economic Policy Institute, Minimum Wage Simulation Model Technical Methodology (Feb. 2019), <https://www.epi.org/publication/minimum-wage-simulation-model-technical-methodology/>.

² Restaurant Opportunities Centers United, Better Wages, Better Tips: Restaurants Flourish with One Fair Wage (Feb. 13, 2018), https://chapters.rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

³ Elise Gould & David Cooper, Economic Policy Institute, Seven Facts about Tipped Workers and the Tipped Minimum Wage (May 31, 2018), <https://www.epi.org/blog/seven-facts-about-tipped-workers-and-the-tipped-minimum-wage/>.

⁴ Morgan Harwood, Jasmine Tucker & Julie Vogtman, National Women’s Law Center, Women Fare Better in States with Equal Treatment for Tipped Workers (May 2019), <http://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/05/Tipped-Worker-Blue-2019-v2.pdf>.



Finally, the Department should delay implementation of the Tip Rule to allow for review of the rule in light of the lawsuit filed by eight states and the District of Columbia challenging the rule as a violation of the Administrative Procedure Act. The lawsuit raises serious questions about whether the Tip Rule contradicts the text and purpose of the FLSA and whether the Department failed to analyze the impact the rule would have on tipped workers. The Leadership Conference has previously noted our concern that the Department did not provide a cogent explanation for the repeal of the 80/20 rule and did not offer a meaningful analysis of the cost of the Tip Rule, particularly to low-wage working people, many of whom are women and people of color who have already been historically marginalized in the workforce.

The Leadership Conference fully supports the Department's proposal to delay the implementation of the Tip Rule to allow for additional review. By narrowing the protections of the FLSA, the Tip Rule would undermine the economic security of millions of working people and particularly harm those who have been hit hardest by the current pandemic, including women and people of color who comprise the majority of the tipped workforce. We 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 and CEO



LaShawn Warren
Executive Vice President for Government Affairs