

February 1, 2018

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

Re: RIN 1235-AA21, Comments in Response to Request for Information: Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Ms. Smith:

The National Partnership for Women & Families strongly opposes the Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM or Proposed Rule) that seeks to rescind portions of tip regulations it issued in 2011 (the 2011 Final Rule) pursuant to the Fair Labor Standards Act (FLSA).¹ By partially rescinding the existing tip regulations, the Department will overturn decades of precedent and practice that protects tips as the property of workers, thereby undermining the financial stability of millions of women and men who work in tipped positions.

The National Partnership is a non-profit, non-partisan advocacy organization with more than 40 years of experience promoting fairness in the workplace, reproductive health and rights, access to quality, affordable health care and policies that help women and men meet the dual demands of their jobs and families. Since our founding as the Women's Legal Defense Fund in 1971, we have fought for every significant federal advance for equal opportunity in the workplace, and we continue to advocate for meaningful safeguards that prevent discrimination against women.

By rescinding portions of the 2011 Final Rule that clarify employers' obligations to tipped employees under section 3(m) of the FLSA and, in particular, abolishing the regulation affirming that tips are the property of the employee who earned them, the Department threatens the economic stability of millions of working people and their families. Tipped workers in the United States stand to lose an estimated \$5.8 billion dollars in tips each year if the Department's rule goes into effect – with women alone losing an estimated \$4.6 billion each year.²

The Department of Labor's 2011 Final Rule updating the tip credit regulations was a long-overdue change that harmonized those regulations with intervening statutory changes and legislative history; clarified that tips are the property of the employee and may not be confiscated by employers to bolster their profits or subsidize their operating costs; and strengthened critical wage protections for working people.³ The Department cites legal challenges to the 2011 Final Rule as a primary rationale for its proposed changes.⁴ Pending litigation challenging a rule is no basis for reversing an agency's prior position – especially where one of the two courts of appeals that have considered direct challenges to the 2011

Final Rule agreed with the Department's prior view that the 2011 Final Rule is a valid exercise of agency discretion.⁵

The Department also points to changes in state minimum wage laws that have reduced the number of employees who may claim a tip credit under the FLSA as a reason to revisit the 2011 Final Rule.⁶ This is also not a credible basis to reverse the Department's prior position. Weakening federal standards in response to the enactment of stronger state-law protections is antithetical to one of the fundamental goals of the FLSA, which "is to establish a national *floor* under which wage protections cannot drop."⁷ It would turn congressional intent on its head for the Department to lower federal standards under the FLSA in response to state-law developments that aim to provide greater protections for working people.

The Department should withdraw the NPRM, and instead focus on advancing policies that strengthen – rather than undermine – the ability of people working in low-wage jobs, including tipped workers, to support themselves and their families.

I. The Proposed Rule would increase economic insecurity for tipped workers, the majority of whom are women.

Women – predominantly women of color – represent nearly two-thirds of tipped workers nationwide. In 32 states, at least 7 in 10 tipped workers are women. As the federal minimum cash wage for tipped workers has been stuck at \$2.13 per hour for over 25 years, poverty rates for tipped workers are more than twice as high as rates for working people overall.⁸ In fact, 71 percent of restaurant servers nationwide are women making an average of \$15,814 a year.⁹ The poverty rate for women in a \$2.13 tipped wage state is 13 percent higher than in a state with a single minimum wage.¹⁰ The data is even worse for women of color in tipped occupations, who experience a poverty rate of nearly 25 percent in states with a \$2.13 tipped wage.¹¹

Overall, it is estimated that workers will lose \$5.8 billion dollars annually as tips are shifted from workers to employers. Of that \$5.8 billion, nearly 80 percent – \$4.6 billion dollars – would be taken from women.¹² As recognized in the NPRM, working people in tipped occupations rely on tips as a major source of income. The National Employment Law Project 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 bartenders.¹³ Tipped workers rely on their tips to afford basic expenses, like utilities, rent and food. And given that mothers are breadwinners in half of families with children, women in particular need tips to support their families and afford these basic expenses.¹⁴ Low wage workers also struggle to pay for health care, and losing tips they currently rely on may mean not receiving health care services, including preventative services, screenings and reproductive health care services, they need. Thirty-seven percent of Black women and 42 percent of Latinas making less than 200 percent of the federal poverty level (FPL) report they have delayed or skipped getting needed health care because of the cost.¹⁵ Delaying or skipping reproductive health care in particular can further undermine a woman's economic stability by undermining her ability to plan if and when to have a family. Reducing the

amount of tips that working people can take home to their families will undoubtedly harm this already financially insecure workforce, pushing many further into poverty.

II. The Proposed Rule Exacerbates the Vulnerability of Women in Tipped Jobs to Sexual Harassment and Assault.

Sexual harassment is pervasive in the restaurant industry and other industries where women rely on tips to survive. Women who rely on tips for much of their income often feel forced to tolerate inappropriate behavior from customers and employers so as not to jeopardize that income. A study conducted by Hart Research Associates found that 40 percent of women in the fast food industry have reported facing sexual harassment while on the job.¹⁶ Another study by ROC United and Forward Together found that the overwhelming majority of tipped restaurant workers have experienced some type of sexual harassment or assault in the workplace.¹⁷ Furthermore, Equal Employment Opportunity Commission (EEOC) data shows that workers in the accommodation and food service industry – predominantly women – filed more sexual harassment charges than any other industry between 2005 and 2015.¹⁸ In 2015, the EEOC received 5,431 complaints of sexual harassment from women, and of the 2,036 claims that listed an industry, nearly 13 percent came from the hotel and food industry – more than came from any other industry.¹⁹

Reliance on tips creates strong financial incentives to endure harassment from customers and employers. The power dynamic in tipped industries impacts every major workplace relationship, with restaurant workers reporting high levels of harassing behaviors from management (66 percent), coworkers (80 percent), and customers (78 percent).²⁰ Victims of sexual harassment also face significant disruptions in their jobs as a result of sexual harassment: 10 percent report cutting back on hours, and eight percent quit their jobs altogether, further highlighting the connection between workplace sexual harassment and economic security.²¹

Increasing employers' power, by way of tip theft, will likely only multiply the incidence of sexual harassment by placing employers in complete control over whether workers can keep their tips and maintain their livelihood. When employers have a direct stake in a worker's tips, as this rule would allow, tipped workers will face even greater pressure to accept customer and employer harassment without complaint so as not to risk losing tips to their employer. The proposed rule would make women who depend on tips to support themselves and their families more vulnerable to harassment and exploitation at the hands of both their employer and customers.

III. The NPRM would allow employers to pocket tips and further exploit workers.

While the NPRM suggests that the Department's rule change is motivated by a desire to allow employers to decrease wage disparities between front- and back-of-house workers through tip pooling arrangements, such arrangements are already permissible under existing regulations if employees agree. Allowing employers to require redistribution of tips to back-of-house workers merely provides an incentive for employers to keep base wages low for cooks, dishwashers, and others, subsidizing back-of-house earnings from bartenders and wait staff tips rather than paying a higher wage. Restaurant jobs are currently among

the lowest paid in the country; of the 30 lowest paid jobs in the country, 13 are in the restaurant industry and nine are tipped positions.²² The proposed rule would allow employers to use tips as a new source of revenue, only further driving down wages.

Evidence shows that even under current labor laws, employers continue to illegally pocket workers' tips. One study of workers in Chicago, Los Angeles and New York found that 12 percent of tipped workers had wages stolen by their employers or supervisors.²³ The Department even acknowledges in its NPRM that its proposal could allow employers to "circumvent the protections of section 3(m) [of the FLSA]...by utilizing its employees' tips towards its minimum wage obligations to a greater extent than permitted under the statute for employers that take the tip credit."²⁴ Based on this proposed rule, employers could take tips earned one week to subsidize payment of all or some of the minimum wage the next week, and so on. Allowing employers to engage in such a practice leaves millions of tipped workers – the majority of whom are women – without income they legitimately rely upon.

IV. The Department failed to engage in necessary quantitative analysis of the Proposed Rule.

In a highly unusual move, the Department has failed to even attempt a quantitative analysis of the costs and benefits of the proposed rule, as required under Section 1(c) of Executive Order 13563.²⁵ Despite the lack of analysis from the Department, the impact of the rule is quantifiable, as shown by the Economic Policy Institute, which conducted such an analysis. It would be arbitrary and capricious for the Department to proceed with its rulemaking without understanding the proposed rule's effect on the working people it is charged with protecting.

The Proposed Rule would cost women in tipped positions \$4.6 billion dollars each year, likely exacerbate sexual harassment and allow employers to exploit workers further. We strongly urge the Department to withdraw the proposed rule, and focus its energies on promoting policies that improve economic security for women and all people working in low wage jobs. If you have any questions regarding these comments, please contact Sarah Fleisch Fink, Director of Workplace Policy and Senior Counsel (sfleischfink@nationalpartnership.org) or Alex Baptiste, Workplace Policy Counsel (abaptiste@nationalpartnership.org).

Sincerely,
National Partnership for Women & Families

1 Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 4, 2017)

2 Shierholz, H., Cooper, D., Wolfe, J., & Zipperer, B. (2018, January). *Women would lose \$4.6 billion in earned tips if the administration's "tip stealing" rule is finalized*. Economic Policy Institute Publication. Retrieved 23 January 2018, from <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/>

3 See generally 2011 Final Rule, 76 Fed. Reg. 18,832

4 See note 1 at 57,396, 57,399, 57,402, 57,399

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- 5 Oregon Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1086-90 (9th Cir. 2016) (upholding Department's 2011 Final Rule, concluding that the rule permissibly regulated the tip pooling practices of employers who do not take a tip credit)
- 6 See *Tipped Workers NPRM*, 82 Fed. Reg. at 57,396, 57,401
- 7 Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1425 (9th Cir. 1990).
- 8 National Women's Law Center & Restaurant Opportunities Center United (2018, January). *Women and the Tipped Minimum Wage, State by State*. Retrieved 23 January 2018, from <https://nwlc.org/resources/tipped-workers/>
- 9 Johnson, S. & Madera, J (2018 January). *Sexual Harassment is Pervasive in the Restaurant Industry*. Here's What Needs to Change. Harvard Business Review. Retrieved 30 January, 2018 from <https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change>.
- 10 National Women's Law Center & Restaurant Opportunities Center United (2016, October). *Raise the Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*. Retrieved 23 January 2018, from <https://nwlc.org/resources/raise-the-wage-women-fare-better-in-states-with-equal-treatment-for-tipped-workers/>
- 11 Ibid.
- 12 See note 2.
- 13 Tung, I., & Reyes, T. (2018, January). *Wait Staff and Bartenders Depend on Tips for More than Half of Their Earnings*. National Employment Law Project & Restaurant Opportunities Center United Publication. Retrieved 23 January 2018, from <http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/>
- 14 National Partnership for Women & Families. (2017, April). *America's Women and the Wage Gap*. Retrieved 23 January 2018, from <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>
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- 16 Hart Research Associates. (2016, October). *Key Findings from a Survey of Women Fast Food Workers*. Retrieved 24 January 2018, from <http://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf>
- 17 Restaurant Opportunities Center United & Forward Together. (2014, October). *The Glass Floor: Sexual Harassment in the Restaurant Industry*. Retrieved 23 January 2018, from <http://rocunited.org/2014/10/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>
- 18 Frye, J. (2017, November). *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*. Center for American Progress Publication. Retrieved 23 January 2018, from <https://americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>
- 19 Judkis, M. & Heil, E., (17 November, 2017). *Rape in the Storage Room. Groping at the bar. Why is the Restaurant industry so terrible for women?* Washington Post. Retrieved 30 January, 2018, from https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.f779dbb3dbcd.
- 20 Restaurant Opportunities Center United & Forward Together. (2014, October). *The Glass Floor: Sexual Harassment in the Restaurant Industry*. Retrieved 23 January 2018, from <http://rocunited.org/2014/10/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>
- 21 See note 14.
- 22 Restaurant Opportunities Centers United comparison of hourly median wage using May 2016 State Occupational Employment and Wage Estimates from https://www.bls.gov/oes/current/oes_nat.htm (unpublished ROC United study)
- 23 Bernhardt, A. et al. (2009). *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. Retrieved 23 January 2018, from <http://nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>
- 24 See note 1 at 57,402 n.14.
- 25 Executive Order 13563. Retrieved 24 January 2018, from <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>