COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

August 23, 2021

The Honorable Marty J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking (RIN 1235-AA21), Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

Dear Secretary Walsh:

We write in support of the Department of Labor's ("the Department") above-reference proposed rule ("2021 Proposed Rule") regarding tip regulations under the *Fair Labor Standards Act* (FLSA). [1]

Under the FLSA, an employer may pay a tipped employee a cash wage of no less than $2.13 per hour and use the employee's tips as a "tip credit" against the employer's obligation to pay the federal minimum wage of $7.25 per hour.[2] Under the FLSA, a "'[t]ipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."[3] When an employee is not engaged in a tipped occupation, the employer may not use a tip credit and must pay at least the full federal minimum wage.

For decades, the Department's regulations have noted that an employee may be employed in a "dual job," with one occupation a tipped occupation (e.g., server) for which an employer may take a tip credit for hours worked in such occupation and another occupation a non-tipped occupation (e.g., maintenance man) for which an employer may not take a tip credit for hours

[1] 29 U.S.C. §§ 201 et seq.
[2] 29 U.S.C. § 203(m)(2)(A).
[3] 29 U.S.C. § 203(t).

worked in such occupation.[4] This is differentiated from an employee in a "single job" that is a tipped occupation and who may perform a limited amount of work that is not itself tip-producing.[5] Because of these two distinct circumstances, there must be a clear standard for when an employee is no longer engaged in a tipped occupation. Without such a limitation, Congress's intent to only make a tip credit available for employees engaged in a tipped occupation would be circumvented.

For nearly three decades, the Department enforced guidance that placed clear limitations on the use of the tip credit under the FLSA.[6] Under this guidance, commonly referred to as the "80/20 rule," employers were permitted to take a tip credit for time tipped employees spent performing tasks related to their tipped occupation, such as setting tables or performing closing activities, even where those specific activities were not tip-producing activities. However, if a tipped employee spent a substantial amount of time, set at more than 20 percent of the employee's workweek, performing these "related duties," an employer could not use a tip credit for such time.

In December 2020, the Department finalized a rule ("2020 Tip Rule") that, among other things, amended its dual jobs regulations to place *no* limitation on the amount of time a tipped employee can perform related duties that are not tip-producing activities.[7] These provisions would allow an employer to take a tip credit when a tipped employee spends a substantial amount of time performing non-tipped duties rather than earning tips. Such duties could include sweeping and mopping floors, vacuuming carpets, taking out trash, or cleaning bathrooms, etc. These regulatory changes have not yet gone into effect.[8]

As noted in the proposal for the 2020 Tip Rule, without the safeguard of the 80/20 rule, 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."[9] While the 2020 Tip Rule failed to include quantitative estimates of the impact of changes to the dual jobs regulations,[10] the Economic Policy Institute estimates workers could lose $705 million

[4] *See* 32 Fed. Reg. 222 (Jan. 10, 1967) (Notice of Proposed Rulemaking); 32 Fed. Reg. 13575 (Sept. 28, 1967) (Promulgation of Final Rule); 29 C.F.R. § 531.56(e).
[5] *Id*.
[6] This guidance was in effect from December 9, 1988, until January 16, 2009, and again from March 2, 2009, until November 8, 2018. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-16 (Jan. 16, 2009); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-23 (Jan. 16, 2009); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA 2018-27 (Nov. 8, 2018).
[7] 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53964 (Oct. 8, 2019).
[8] The amendments made to the dual jobs regulations by the 2020 Tip Rule are delayed until December 31, 2021. Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg. 53956 (April 29, 2021).
[9] 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. at 53972.
[10] *Id*.

annually.[11] This loss of tipped income is significant for tipped workers, who are generally low-wage workers and experience poverty at higher rates than non-tipped workers.[12]

The proposal for the 2020 Tip Rule also noted its dual jobs provisions would result in reduced employment of workers, such as dishwashers or busboys, who currently perform non-tipped duties.[13] This is because more non-tipped duties would be shifted to tipped workers who could be paid a subminimum wage, reducing employers' labor costs. The Economic Policy Institute estimates 243,000 jobs could shift from non-tipped to tipped as a result of the dual jobs provisions of the 2020 Tip Rule.[14]

The 2021 Proposed Rule would withdraw the 2020 Tip Rule's dual jobs provisions and amend regulations to incorporate a clear, reasonable standard for when an employer can take a tip credit. Under the Department's proposal, an employee is "engaged in a tipped occupation" only when the employee (1) performs work that produces tips or (2) "performs work that directly supports the tip-producing work, provided that the directly supporting work is not performed for a substantial amount of time."[15]

Under the proposal, work "directly supports tip-producing work" where it "assists a tipped employee to perform the work for which the employee receives tip."[16] We believe using "directly supports," rather than "related duties," to identify non-tip-producing work that may still be performed by an employee in a tipped occupation better aligns with the FLSA's restrictions on the use of the tip credit. We agree with the Department that the use of "related duties" risks being interpreted too broadly to "encompass duties that are only remotely related to the tipped occupation."[17] We also support the 2021 Proposed Rule's use of examples to identify what is considered work that directly supports tip-producing work for servers, bartenders, and nail technicians. We urge the Department to also include examples from additional occupations in other industries, such as delivery drivers, airport attendants, parking attendants, and hotel workers.

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[11] Heidi Shierholz and David Cooper, *Workers will lose more than $700 million dollars annually under proposed DOL rule*, Working Economics Blog (Nov. 30, 2019), https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/.
[12] David Cooper, *Valentine's Day is Better on the West Coast (at Least for Restaurant Servers)*, Working Economics Blog (Feb. 7, 2017), https://www.epi.org/blog/valentines-day-is-better-on-the-west-coast-at-least-for-restaurant-servers/.
[13] 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53972 (Oct. 8, 2019).
[14] Heidi Shierholz and David Cooper, *Workers will lose more than $700 million dollars annually under proposed DOL rule*, Working Economics Blog (Nov. 30, 2019), https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/.
[15] Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 32818, 32820 (Jun. 23, 2021).
[16] *Id*. at 32820.
[17] *Id*. at 32828.

The 2021 Proposed Rule also defines "substantial amount of time" in two ways. First, an employee spends a substantial amount of time on directly supporting work where he performs such work for more than 20 percent of the employee's hours in a workweek. In this situation, an employer cannot take the tip credit for any of the time over 20 percent of the workweek. This decades-old 80/20 rule remains a reasonable standard for restricting the use of the tip credit.

Second, the employee spends a substantial amount of time on directly supporting work where such work is performed for more than 30 minutes continuously and uninterrupted ("30-minute rule"). Under these circumstances, the employer cannot utilize the tip credit for *any* of the time spent on this directly supporting work.[18] This additional definition of "substantial amount of time" is a much-needed improvement to ensure employers are not paying employees the tipped subminimum wage for an hour of work in which the employee has limited or no opportunity to actually earn tips.

The most protective standard for tipped workers is ensuring they are paid the full federal minimum wage for all hours worked; unfortunately, Congress has not yet passed such a law.[19] The Department, however, remains tasked with promulgating regulations that are in line with the FLSA's limitations on the use of the tip credit. As such, we support the Department's proposal to withdraw the dual jobs provisions in the 2020 Tip Rule and repropose a stronger standard that will better protect tipped workers.

Thank you for your consideration of these views. For any questions or further communication, please contact Udochi Onwubiko with the Education and Labor Committee Majority Staff at Udochi.Onwubiko@mail.house.gov or (202) 225-3725.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

ALMA S. ADAMS, Ph.D.
Chair
Subcommittee on Workforce Protections

[18] *Id.* at 32829.
[19] The *Raise the Wage Act* would ensure tipped workers make at least the full minimum wage for all hours worked by gradually phasing out the tip credit. H.R. 603, 117th Cong. (2021).

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