

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 11, 2019

The Honorable Eugene Scalia
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)

Dear Secretary Scalia:

We write to urge the Department of Labor (“the Department”) to withdraw proposed changes to “dual jobs” provisions of the above-referenced tip regulations and instead codify in its regulations the longstanding 80-20 rule.

For nearly three decades, the Department enforced guidance that placed limitations on the use of the tip credit¹ under the Fair Labor Standards Act (FLSA).² Under this guidance, 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 (more than 20 percent of the employee’s workweek) performing these related, non-tipped duties, an employer could not use a tip credit for such time. Commonly referred to as the “80-20 rule,” this guidance helped ensure that employers could not pay workers the tipped subminimum wage for work that a non-tipped worker would normally perform. This rule also helped ensure tipped workers were not spending excessive amounts of time performing work for which they did not have an opportunity to earn tips while being paid a subminimum wage.

The Department now proposes to amend its current “dual jobs” regulations to place no limitation on the amount of time a tipped employee can perform related, non-tipped activities.³ This would allow an employer to take a tip credit when a tipped employee spends a substantial amount of

¹ Currently, under the Fair Labor Standards Act (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 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).

³ 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53964 (Oct. 8, 2019).

time performing non-tipped duties rather than earning tips. Such duties would include sweeping and mopping floors, vacuuming carpets, taking out trash, or cleaning bathrooms, etc.

As the Department concedes, 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.”⁴ The Economic Policy Institute estimates workers could lose \$705 million annually.⁵ This loss of tip income is significant for tipped workers, who are generally low-wage workers and experience poverty at higher rates than non-tipped workers.⁶

The Department also concedes that its policy shift could result in reduced employment of workers, such as dishwashers or busboys, who currently perform non-tipped duties.⁷ 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 Department’s proposal.⁸

In addition to directly decreasing employees’ tip income, the Department’s proposal would make tipped employees more vulnerable to wage theft. Too often, employers using a tip credit, through error or outright wage theft, fail to ensure their workers are making the full minimum wage. For instance, a compliance sweep of nearly 9,000 full-service restaurants by the Department’s Wage and Hour Division (WHD) from 2010 to 2012 found 1,170 tip credit violations that resulted in nearly \$5.5 million in back wages.⁹ As the Department states, its proposal would mean employers currently paying the full federal minimum wage for non-tipped work would be able to pay a subminimum wage for an increased amount of an employee’s working hours.¹⁰ By incentivizing employers to more often use a tip credit, rather than paying the full federal minimum wage, this proposal would make tipped workers more vulnerable to wage theft.

⁴ *Id.* at 53972.

⁵ 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/>.

⁶ 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/>.

⁷ 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53972 (Oct. 8, 2019).

⁸ 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/>.

⁹ Sylvia A. Allegretto, *Should New York State Eliminate its Subminimum Wage?* 11 (2018),

<http://irle.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf>.

¹⁰ 2019 Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53972 (Oct. 8, 2019).

Deviating from rulemaking requirements,¹¹ the Department has failed to include quantitative estimates of the impact of its rollback of protections for tipped workers.¹² This failure is especially concerning given the Department's recent history of withholding an unfavorable economic analysis quantifying the loss of tip income for tipped workers in a prior proposal.¹³ As you know, these actions are currently the subject of an audit by the Office of Inspector General.¹⁴

The Department also failed to provide any legally required¹⁵ analysis of regulatory alternatives for the rollback of the 80-20 rule that may be less harmful to workers or to quantify the costs of such alternatives. Without these required analyses, the public cannot fully evaluate the impact of this portion of the proposal, and the Department cannot come to any determination that the rule's benefits justify its costs, as required by law.¹⁶

While we believe the most protective standard for tipped workers is ensuring they are paid the full federal minimum wage for all hours worked, until Congress passes such a law,¹⁷ the Department should uphold its longstanding 80-20 rule to protect tipped workers. We urge the Department to withdraw the "dual jobs" provisions in its proposal and instead codify its guidance consistent with the 80-20 rule.

¹¹ Executive Order 13653 requires agencies to "quantify anticipated present and future benefits and costs as accurately as possible". Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).

¹² *Id.*

¹³ Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, Bloomberg Law, (Feb. 1, 2018, 10:03 AM), <https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

¹⁴ Memorandum from Elliot P. Lewis, Assistant Inspector General for Audit, U.S. Dep't of Labor, Office of the Inspector General, to Bryan Jarrett, Acting Administrator Wage & Hour Div., (Feb. 5, 2018) (on file with author).

¹⁵ Executive Order 13563 requires agencies to "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits". Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).

¹⁶ Executive Order 12866 requires that an agency propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993). The Department has determined that this proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866. 84 Fed. Reg. 53967.

¹⁷ In July 2019, the House of Representatives passed the *Raise the Wage Act*, legislation that would ensure tipped workers make at least the full minimum wage for all hours worked by gradually phasing out the tip credit. H.R. 582, 116th Cong. (2019).

The Honorable Eugene Scalia

December 11, 2019

Page 4

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
Committee on Education and Labor



ALMA S. ADAMS
Chairwoman
Subcommittee on Workforce Protections
Committee on Education and Labor



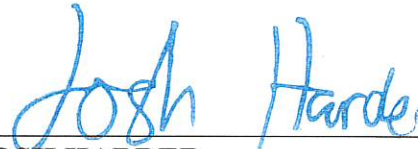
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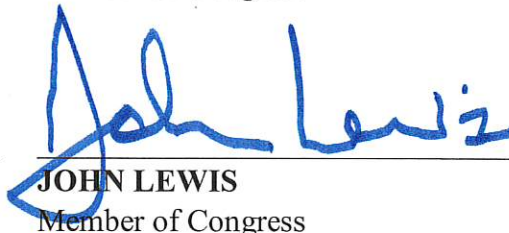
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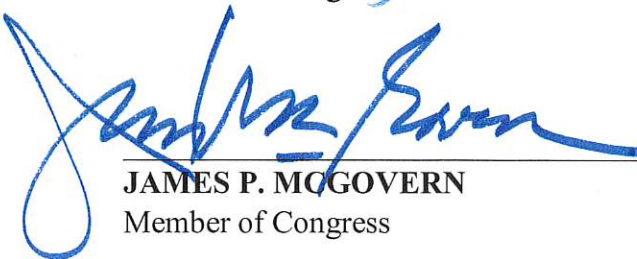
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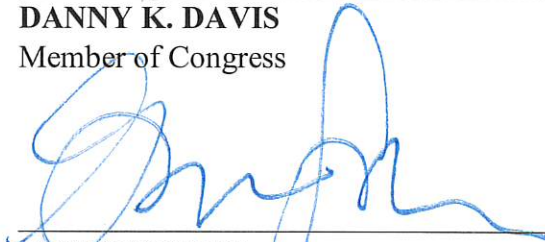
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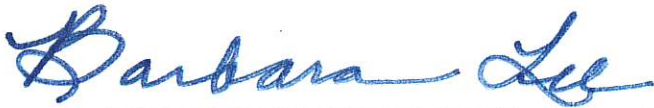
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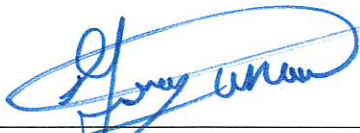
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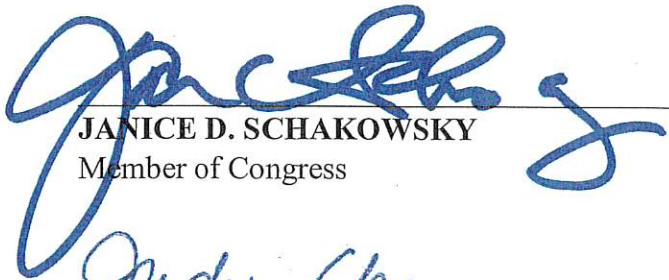
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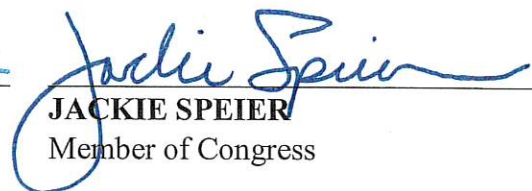
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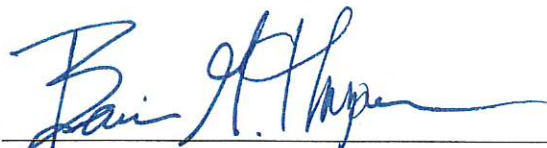
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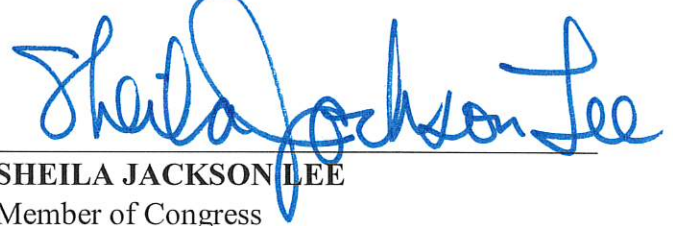
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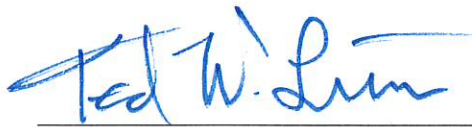
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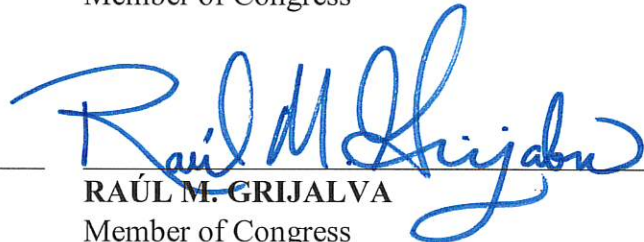
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