NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

February 5, 2018

Submitted via www.regulations.gov

Melissa Smith
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Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W., Room S-3502
Washington, DC 20210

Re: RIN 1235-AA21, Comments in Response to Notice of Proposed Rulemaking; Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Director Smith:

The National Women's Law Center (the Center) writes in response to the Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM), whereby the Department seeks to rescind portions of tip regulations it issued in 2011 (the 2011 Final Rule) pursuant to the Fair Labor Standards Act (FLSA).[1] We oppose this NPRM in the strongest possible terms and urge the Department to withdraw it.

Since 1972, the Center has worked to remove barriers based on gender, to open opportunities for women and girls, and to help women and their families lead economically secure, healthy, and fulfilled lives. The Center advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of low-income women and their families, communities of color, and others who face historic and systemic barriers to equality and economic security.

In light of the recent report (which the Department has not denied) that the Department prepared and then "shelved" economic analysis demonstrating that workers would lose billions of dollars in pay were the above-referenced NPRM to be finalized and implemented,[2] immediate withdrawal of the proposal is the appropriate course for the Department to take. The Department deliberately misled the public by claiming in the NPRM that it is "unable to quantify how customers will respond to the proposed regulatory changes" and "currently lacks data to quantify possible reallocations of tips,"[3] when in fact it had performed such quantitative analysis but sought to avoid the inevitable opposition to a rule under which employees who depend on tips to

[1] U.S. Dep't of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57,395 (proposed Dec. 5, 2017) [hereinafter "Tipped Workers NPRM"]; U.S. Dep't of Labor, Final Rule, *Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832 (Apr. 5, 2011) [hereinafter "2011 Final Rule"].

[2] Ben Penn, *Labor Department Ditches Data on Worker Tips Retained by Business*, BLOOMBERG BNA, Feb. 1, 2018, https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses.

[3] Tipped Workers NPRM, 82 Fed. Reg. at 57,396.

make a living will lose billions of dollars to their employers. In so doing, the Department directly violated its responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible[4]—and abandoned its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law.

The Department's extraordinary disregard for the rulemaking process should invalidate the Department's proposal; moreover, the Department should withdraw the rule based on its substance. By rescinding portions of the 2011 Final Rule that clarify employers' obligations to their 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 departs from longstanding practice and precedent and threatens the economic security of millions of working people and their families. The Economic Policy Institute, which conducted the type of analysis that the Department evidently concealed, estimates that tipped workers in the United States will lose $5.8 billion dollars in tips each year if the Department's rule goes into effect—and women will bear the overwhelming share of this loss: $4.6 billion.[5]

The Department has failed to put forth a well-reasoned rationale for its proposed rule, which will increase economic insecurity and heighten vulnerability to sexual harassment for people working for tips—especially for the women and people of color who predominate in these jobs. The Department has also failed to disclose the requisite analysis of the costs that working people are likely to bear as a result of the proposed rule's unjustifiable expansion of employer control over their tips, ignoring the requirements of numerous rulemaking authorities in an arbitrary and capricious fashion. For these reasons, explained in further detail in the comments that follow, we urge the Department to withdraw its proposed rule.

I. *The 2011 Final Rule was the product of reasoned decision making and the Department has not articulated a sound basis for its proposed revisions.*

The Department's 2011 Final Rule updating the tip regulations under the FLSA 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.[6] The revisions proposed by the Department in the current NPRM would have the opposite effect in every respect.

The 2011 Final Rule affirmed and clarified the Department's interpretation of the tip credit provision at section 3(m) of the FLSA, updating regulations that had never been revised to reflect

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[4] *See* Exec. Order 13,563, at § 1(c), 76 Fed. Reg. 3821 (Jan. 21, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), 58 Fed. Reg. 51,735 (Oct. 4, 1993), https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

[5] HEIDI SHIERHOLZ ET AL., ECON. POLICY INST. (EPI), WOMEN WOULD LOSE $4.6 BILLION IN EARNED TIPS IF THE ADMINISTRATION'S "TIP STEALING" RULE IS FINALIZED 1 (2018), http://www.epi.org/files/pdf/140380.pdf.

[6] *See generally* 2011 Final Rule, 76 Fed. Reg. 18,832.

amendments to section 3(m) enacted in 1974. Section 3(m) defines "wage" under the FLSA; when the FLSA was amended in 1966 to cover hotels and restaurants for the first time, corresponding amendments to section 3(m) added a "tip credit" provision, specifying that an employer could pay its tipped workers a cash wage equal to no less than half of the current minimum wage and count the employees' tips as a credit against the remainder of its minimum wage obligation.[7] Prior to 1974, however, employers and their tipped employees could agree, for example, that employee tips would be turned over to the employer, who could then use the tips to pay the full minimum wage.[8] The 1974 amendments restricted such agreements by requiring that tips received by the employee be retained by the employee, except through valid tip pooling arrangements "among employees who customarily and regularly receive tips."[9]

The legislative history of the 1974 amendments confirms that section 3(m), as amended, "requir[es] that all tips received be paid out to tipped employees," and explains that the tip retention clause was added specifically "to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage."[10] As one court explained shortly after the 1974 amendments were enacted, allowing an employer to forgo the tip credit and use a greater part of its employees' tips toward meeting its minimum wage obligations than permitted by section 3(m) would stand the 1974 amendment "on its head" and mean that Congress "accomplished nothing" in amending the statute.[11]

In multiple guidance documents issued by the Department's Wage and Hour Division (WHD) following the 1974 amendments, the WHD clearly interpreted the revised section 3(m) to bar employers from using employee tips for any purpose other than applying the permissible tip credit or in furtherance of a valid tip pool.[12] A WHD letter issued in 1975, for example, confirmed that tips belong to the employee who earns them, regardless of whether an employer takes the tip credit: "If an employer should elect *not* to avail himself of [the tip credit], he would

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[7] Pub. L. 89-601, §101(a), 80 Stat. 830 (1966), https://www.gpo.gov/fdsys/pkg/STATUTE-80/pdf/STATUTE-80-Pg830.pdf; *see also* 2011 Final Rule, 76 Fed. Reg. at 18,838. As amended in 1996, section 3(m) currently allows a larger tip credit; an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage ($2.13 per hour) and the federal minimum wage ($7.25 per hour). *See* 29 U.S.C.A. §203(m) (West 2014).

[8] *See* 2011 Final Rule, 76 Fed. Reg. 18,839 (citing *Usery* v. *Emersons Ltd.,* 1976 WL 1668, at *2 (E.D. Va. 1976), *vacated and remanded on other grounds sub. nom. Marshall* v. *Emersons Ltd.,* 593 F.2d 565 (4th Cir. 1979)).

[9] Pub. L. No. 93-259, §13, 88 Stat. 55 (1974). *See also* 2011 Final Rule, 76 Fed. Reg. at 18,839, and Nancy J Lepnick, Wage and Hour Division Field Assistance Bulletin No 2012-2, "Enforcement of 2011 Tip Credit Regulations," Feb. 29, 2012, https://www.dol.gov/whd/FieldBulletins/fab2012_2.htm.

[10] S. REP. NO. 93-690, at 42-43 (1974).

[11] *Usery v. Emersons Ltd.*, No. 76-11-A, 1976 WL 1668, at *2-4 (E.D. Va. 1976), *vacated and remanded on other grounds sub nom. Marshall v. Emersons Ltd.*, 593 F.2d 565 (4th Cir. 1979); *see also* 2011 Final Rule, 76 Fed. Reg. at 18,842.

[12] *See* Wage and Hour Opinion Letter FLSA-626, 1974 WL 422051 at *2 (June 21, 1974) ("amendments to section 3(m) would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act"); Wage and Hour Opinion Letter WH-321, 1975 WL 40945, at *1-2 (Apr. 30, 1975) (tips belong to the employee who earns them, regardless of whether an employer takes the tip credit); *see also Richard v. Marriott Corp.*, 549 F.2d 303, 304–05 (4th Cir. 1977) ("This opinion letter and subsequent ones repudiated earlier opinions and gave notice to…employers that tips had to be retained by the employees, that agreements remitting tips to the employer were henceforth invalid, and that the employer had to pay, regardless of the amount of tips, at least one-half of the minimum wage").

have to pay his tipped employees in accordance with the Act's minimum wage standards and, in addition, *allow them to keep their tips* since . . . '[a] tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him.'"[13]

In 2011, after opportunity for notice and comment, the Department adopted regulatory amendments consistent with the 1974 statutory changes, characterizing tips as a "gift or gratuity" from the customer to the employee in "recognition of some service performed."[14] Further, the 2011 Final Rule made clear that "all tips received by the tipped employee are to be retained by the employee" whether or not a tip credit is taken, excepting a valid tip pool arrangement with other employees who customarily and regularly receive tips.[15] As the Department noted in the preamble to the 2011 Final Rule:

> Congress would not have had to legislatively permit employers to use their employees' tips to the extent authorized in section 3(m) unless tips were the property of the employee in the first instance. In other words, if tips were not the property of the employee, Congress would not have needed to specify that an employer is only permitted to use its employees' tips as a partial credit against its minimum wage obligations in certain prescribed circumstances because an employer would have been able to use all of its employees' tips for any reason it saw fit.[16]

Despite the robust legislative record and consistent Department practice affirming the intent of the 1974 amendments to preserve tips as the property of the employee who earns them (regardless of whether the employer takes a tip credit), circuit court decisions in cases challenging the 2011 Final Rule have been split, and the Department cites this conflict as a primary rationale for its proposed reversal.[17] But pending litigation challenging a rule is not a reasoned basis for reversing an agency's prior considered position—especially where one of the two courts of appeals to consider direct challenges to the 2011 Final Rule has *agreed* with the Department's prior view that the 2011 Final Rule is a valid exercise of agency discretion.[18]

Nor does the Department's argument that state minimum wage increases since 2011 have reduced the number of employers who may claim a tip credit under the FLSA provide a credible basis for revisiting the 2011 Final Rule.[19] It is true that, as a result of new state minimum wage

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[13] Wage and Hour Opinion Letter WH-321, 1975 WL 40945, at *1-2 (Apr. 30, 1975) (emphasis added) (quoting 29 C.F.R. § 531.52 and noting, "[t]his section of our interpretation bulletin was expressly approved in S.Rept. 93-690, p. 42").

[14] *See* 2011 Final Rule, 76 Fed. Reg. 18,832, §531.52, 531.54, 531.59.

[15].2011 Final Rule 76 Fed. Reg. at 18,844, 18,854. *See also, e.g.*, U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA) (December 2016), https://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

[16] 2011 Final Rule, 76 Fed. Reg. at 18,842.

[17] Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,399, 57,402, 57,399.

[18] *Compare Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086-90, *reh'g and reh'g en banc denied*, 843 F.3d. 355, 356 (9th Cir. 2016) (Ninth Circuit upheld the Department's 2011 Final Rule, concluding that the rule permissibly regulated the tip pooling practices of employers who do not take a tip credit) *with Marlow v. The New Food Guy, Inc.*, 861 F.3d 1157, 1162-64 (10th Cir. 2017) (holding that the Department lacked authority to promulgate its tip regulation to the extent it applies to employers who do not take a tip credit). *See Pennsylvania v. Trump*, Civ. No. 17-4540, 2017 WL 6398465, at *11-12 (E.D. Pa. Dec. 15, 2017) (holding that uncertainty caused by ongoing litigation does not create the kind of good cause needed to avoid notice and comment under the APA).

[19] *See* Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,401.

laws, "the number of employers paying tipped employees a direct cash wage that is equal to our greater than the Federal minimum wage (and thus not claiming a section 3(m) tip credit) has increased since the Department promulgated the 2011 Final Rule"[20]—and thus under that rule, many tipped employees may now be benefiting from higher direct wages from their employers in combination with the right to retain the tips they earn. But relying on the enactment of stronger state law protections to weaken federal standards is a perverse argument that would undermine the fundamental goals of the FLSA, the purpose of which "is to establish a national *floor* under which wage protections cannot drop."[21] 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.

Finally, the policy goal the Department proffers in support of its proposed regulatory change—that is, the desire to reduce wage disparities experienced by people working in low-paying "back-of-house" jobs in restaurants by broadening the scope of tip pooling permissible under FLSA regulations—will not be achieved by the Department's current proposal.[22] The proposed rule itself does not guarantee (or even encourage) employers' sharing of tips taken from front-of-house employees with back-of-house employees. It simply allows employers to claim ownership of tips earned by their employees as long as those employees are paid the federal minimum wage—a policy that will help few if any back-of-house workers, while depriving many workers of their hard-earned tips,[23] and that is contrary to congressional intent in any event. Indeed, the Department cannot credibly claim that it is proposing this regulation "upon a reasoned determination that the benefits [to workers] justify its costs"[24] because, as discussed further below, it has ignored its duty to include in the NPRM the quantitative analysis that would enable it to make that assessment—presumably because its analysis determined no such thing.

II. *The proposed rule will increase economic insecurity for working people who rely on tips—most of whom are women.*

Women—disproportionately women of color—represent nearly two-thirds of tipped workers nationwide.[25] In 32 states, at least 7 in 10 tipped workers are women.[26] Median hourly earnings

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[20] Tipped Workers NPRM, 82 Fed. Reg. at 57,401.

[21] *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

[22] Tipped Workers NPRM, 82 Fed. Reg. at 57,399; *see also id.* at 57,402, 57,404.

[23] *See* HEIDI SHIERHOLZ ET AL., EPI, EMPLOYERS WOULD POCKET $5.8 BILLION OF WORKERS' TIPS UNDER TRUMP ADMINISTRATION'S PROPOSED 'TIP STEALING' RULE 1 (2017), http://www.epi.org/files/pdf/139138.pdf [hereinafter SHIERHOLZ ET AL. 2017].

[24] Exec. Order 12,866, at §1(b)(6), 76 Fed. Reg. 3821 (Oct. 4, 1993); *see also* Exec. Order 13,563 at §1(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

[25] Women make up 65.5 percent of tipped workers. Women of color are 25.2 percent of tipped workers, compared to 17.5 percent of all workers. Nat'l Women's Law Ctr. (NWLC) calculations based on U.S. Census Bureau, American Community Survey 2016 one-year estimates (ACS 2016) using using Steven Ruggles et al., Integrated Public Use Microdata Series (IPUMS-USA): Version 7.0 [dataset], Minneapolis: University of Minnesota (2017). Figures include employed workers only and use the same definition of tipped workers set forth in SYLVIA A. ALLEGRETTO & DAVID COOPER, EPI & CTR. ON WAGE & EMPLOYMENT DYNAMICS, UNIV. OF CA., BERKELEY, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE 20, 23 (2014), http://s2.epi.org/files/2014/EPI-CWED-BP379.pdf.

[26] *See* NWLC & REST. OPP. CTR. UNITED (ROC UNITED), WOMEN AND THE TIPPED MINIMUM WAGE, STATE BY STATE, https://nwlc.org/resources/tipped-workers/ (last visited Jan. 18, 2018).

for people working in tipped jobs hover around $10, *including tips*,[27] and poverty rates for tipped workers are more than twice as high as rates for working people overall—with tipped workers who are women, and especially women of color, at a particular disadvantage.[28] In fact, women's concentration in tipped occupations and other low-wage jobs is an important factor contributing to the persistent gender wage gap: women working full time, year round typically are paid just 80 percent of what their male counterparts are paid—and the wage gap is even wider for women of color compared to their white, non-Hispanic male counterparts.[29]

As recognized in the NPRM, working people in tipped occupations rely on tips as a major source of income;[30] the National Employment Law Project and Restaurant Opportunities Centers United estimate that tips typically represent close to 60 percent of hourly earnings for servers and 54 percent for bartenders.[31] Reducing the amount of tips that working people can take home to their families will undoubtedly harm this already low-paid workforce.

Yet this is precisely what the proposed rule would do, by allowing employers to retain employee tips for their own purposes—whatever those purposes may be, including increasing profits. 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 when employees voluntarily share their tips. 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, subsidized by the earnings of bartenders and wait staff. And the proposed rule itself—which would apply to all tipped workers, not just those in restaurants or other settings where tip pooling is relevant—simply removes all limits on employer control of employee tips, so long as the employer pays the employee the federal minimum wage.[32]

Evidence demonstrates that even under current law, employers are illegally pocketing worker tips. One study surveying workers in Chicago, Los Angeles, and New York found that 12 percent of tipped workers had wages stolen by their employer or supervisor.[33] If the deterrent of illegality is removed, and employers are indeed encouraged to take tips for projects like "capital

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[27] *See* ALLEGRETTO & COOPER, *supra* note 25, at 12 (finding median hourly wages of $10.22 for all tipped workers and $10.11 for waiters/bartenders, compared to $16.48 for all workers).

[28] *See generally* NWLC & ROC UNITED, RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (2016), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf.

[29] *Id. See also, e.g.*, NWLC, THE WAGE GAP, THE WHO, HOW, WHY AND WHAT TO DO (2017) https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017-2.pdf.

[30] Tipped Workers NPRM, 83 Fed. Reg. at 57,409 n. 40, 41.

[31] IRENE TUNG & TEOFILO REYES, NAT'L EMPLOYMENT LAW PROJECT (NELP) & ROC UNITED, WAIT STAFF AND BARTENDERS DEPEND ON TIPS FOR MORE THAN HALF OF THEIR EARNINGS (2018), http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/.

[32] NELP & ROC UNITED, DOL'S PROPOSED RULE ON TIPPED WORKERS: LEGALIZING WAGE THEFT IN TIPPED INDUSTRIES (2017), http://www.nelp.org/publication/dols-proposed-rule-on-tipped-workers-legalizing-wage-theft-in-tipped-industries/.

[33] ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 23 (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf.

improvements to their establishment," [34] many will do so. The Economic Policy Institute now estimates (conservatively) that under the proposed rule, employers would claim $5.8 billion dollars *legally* from their employees each year, representing 16 percent of tips earned by workers annually.[35] And an astounding $4.6 billion of this $5.8 billion—nearly 80 percent—would be tips earned by women.[36]

Even the slight protection offered by the rule's requirement that employers forego the federal tip credit before taking control of employee tips may prove illusory. As the Department acknowledges in the NPRM, 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."[37] The risk here is clear: money is fungible, and so long as an employer pays its tipped employees the full minimum wage in week one, there is nothing in the proposed rule that would prevent the employer from taking all of the tips earned in week one to subsidize payment of all or some of the minimum wage in week two, and so on. In this scenario, except for the first week of work, an employee's tips are the source of the minimum wage payments and the employer is in effect taking a tip credit without abiding by the protections of section 3(m) of the FLSA.

Indeed, the Department clearly recognized this risk as it crafted the 2011 Final Rule. As the Department then observed, under an interpretation of section 3(m) that limits an employer's use of its employees' tips only if the employer takes a tip credit—i.e., the interpretation that the Department now proposes—an employer "would have no reason to ever elect the tip credit because, instead of using only a portion of its employees' tips to fulfill its minimum wage obligation, it could use all of its employees' tips to fulfill its entire minimum wage obligation to the tipped employees or other employees."[38] Moreover, the assurance of receiving $7.25 an hour before tips does little to change the employee's dependence on those tips, as the inadequate federal minimum wage leaves a mother supporting one or more children thousands of dollars below the poverty line, even if she works full time.[39]

Finally, recent polling provides evidence that the Department's proposal could further undermine earnings for tipped workers by inducing consumers to tip *less.* Specifically, in a poll conducted by Hart Research Associates in January 2018, 82 percent of registered voters opposed the Department's proposal, and 57 percent of respondents further said that they would be likely to tip less under the system proposed.[40] If the Department finalizes this ill-advised proposed rule, it should *at minimum* require employers to disclose to their customers how the establishment uses

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[34] Tipped Workers NPRM, 82 Fed. Reg. at 57408.

[35] SHIERHOLZ ET AL 2017, *supra* note 23, at 1.

[36] SHIERHOLZ ET AL., *supra* note 5, at 1.

[37] Tipped Workers NPRM, 82 Fed. Reg. at 57,402 n.14.

[38] 2011 Final Rule, 76 Fed. Reg. at 18,842.

[39] A woman working full time at minimum wage earns just $14,500 annually (assuming 40 hours of work per week, 50 weeks per year). The poverty line for a parent and one child, for example, is $16,895; for a parent and two children, it is $19,749. U.S. Census Bureau, Poverty Thresholds for 2017, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html (last visited Jan. 31, 2018).

[40] NELP, Trump Administration's 'Tip Stealing' Rule Overwhelmingly Unpopular With Voters, (Jan. 29, 2018), http://www.nelp.org/news-releases/trump-administrations-tip-stealing-rule-overwhelmingly-unpopular-with-voters/.

and/or distributes tips, along the lines of the state of Colorado's disclosure requirements,[41] which could help to reassure customers that their tips are going to the people to whom they intend to provide them rather than employers (in establishments where that is in fact the case). To clarify expectations for workers when their employers do elect to redistribute or retain a portion of tips, the Department should also amend its Part 516 recordkeeping regulations to require employers to record the total tips received each night, to whom they were ultimately distributed, and by what methodology,[42] and proactively disclose this information to workers on a regular basis.[43]

Such modifications would provide necessary transparency, but should the Department adopt any version of the changes proposed in this NPRM, the very likely result will be lower earnings for the already vulnerable tipped workforce, an increased number of women living in poverty, and reduced incentives for employers to raise base wages across the board now or in the future.

III. *The proposed rule exacerbates the already heightened vulnerability to sexual harassment faced by women in tipped jobs.*

Sexual harassment remains a widespread problem, affecting women in every kind of workplace setting and at every level of employment. Surveys indicate that at least one quarter of all women have experienced workplace sexual harassment[44]—and while no occupation is immune, the incidence of sexual harassment is higher in industries with a high proportion of low-wage jobs, such as food service and agriculture.[45]

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[41] Colo. Rev. Stat. § 8-4-103 ("It is unlawful for any employer engaged in any business where the custom prevails of the giving of presents, tips, or gratuities by patrons thereof to an employee of said business to assert any claim to, or right of ownership in, or control over such presents, tips, or gratuities; and such presents, tips, or gratuities shall be the sole property of the employee of said business unless the employer posts in his or her place of business in a conspicuous place a printed card, at least twelve inches by fifteen inches in size, containing a notice to the general public in letters at least one-half inch high that all presents, tips, or gratuities given by any patron of said business to an employee thereof are not the property of said employee but belong to the employer.")

[42] *See* U.S. Dep't of Labor, Wage and Hour Division, Tipped Employees, 29 C.F.R. 516.28 (2012) https://www.gpo.gov/fdsys/granule/CFR-2012-title29-vol3/CFR-2012-title29-vol3-sec516-28.

[43] *Cf.* Right to Know Under the Fair Labor Standards Act regulatory item, https://www.dol.gov/whd/regs/unifiedagenda/fall2010/1235-AA04.htm (outlining a rule once under development to require regular disclosures to workers of key terms of their employment); Fair Pay and Safe Workplaces Final Rule, 81 Fed. Reg. 58,562, 58,643 (Aug. 26, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-08-25/pdf/2016-19676.pdf (implementing the paycheck transparency provision of the Fair Pay and Safe Workplaces Executive Order at Section 22.2005, requiring impacted workers to receive a pay stub) (subsequently repealed, 82 Fed. Reg. 51,527 (Nov. 6, 2017)).

[44] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm ("anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace") [hereinafter EEOC Select Task Force Report]; Langer Research, ABC News/Washington Post Poll: One in Four U.S. Women Reports Workplace Harassment (Nov. 16, 2011), http://www.langerresearch.com/wp-content/uploads/1130a2WorkplaceHarassment.pdf.

[45] *See* MAYA RAGHU & JOANNA SURIANI, NWLC, #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf.

Sexual harassment is a pervasive problem in the restaurant industry in particular and in other industries where women rely on tips to survive.[46] Women who rely on tips for much of their income often feel forced to tolerate inappropriate behavior from customers so as not to jeopardize that income; women working for tips know, just as the NPRM observes, that tips often "may be more a function of server looks and friendliness [and] the customer mood . . . than they are of aspects of service quality."[47] A study by the Restaurant Opportunities Centers 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,[48] and Equal Employment Opportunity Commission (EEOC) data reveal that workers in the accommodation and food service industry—mostly women—filed more sexual harassment charges than in any other industry between the years 2005 and 2015.[49] These claims likely far understate the scope of the problem: survey data indicate that most victims of harassment do not formally make a complaint to their employers or file a charge with fair employment agencies,[50] often due to fear of retaliation from their employers, including losing their jobs or otherwise hurting their careers.[51]

The proposed rule further entrenches the most problematic aspects of tipped work. Reliance on tips already creates strong financial incentives to tolerate harassment from customers, which affects the broader culture of restaurants as workplaces. When employers have a direct stake in those tips, as this rule would permit, we can expect even greater employer pressure on tipped front-of- house workers to accept customer harassment without complaint so as not to risk lower tips, which in turn feeds into a workplace culture of objectification of tipped workers. The proposed rule would make women who depend on tips doubly vulnerable to harassment and

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[46] *See generally* ROC UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

[47] Tipped Workers NPRM, 82 Fed. Reg. at 57,409.

[48] *See* ROC UNITED & FORWARD TOGETHER, *supra* note 46, at 2 (restaurant workers surveyed report high levels of harassing behaviors from restaurant management (66 percent), co-workers (80 percent), and customers (78 percent)).

[49] JOCELYN FRYE, CTR. FOR AM. PROGRESS, NOT JUST THE RICH AND FAMOUS: THE PERVASIVENESS OF SEXUAL HARASSMENT ACROSS INDUSTRIES AFFECTS ALL WORKERS (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/. In addition, in every year between 2002 and 2016, women working in the accommodation and food services sector filed more sexual harassment charges than women in any other sector. NWLC calculations based on unpublished U.S. Equal Employment Opportunity Commission data on sexual harassment charges by industry for 1996-2016.

[50] Seventy percent of respondents surveyed in a recent poll said they did not report the sexual harassment they experienced at work to their employer. Huffington Post & YouGov, Poll of 1,000 Adults in United States on Workplace Sexual Harassment (Aug. 2013), http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf. *See also* EEOC Select Task Force Report, *supra* note 44, at 16; U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 30, 33 (1995), https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253661&version=253948&application=ACROBAT [hereinafter Sexual Harassment in the Federal Workplace] (12 percent of victims reported harassment to supervisors; 6 percent took more formal action).

[51] *See* FITZGERALD, L.F., ET AL., WHY DIDN'T SHE JUST REPORT HIM? THE PSYCHOLOGICAL AND LEGAL IMPLICATIONS OF WOMEN'S RESPONSES TO SEXUAL HARASSMENT, 51 J. Social Issues 117, 122 (1995); CORTINA, L.M. & BERDAHL, J.L., SEXUAL HARASSMENT IN ORGANIZATIONS: A DECADE OF RESEARCH IN REVIEW, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484 (J. Barling & C.L. Cooper eds., 2008).

exploitation as they try to please the customer in order to earn tips, then the employer in order to keep them.

Sexual harassment often has a serious and negative impact on victims' physical and emotional health, and can also cause substantial financial harm; victims often try to avoid the harassing behavior by taking sick leave or leave without pay from work, or even quitting or transferring to new jobs, which results in a loss of wages.[52] Employers also suffer significant financial losses from the job turnover, use of sick leave, and losses to individual and workgroup productivity that result from unchecked harassment.[53] The proposed rule would almost certainly exacerbate these harms.

IV. *The Department has failed to disclose the required quantitative analysis of its proposed rule.*

The Department's failure to include a quantitative analysis of the costs and benefits of the proposed rule in its NPRM is highly unusual and runs counter to standard practice and multiple rulemaking authorities.[54] This failure alone would likely be sufficient to render the Department's actions arbitrary and capricious under the Administrative Procedure Act (APA), in light of the agency's duties to both consider and publicize the likely effect of the proposed rule on working people.[55] The Department has claimed that due in large part to "labor market forces" it is unable to model the economic impacts of the changes it proposes (beyond regulatory familiarization costs for just two categories of establishments—drinking places and full-service restaurants—employing tipped workers).[56] Yet the history of the Department's own rulemaking demonstrates that it is quite capable of modeling economic costs and benefits of a proposed rule when faced with a range of possible labor market responses[57]—and the recent revelation that the Department did in fact conduct the requisite analysis, but then excluded it from the public NPRM because it

[52] For example, one analysis found sexual harassment cost federal employees $4.4 million between 1992 and 1994. Sexual Harassment in the Federal Workplace, *supra* note 50, at 26.

[53] For example, the federal government lost $327 million due to harassment from 1992 to 1994. *Id.*

[54] *See* Exec. Order 13,563, at § 1, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

[55] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

[56] Tipped Workers NPRM, 82 Fed. Reg. at 57,404; *see also id.* at 57,396. Even the Department's estimate of affected is unduly narrow, as it is limited to wait staff and bartenders despite the much broader range of occupations that will surely be affected by the proposal, including, for example, hair styling and other personal services, limousine and taxi services, and other hospitality industries.

[57] *See, e.g.*, U.S. Dep't of Labor, Notice of Proposed Rulemaking, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 at 38,562, 38,563, 38,567, 38,577 (July 6, 2015) (comprehensively analyzing and modeling at least five different cost and benefit impact scenarios based on possible employer responses to the Department's 2015 overtime rule NPRM); U.S. Dep't of Labor, Final Rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,483-32,493 (May 23, 2016) (reflecting a similar analysis in the 2016 final rule).

did not like the results, indicates a brazen dereliction of duty that, as noted above, should be remedied by the immediate withdrawal of the proposed rule.

Moreover, we have every confidence that the estimates the Department chose to ignore show that the agency should not move forward with this rulemaking because of the harm it would cause to the working people the Department is charged with protecting. In a paper authored by Heidi Shierholz, former chief economist for the Department, the Economic Policy Institute produced an estimate based upon "the same data researchers routinely use in similar contexts and taking a methodological approach that is in precisely the same spirit of estimates the Department of Labor undertakes on a regular basis,"[58] and concluded that:

> [T]ipped workers will lose $5.8 billion a year in tips, (2) the take-home pay of back-of-the-house workers will remain largely unchanged, and (3) employers will get a $5.8 billion a year windfall. The $5.8 billion is 16.1 percent of the estimated $36.4 billion in tips earned by tipped workers annually and amounts to more than $1,000 per year on average across all tipped workers.[59]

The Department can undertake—and apparently has undertaken—the same kind of analysis to quantify the economic effects of its proposal to change the FLSA tip regulations. The Department's failure to release this assessment of the likely costs to working people of its proposal deprives the public of the opportunity to understand and comment on the impact of the proposed rule change, and should render any final rule invalid under the APA.[60] In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, for example, the Ninth Circuit held that the agency's failure to monetize the benefits of greenhouse gas emissions reduction when setting fuel economy standards was arbitrary and capricious under the APA.[61] In that case, the agency declined to quantify any monetizable value to reducing greenhouse gas emissions on the grounds that the value of such a reduction was too uncertain, and that the range of possible values was purportedly too wide to identify any particular value.[62] The court rejected these arguments, holding that where it is possible for an agency to estimate quantifiable benefits within or among a range of values, it is arbitrary and capricious to decline to do so: "[T]here is no evidence to support [the agency's] conclusion that the appropriate course was not to monetize or quantify the value of carbon emissions reduction at all."[63]

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[58] SHIERHOLZ ET AL., *supra* note 23.

[59] SHIERHOLZ ET AL., *supra* note 5, at 2.

[60] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (recognizing that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has…entirely failed to consider an important aspect of the problem" and that in order to avoid a finding of arbitrary and capricious the agency must, in part, "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245–246, 9 L.Ed.2d 207 (1962)).

[61] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198-1203 (9th Cir. 2008).

[62] *Id.* at 1200-01.

[63] *Id.* at 1201.

The Department's failure to quantify the impacts of the proposed rule (other than business familiarization costs) in its NPRM will undermine any final rule the Department publishes. Including an economic analysis in the final rule will not cure this shortcoming in light of the APA's requirement that an agency "make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."[64] Indeed, the opportunity for meaningful comment—allowing "the most critical factual material" to be "exposed to refutation"—is key:

> By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.[65]

Accordingly, providing quantitative data that bears on the merits and impact of a regulation only in a final rule, and not in the proposed rulemaking, would violate the Department's obligations under the APA[66]—especially where the Department has omitted from the NPRM data that it in fact possessed. Any quantitative analysis the Department develops should therefore be subjected to scrutiny by affected stakeholders in a new proposed rulemaking before any final rule is promulgated.

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For the reasons set forth above, the National Women's Law Center strongly urges the Department to withdraw the proposed rule. We encourage the Department to instead focus its energies on promoting policies that will improve economic security for people working in low-wage jobs and empower all working people—women and people of color in particular—with the resources they need to combat sexual harassment in their workplaces.

Thank you for the opportunity to submit comments on this NPRM. Please do not hesitate to contact Julie Vogtman, Director of Job Quality and Senior Counsel (jvogtman@nwlc.org/ 202.588.5180) if you have questions or require additional information regarding these comments.

Sincerely,

Emily Martin
Vice President for Education & Workplace Justice

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[64] *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

[65] *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (vacating an SEC rule that relied upon extra-record material on costs and benefits without affording an opportunity to comment).

[66] *See Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary").

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