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Melissa Smith
Director of the 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: Public Comment Regarding Proposed Rule 82 FR 57395

Dear Director Smith,

The Fair Standards Labor Act ("FLSA" or "the Act") was enacted in 1937 as part of the New Deal to benefit and protect workers from substandard and oppressive working conditions. The FLSA was meant to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work,' and would be protected from the evil of 'overwork' as well as 'underpay.'"[1] The proposed regulation would do the opposite. By allowing employers to take control and ownership of their employees' tips, the proposed rule would overturn the existing regulation and longstanding practice and procedure, and would conflict with federal and state laws safeguarding tips as the sole property of workers who earn them.[2] The proposed regulation would also force an already susceptible workforce further into poverty and economic instability, and expose them to heightened harassment, assault, and retaliation.

The Department of Labor's ("DOL") long-standing practice and interpretation is that tips are the property of workers who receive them, regardless of whether the employer pays the minimum wage, and an employer can use its employees' tips only in the very limited way prescribed by section 3(m) of the Act. This position is based on the legislative history of the 1974 amendments to FLSA, over 40 years of custom and practice by DOL (including opinion letters and amicus briefs), and a final rule promulgated following an extensive notice and comment period in 2011.[3]

The proposed rule fails to clarify that a business owner can simply pocket the tips as profit
The notice of proposed rulemaking fails to clarify that an employer is not *required* to pool tips among service-facing employees and non-service-facing employees. The proposed rule pontificates on studies that suggest that tip pooling would increase service quality and cooperation and expounds on the virtues of reducing wage disparities among all the employees who contribute to the customer's experience. But the proposed regulation fails to clarify that it would be the prerogative of the business owners to simply (and legally) pocket all tip money earned by their employees instead of pooling it. The proposed rule

[1] *Barrentine v. Ark.-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981).
[2] *See Oregon Restaurant and Lodging Ass'n. v. Perez*, 816 F.3d 1080 (9th Cir. 2016).
[3] *See* Senate Report makes clear that its intent in making the 1974 amendments to the law was enacted to provide "stronger protection" for tipped employees and "to ensure the fair operation of this provision." S. Rep. No. 93-690, at 43 (1974); Opinion Letter WH-32, 1975 WL 40945 (April 30, 1975); Notice of Proposed Rulemaking to conform the regulations to clarify the FLSA amendments passed since 1967. 73 Fed. Reg. 43,654 (2008); DOL Amicus Brief in *Cumbie v. Woody Woo*, No. 08-35178 (9th Cir. 2009) ("tips are the property of the employee"), https://www.dol.gov/sol/media/briefs/cumbie(A)-4-29-2009.htm; 29 Fed. Reg. 531.52; 29 U.S.C. § 203(m); *see* Wage and Hour Division Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), available at https://www.dol.gov/whd/regs/compliance/whdfs15.htm#fnt_1

does not explain that it would enable employers to *choose* between using the tip money (or some of it) to subsidize low wages it pays to non-service-facing employees such as dishwashers and cooks, or simply pocketing the tip money, effectively charging the customer twice. Customers will have no way of knowing if the tips they leave, or any part of them, will actually go to the employee who served them or will be pocketed by the owner. This will likely lead to decreases in customer tips, which undermines the asserted purpose of the rule.

The proposed rule will expose vulnerable workers to further harassment, retaliation, and exploitation
Restaurant workers already suffer higher rates of sexual harassment than any industry, with tipped workers in particular experiencing the highest rates.[4] Women comprise the majority of tipped employees at restaurants, and those who rely on customers' tips for the bulk of their income are twice as likely to be harassed due to their interactions with customers.[5] This is largely due to the low wages that force them to depend on customer tips for their base wage. Workers who depend on tips to pay their bills often cannot afford to refuse unwelcome advances from customers or supervisors, nor can they afford to push back on unfair employment practices for fear of retaliation. Transgender workers in the restaurant industry are already two and a half times more likely to experience harassing comments from customers, and nearly three times as likely to experience harassing comments from managers, as compared to their non-transgender coworkers.[6] Undocumented and immigrant restaurant workers, who face rampant wage and hour violations and discrimination, will likely be deterred from filing complaints due to the very real threat of retaliatory acts by their employer, such as alerting immigration or local law enforcement of an undocumented worker's status.[7] The proposed rule will lead to greater abuse and exploitation, as managers and owners will have unbridled discretion to decide if, how and when tips are distributed. Workers will likely be pressured to tolerate inappropriate behavior and subpar conditions in order to receive their fair share of those tips from management.[8]

The proposed rule's bold assertion that the 2011 regulation is based on "erroneous reasoning" is itself erroneous reasoning. The only two circuit courts of appeals to have addressed whether the rule is a lawful exercise of agency discretion are the Ninth Circuit and the Tenth Circuit. The Fourth Circuit and the Eleventh Circuit decisions simply dismissed a private right of action under FLSA. Those Courts did not hold that the 2011 DOL rule exceeded the agency's scope of authority.[9] The proposed rule should be

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[4] *See* The Restaurant Opportunities Centers United Forward Together, The Glass Floor; Sexual Harassment in the Restaurant Industry (October 7, 2014), *available at* http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.
[5] *See* Restaurant Opportunities Centers United, *Our Tips Belong To Us; Overcoming the National Restaurant Association's Attempt to Steal Workers' Tips, Perpetuate Sexual Harassment, and Maintain Racial Exploitation* (October 2017) *available at* http://rocunited.org/wp-content/uploads/2017/10/OurTips_2017_W.pdf; *see also* BLS Quarterly Census of Employment and Wages cited in the proposed regulation: https://www.regulations.gov/document?D=WHD-2017-0003-0001.
[6] *Supra* note 4.
[7] *See* National Employment Law Project, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights* (February 2013) *available at* http://www.nelp.org/content/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report.pdf.
[8] *See* BLS Quarterly Census of Employment and Wages cited in the proposed regulation: https://www.regulations.gov/document?D=WHD-2017-0003-0001; *Reinventing Low Wage Work for Employees, Employers and the Economy*, WORKFORCE STRATEGIES INITIATIVE OF THE ASPEN INSTITUTE (2012), *available at* http://www.aspenwsi.org/wordpress/wp-content/uploads/The-Restaurant-Workforce-in-the-United-States.pdf.
[9] *See ORLA v. Perez*, 816 F.3d 1080 (9th Cir. 2016); *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157 (10th Cir. 2017); *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442 (4th Cir. 2015); *Malivuk v. Ameripark, LLC*, 2007 WL 2491498 (11th Cir. June 9, 2017).

withdrawn because it erroneously waves off the Ninth Circuit precedent in deference to a dissent from that decision and mischaracterizes legal precedent.

Furthermore, the proposed rule fails to provide an economic analysis. The Economic Policy Institute has published a study finding that employers would pocket $5.8 billion of workers' tips under this rule.[10] DOL has not provided any estimate regarding the projected cost to restaurant workers and the estimated financial benefit to restaurant owners. Such estimates are not only required by law; they are also essential information the public needs to make informed comments about the proposal. In light of this significant and inexcusable omission, DOL must withdraw this proposal until it calculates and discloses the estimated impact of the proposed rule. DOL should not propose and the Office of Management and Business should not permit publication of a proposed rule that does not include the legally required economic analysis.

We urge the Department to withdraw this rule. Few workers are more vulnerable than tipped restaurant workers who work long hours, have little access to benefits and earn a median wage of $9.70 an hour including tips.[11] DOL should be advocating for fair and just workplaces and on behalf of working families, not promoting anti-worker rules that expose workers to further poverty, economic instability, and make them more vulnerable to harassment and assault.

If you have any questions, please contact Sasha Buchert at sbuchert@lambdalegal.rog

Sincerely,

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[10] Heidi Shierholz et al, *Employers would pocket $5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule*, ECONOMIC POLICY INSTITUTE (December 12, 2017), *available at* http://www.epi.org/files/pdf/139138.pdf.
[11] https://www.bls.gov/oes/current/oes353031.htm