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Hon. Martin J. Walsh, Secretary of Labor
C/O Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, 86 Fed. Reg. 15811 (Mar. 25, 2021), RIN 1235-AA21

Dear Secretary Walsh:

On behalf of the Restaurant Law Center (the "Law Center") and the National Restaurant Association (the "Association"), we appreciate the opportunity to submit our comments on the notice of proposed rulemaking (the "Proposed Rule") issued by the Wage and Hour Division ("WHD") of the U.S. Department of Labor (the "Department") and published in the Federal Register on March 25, 2021, to further extend the effective date of portions of the 2020 Tip final rule. Specifically, WHD seeks additional time to consider whether to withdraw and repropose that portion of the 2020 Tip final rule addressing the application of the FLSA's tip credit provision to tipped employees who have dual jobs.[1] Our comments focus mostly on only the dual jobs portion of the Proposed Rule.

[1] WHD also proposes the delay of three other portions of the 2020 Tip final rule in order to complete a separate rulemaking that was published in the same issue of the Federal Register at 86 Fed. Reg. 15817. We will address

Interest of the Parties

The Law Center is a 501(c)(6) legal entity affiliated with the Association and launched in 2015 with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. The Law Center's goal is to protect and advance the restaurant industry and to ensure that the voice of America's restaurants is heard by giving them a stronger voice, particularly in the courtroom. The Law Center pursues cases of interest to the restaurant industry. In fact, for over a decade, the Law Center and/or the Association has led the litigation seeking proper enforcement of the FLSA with regard to its tips' provisions.[2]

Founded in 1919, the Association is the largest trade association representing the restaurant and foodservice industry (the "Industry") in the world. The Industry is comprised of over one million restaurants and other foodservice outlets employing almost 15.6 million people—approximately 10 percent of the U.S. workforce.

Restaurants are job creators and the nation's second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. Thus, it is especially important that the FLSA's tip regulations provide clear guidance that informs small business owners, as well as their employees, what the law allows and requires.

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those three portions of the 2020 Tip final rule separately with comments to that distinct proposed rulemaking at a later time.

[2] *See, e.g., Restaurant Law Center v. U.S. Dept. of Labor*, No. 18-cv-567 (W.D. Tex. July 6, 2018); *National Restaurant Association, et al., Petitioners v. Dept. of Labor, et al.*, SCOTUS No. 16-920 (Appeal mooted by change in the law and, thus, *certiorari* petition denied on January 24, 2017); and, *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (February 23, 2010).

The Department acknowledges that our members will be the most affected by the proposed delay, as our industry has the largest share of tipped workers.[3] Given that we generally supported the approach taken in the 2020 Tip final rule, we are glad that some sections will be allowed to become effective without further delay, but disappointed at the additional uncertainty the delay of other portions of the 2020 Tip final rule will cause.

Proposed Rule

In particular, the Department states that part of the reason for proposing an additional delay of the effective date is for it to consider withdrawing the portion of the rule that amends the Department's dual jobs regulations.[4] As the Department points out, the 2020 Tip final rule merely codified WHD's guidance regarding when an employer can take a tip credit for hours that a tipped employee performs so called non-tipped duties related to his or her occupation by replacing the 20 percent limitation on related non-tipped duties—a limitation not found in the statute—with an updated related duties test.[5]

However, the Department raises concerns for the need to delay this portion of the 2020 Tip final rule because of issues presented by parties in litigation pending in the U.S. District Court for the Eastern District of Pennsylvania ("Pennsylvania Litigants") and others with regard to the economic analysis of the portion of the 2020 Tip final rule that amends the dual jobs regulation.[6] The Department, meanwhile, ignores the fact that it had considered some of the issues it now raises

[3] The industries highlighted by the Department included Casinos, Hotels and Motels, Drinking Places of Alcoholic Beverages, Full-Service Restaurants, Limited-Service Restaurants, and Snack and Nonalcoholic Beverage Bars. *See* 86 FR 15816.
[4] *Id.*
[5] *Id.*
[6] *See* 86 FR 15816.

as a rationale for further delay of this portion of the 2020 Tip final rule during prior litigation[7] and that the rule is in line with its prior settlement.[8]

History and purpose of the dual jobs regulation

The Proposed Rule seeks comments on the substance of the Department's dual jobs regulation to address the application of the FLSA's tip credit to tipped employees who perform both tipped and so called non-tipped duties.[9] Thus, it is worth clarifying that, under the FLSA, employers may pay a "tipped employee"—i.e., "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"—a cash wage of $2.13 per hour (or more) so long as the employer satisfies certain statutory criteria, including that the employee's tips plus the cash wage equal the minimum wage.[10] Congress has noted occupations in which workers qualify for the tip credit to include "waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc."[11]

The "dual jobs" regulation—in both its prior form and under the 2020 Tip final rule—seeks to address the scenario in which an employee may work for an employer in two distinct, non-overlapping capacities, one of which is tipped and one of which is not. Congress has already spoken to how the law should treat a worker's status as a tipped employee in that situation: "[W]here the employee performs a variety of different jobs, the employee's status as one who

[7] *See Restaurant Law Center v. Department of Labor*, No. 1:18-cv-00567 (W.D. Tex. Nov. 30, 2018).
[8] *See* Notice of Voluntary Dismissal, Docket Entry 21, *Restaurant Law Center v. Department of Labor*, No. 1:18-cv-00567 (W.D. Tex. Nov. 30, 2018).
[9] *See* 86 FR 15815.
[10] *See* 29 U.S.C. §§ 203(m), 203(t).
[11] *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

'customarily and regularly receives tips' will be determined on the basis of the employee's activities over the entire workweek."[12]

According to Congress, therefore, the availability of the tip credit in situations where the employee has both a tipped job and an untipped job depends on which job was predominant in any given workweek. Apart from the dual jobs regulation, the first discussion by WHD of tipped employees engaging in supposedly non-tipped work appears to be in a 1979 opinion letter addressing waitresses who "report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar."[13] With little analysis, WHD concluded that "since it is our opinion that salad preparation activities are essentially the activities performed by chefs, no tip credit may be taken for the time spent in preparing vegetables for the salad bar."[14]

In 1980, WHD was asked to opine whether the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese, salt and pepper shakers), and vacuumed the dining room carpet.[15] WHD stated that the employee would be considered a tipped employee for this period and the tip credit would apply because the employee was not engaged in a dual occupation.

Furthermore, WHD noted that there was no "clear dividing line" between the work of the server and the work of another occupation. The letter makes no mention of any percentage limitation on tipped versus non-tipped duties or that the appropriate analysis would involve such

[12] *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974).
[13] *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter, FLSA-895 (Aug. 8, 1975).
[14] *Id.*
[15] *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter, WH-502 (Mar. 28, 1980).

a limitation. In 1985, WHD issued an opinion letter addressing whether a server who, during a five-hour shift, performed 1.5 to 2 hours of preparatory work prior to the restaurant opening could be paid the tip credit rate for the time spent performing preparatory activities, which amounted to "30%-40%" of the employee's workday.[16] WHD concluded that because only one employee was assigned to the opening duties, the employee was responsible for preparing the entire restaurant, not just her area, and because the amount of time was 30% to 40% of the entire shift, the tip credit could not be applied.[17]

None of those opinion letters articulated a temporal limit on performing tasks that do not directly generate tips in order for an employer to retain the right to take a tip credit for all time a tipped employee works. Then in 1988, based on these various opinion letters, WHD issued a revision to the Field Operations Handbook[18] (since rescinded) inventing, seemingly from whole cloth, a variety of new categories of restaurant duties, including those that are:

- "related to the tipped occupation";
- "not by themselves directed toward producing tips";
- "not tip producing";
- "incidental to the regular duties of the [tipped employees]";
- "generally assigned to the [tipped employees]"; and
- "general preparation work or maintenance".

These new made-up categories in the Field Operations Handbook unleashed a wave of class and collective action litigation focusing on, among other things, whether certain tasks are tip-

[16] *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter, FLSA-854 (Dec. 20, 1985).
[17] *Id.*
[18] *See* U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook § 30d00(e) (Dec. 9, 1988).

producing, related or incidental to tip-producing tasks, or unrelated to tip-producing tasks. None of that litigation, which imposed untold millions of dollars in costs and burdens on the Industry, should have happened, because WHD should never have gone down the rabbit hole of applying the dual jobs framework to a single job in the Industry. Tasks such as getting the restaurant ready for customers, restocking various items during meal service, cleaning, and closing down the restaurant at the end of the day—known in the industry as "side work"—have long been an integral part of the tipped occupations commonly found in restaurants.

The 2020 Tip final rule acknowledges that these activities are a normal part of these jobs. The FLSA simply provides no basis for carving up a tipped restaurant job into tipped and non-tipped segments, especially given the clearly expressed will of Congress that these restaurant occupations qualify as "tipped occupations" under the law.[19]

So long as an employer assigns a tipped employee to perform the core functions of an occupation during a shift (e.g., assigning a server to wait tables, or a bartender to prepare drinks for customers), that employee does not cease to be engaged in the tipped occupation by virtue of performing side work during a shift along with the core functions of the occupation. Nor does a tipped employee cease to be engaged in the tipped occupation merely because the employer assigns side work during times when the restaurant is slow.

Codifying the duties test and doing away with the 20 percent limitation

In agreement with the history provided above, the Department acknowledges that its 20 percent limitation appeared only in sub-regulatory guidance.[20] Furthermore, the Department now

[19] *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974).
[20] *See* 86 FR 15815.

believes that delaying the effective date of the dual jobs portion of the 2020 Tip final rule is the best option so it can further consider whether it should codify the duties test into its regulations.[21] However, we believe that the Department already took years to consider every angle and went through an extensive notice of proposed rulemaking process before issuing the 2020 Tip final rule and should now let the dual jobs portion of the regulations become effective with the rest of the 2020 Tip final rule.

WHD's codification of the dual jobs duties test in the 2020 Tip final rule was in fact a significant step in the right direction, insofar as WHD expressly reject—in accordance with the underlying statute—any cap on the amount of time a tipped employee may spend on tasks that do not directly generate tips. Previously, as acknowledged in the Proposed Rule, WHD's sub-regulatory guidance took the position that when a tipped employee spent more than 20 percent of his or her working time on tasks that do not produce tips, the employer must pay full minimum wage, rather than a tipped wage, for the time spent on those tasks. This limitation is not found anywhere in the underlying statute.

The reason why this limitation does not show up in the FLSA is simple. The public policy underlying the FLSA's tip credit provision is to protect employees' minimum wage rights while at the same time accommodating the extensive history of tipping in the restaurant industry, among other industries. It is not the purpose of the FLSA's tip credit provision to put tipped employees in a better position than other employees in the economy who are not subject to the tip credit.

The public policy underlying the FLSA's minimum wage and tip credit provisions is fully satisfied and vindicated so long as in any given workweek a tipped employee receives sufficient

[21] *See* 86 FR 15815.

tips, combined with the cash wage, to cover the minimum wage multiplied by the total number of hours worked. So long as an employee customarily and regularly receives enough tips to satisfy the law's threshold, the employee is engaged in a tipped occupation, and allowing a tip credit for all of that employee's working time places that employee on an equal footing with every other employee not engaged in a tipped occupation. An employee who receives five dollars an hour in wages from an employer and an average of five dollars an hour in tips over the course of a week is in the very same position as a non-tipped employee who receives ten dollars an hour in wages. Either way, the situation satisfies the policies underlying the minimum wage.

Economic impact analysis of the 2020 Tip final rule

Those that continue to oppose the dual jobs portion of the 2020 Tip final rule, like the Pennsylvania Litigants and the Economic Policy Institute, maintain that expressly rejecting a cap on the so-called non-tipped duties for tipped employees will cost workers money.[22] The Department repeats this concern in its Proposed Rule and the alleged "disregard" for the data and analysis provided by the Economic Policy Institute (EPI) as a strong concern in favor of having the Department revisit its own economic analysis regarding the portion of the 2020 Tip final rule addressing dual jobs.[23] The Department goes further by stating that the issue of the EPI analysis alone is enough to call into question whether this portion of the rule would withstand a challenge under the Administrative Procedure Act.[24]

[22] *See, e.g., Commonwealth of Pennsylvania et al. v. Walsh et al.*, No. 2:21-cv-00258, pp. 128, 131 (E.D. Pa., Jan. 19, 2021); *see* also Economic Policy Institute, Working Economics Blog, Workers will lose more than $700 million dollars annually under proposed DOL rule, https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/ (Nov. 30, 2019).
[23] *See* 86 FR 15814.
[24] *Id.*

However, such criticism of the 2020 Tip final rule rests on a flawed premise—i.e., that current law reflects such a quantitative cap. To the contrary, WHD expressly abandoned any such limitation in November 2018 when it (1) issued Opinion Letter FLSA 2018-27 and (2) agreed not to assert such a limitation in pending and future investigations in response to litigation filed against the Department of Labor in federal court in Texas.[25]

Then, in February 2019, WHD issued Field Assistance Bulletin No. 2019-2 reiterating its rejection of any quantitative limit on non-tipped duties and revised the Field Operations Handbook to eliminate any reference to such a limitation. As a matter of federal law, there has been no quantitative limit on non-tipped activity for more than two years. The 2020 Tip final rule simply confirms this result and clarifies that there is no basis in the statute or the regulations for any such limit. Thus, the Pennsylvania Litigants and EPI's baseline is simply incorrect, as this aspect of the 2020 Tip final rule does not change the law or take away any employee's rights.

Employers would prefer for the dual jobs regulations to go into effect

The Department claims to be concerned for employers because, if it were to allow for the dual jobs portion of the regulations to become effective, it would be disruptive for employers to adjust their practices, and then readjust if that portion of the regulations does not survive judicial scrutiny or if the Department decides to propose a new test.[26] However, as outlined above, since at least November 2018, employers had already been adjusting and the only disruption for employers is coming from the Department's failure to allow the 2020 Tip final rule from coming fully into effect.

[25] *See* Notice of Voluntary Dismissal, Docket Entry 21, Restaurant Law Center v. Department of Labor, No. 1:18-cv-00567 (W.D. Tex. Nov. 30, 2018).
[26] *See* 86 FR 15815.

Ongoing litigation in Pennsylvania

In the Proposed Rule, the Department makes a great deal of the litigation in Pennsylvania without even an attempt to defend its 2020 Tip final rule in Court, which was years in the making and which merely codifies existing guidance as it pertains to the dual jobs portion of the regulations. As a legal matter, there is a compelling basis for the Department to suspend its effort to reconsider the dual jobs portion of the 2020 Tip final rule. The Department's proposed delay for purposes of reconsideration of portions of the 2020 Tip final rule is based almost entirely on the fact that, on January 19, 2021, these key provisions have been challenged in the U.S. District Court for the Eastern District of Pennsylvania.

However, there has been no ruling by the Court or even full legal briefing of this matter. Thus, no judge has yet been able to measure the strength of the allegations made against the Department and/or the legality of the 2020 Tip final rule. In addition, if the Department does not wish to adequately represent the interest of the regulated community, of which we represent the majority, others might be willing to intervene in defense of the 2020 Tip final rule.

If the courts determine that the 2020 Tip final rule was lawfully promulgated under the Administrative Procedures Act the factual predicate for the Department's proposed revisions would be null and void. Given that the outcome of the Pennsylvania litigation bears directly on the legal and factual bases for the proposed delay and reconsideration, at this time, the Department should stop considering withdrawing or reproposing portions of the 2020 Tip final rule and concentrate in defending itself and the 2020 Tip final rule in the ongoing litigation.

A word on the current economic status of the Industry

It is important to highlight the fact that the restaurant industry has been uniquely hurt by the pandemic. No industry has lost more jobs or more revenue. As the nation's second-largest private sector employer, that should be alarming. Our analysis shows that in the first 12 months of the pandemic, restaurant and foodservice sales are down $270 billion from expected levels. Restaurants are still down two million jobs (or 16 percent) below its pre-coronavirus level. Approximately 17 percent of restaurants (which is about 110,000 restaurants) have closed permanently or long-term. The vast majority of permanently closed restaurants were well-established businesses, and fixtures in their communities, many of which had been open for at least 30 years.

As the industry attempts an economic recovery from the pandemic, it is critically important that restaurant employers and employees have workplace policies that provide clear guidelines and predictability to achieve regulatory and legal compliance obligations. Notwithstanding the impacts of the pandemic, businesses already confront an ever-expanding nebula of different and often dissimilar or even contradictory obligations imposed by the federal government, states, and local governing bodies. The burden posed on businesses to understand and comply with changing regulations is onerous for both small employers, which generally have limited resources, and larger businesses that operate in multiple states. To the extent that federal labor regulations can be harmonized, consistent and predictable, with the underlying statutes the resulting benefits will broadly enhance business efficiency, opportunity, and allow businesses to emerge successfully

from the pandemic. Improved efficiency and greater opportunity, in turn, benefits everyone from the individual worker to the macro-level of our national economy.

As explained above, the previous experiment of assigning arbitrary caps and attempting to micromanage restaurant work at the level of task assignment led to unnecessary litigation—imposing untold millions of dollars in costs and burdens on the Industry. The Department should instead return its focus on what WHD is designed to do: ensuring that employees receive the wages the FLSA guarantees. At its core, the tip credit is about the tips, not the tasks an employee is performing each minute of the day. The tip credit exists to protect employees' minimum wage rights under the FLSA.

Conclusion

For the reasons stated above, the Law Center and the Association ask the Department to allow the dual jobs portion of the 2020 Tip final rule to also go into effect on April 30, 2021. We thank you for the opportunity to submit these comments and look forward to working with the Department moving forward on such an important issue for our Industry.

Sincerely,

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