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By electronic submission: http://www.regulations.gov

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"); Partial Withdrawal, 86 Fed. Reg. 15817 (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, proposing to withdraw and repropose two portions of the 2020 Tip final rule and seeking comments on whether to revise one other portion of the 2020 Tip final rule relating to the statutory amendments to the FLSA made by the Consolidated Appropriations Act of 2018 ("CAA"). Specifically, WHD seeks to:

1) Withdraw and repropose the portion of the 2020 Tip final rule incorporating the CAA's new provisions authorizing assessment of Civil Monetary Penalties ("CMP") for violations of section 3(m)(2)(B) of the Act;

2) Withdraw and repropose the portion of its CMP regulations addressing willful violations;
3) Receive comments on whether to revise the portion of the 2020 Tip final rule that addresses the statutory term "managers or supervisors"; and,
4) Receive comments on how it might improve the recordkeeping requirements in the 2020 Tip final rule in a future rulemaking.

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 litigation seeking proper enforcement of the FLSA with regard to its tips' provisions.[1]

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.

[1] *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).

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.

The Department acknowledges that our members will be one of the most affected by the proposed changes, as our Industry has a large share of tipped workers.[2] Given that we generally supported the approach taken in the 2020 Tip final rule, we are glad that some sections were allowed to become effective without further delay but concerned with some of the changes being considered by WHD and disappointed at the additional uncertainty created by the delays and proposed changes. Before attending to the four main content issues in the Proposed Rule, as outlined above, we would like to start by addressing two procedural matters:

1) The need for rulemaking; and,

2) The cost assumptions to members of our Industry underlying WHD's conclusions.

There is no need for delaying, withdrawing, or reproposing portions of the 2020 Tip final rule.

WHD argues that there is a need for the Proposed Rule in the most part because a small number of Attorneys General (from eight states) filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging that the 2020 Tip final rule was promulgated

[2] 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 15826 - 15827.

in violation of the Administrative Procedure Act.[3] In the Proposed Rule, and the several delays dealing with the 2020 Tip final rule, WHD makes a great deal of this litigation in Pennsylvania without even an attempt by WHD to defend its own 2020 Tip final rule in Court, which was years in the making. As a legal matter, there is a compelling basis for WHD to suspend its effort to reconsider portions of the 2020 Tip final rule. WHD's proposed delays, withdrawals, and re-proposals of portions of the 2020 Tip final rule are based almost entirely on the fact that, on January 19, 2021, these 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 the allegations. Thus, no judge has yet been able to measure the strength of the allegations made against WHD and/or the legality of all or portions 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 WHD'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 WHD 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.

[3] *See* 86 FR 15820 – 15821, referring to *Commonwealth of Pennsylvania et al. v. Scalia et al*., No. 2:21-cv-00258 (E.D. Pa., Jan. 19, 2021).

Cost Analysis under Executive Order 12866 and under the Regulatory Flexibility Act

Under Executive Order 12866, the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget ("OMB"), determines whether a regulatory action is significant. This would include a regulation that has an annual impact on the economy of at least $100 million or "adversely affect in a material way a sector of the economy."[4] OIRA determined that the proposed rule is not economically significant based on the cost analysis provided by WHD.[5] We consider the analysis to severely underestimate the true cost of the proposed regulatory changes.

For example, WHD "believes 15 minutes per entity, on average, to be an appropriate review time for this proposed rule."[6] Furthermore, WHD "assumes that the proposed rescission would be reviewed by Compensation, Benefits, and Job Analysis Specialists."[7] Our groups conduct training sessions on regulations during monthly webinars and know:

1) It takes more than 15 minutes to explain regulatory changes and the potential impact on restaurants; and,
2) Many restaurants, particularly those that are small businesses, lack the ability to have in-house specialized lawyers or compensation & benefits specialists to explain the nuance of regulatory changes. Thus, the cost of seeking this professional advice would be much more than it would be in an office environment with a company that has both in-house counsel and a human resources department.

[4] *See* 86 FR 15825.
[5] *See* 86 FR 15825.
[6] *See* 86 FR 15826.
[7] *Id.*

Thus, based on our experience, it is our opinion that both assumptions, i.e, the amount necessary to analyze/understand the rule and who would be doing the analysis in house is incorrect—leading to the underestimation in the Executive Order 12866 required analysis of the true cost and impact of the proposed rule on the main regulated sector of the economy that deals with tipped employees. Likewise, the Regulatory Flexibility Analysis ("RFA"), which required WHD to consider the impact of the proposal on small entities, was faulty as it relied on the same two wrongful assumptions outlined above.

WHD should not revise when Civil Money Penalties for violations of Section 3(m)(2)(B) are applied.

WHD points out that the statute does not specifically limit the assessment of tip CMPs for repeated or willful violations but accepts that the CMPs shall apply only as the Secretary determines appropriate.[8] WHD then intends to repropose this portion of the 2020 Tip final rule to be able to assess CMPs in broader circumstances, arguing that this will "promote the goals of consistency and familiarity that the Department emphasized in the 2020 Tip final rule."[9] We disagree.

As WHD asserted in the 2020 Tip final rule, assessing "CMPs only when an employer has repeatedly or willfully violated section 3(m)(2)(B), as opposed to doing so for a first-time violation, is consistent with how the Department enforces other FLSA wage violations."[10] In the Department's own words, assessing CMPs for repeated or willful violations, as the Department

[8] *See* 86 FR 15822.
[9] *Id.*
[10] *See* 85 FR 86773.

has done for three decades for other FLSA violations, "creates familiarity with the Department's requirements in both the public and in the Department's staff, in turn engendering consistency of compliance among employers and consistency in enforcement by the Department's staff, and ultimately improves public trust in the law and the Department's enforcement of it."[11] These proposed changes seek to destroy the public trust sought in the 2020 Tip final rule.

WHD should preserve the definition of "willful" as it pertains to minimum wage and overtime violations.

WHD is proposing to revise portions of the Department's CMP regulations regarding when a minimum wage or overtime violation is "willful" and, thus, subject to a CMP.[12] We agreed with the proposed changes in the 2020 Tip final rule revising 29 CFR § 578.3(c)(2) and the corresponding language in 29 CFR § 579.2 and the deletion of 29 CFR § 578.3(c)(3) and the corresponding language in 29 CFR § 579.2 for the reasons that the Department already outlined before its current and sudden change of opinion.

Managers and supervisor should be able to keep their tips and contribute to tip pools.

We support the proposed changes in the 2020 Tip final rule regarding tip pooling, as they closely track the statutory language. We had suggested in December 2019 for WHD to clarify what is already implicit in the statute and the proposed regulations: that the limitations on tip pooling apply *only* in instances where a tip pool involves at least one tipped employee. We also pointed out that there are circumstances where non-tipped employees, including supervisors or managers, may themselves receive tips directly from customers, or may even have tip pools just

[11] *See* 85 FR 86773.
[12] *See* 86 FR 15822.

among the non-tipped employees. The regulations should continue to make clear that the law does not prohibit supervisors or managers from pooling or retaining tips in those circumstances, where no tipped employee shares tips with a supervisor or manager.

In addition, given the policies underlying the new statutory language in Section 3(m)(2)(A) of the FLSA, we submitted that the Final Rule should clarify that the statutory prohibition on managers or supervisors participating in a tip pool or sharing arrangement extends only to those individuals *receiving* money from the pool or share, but not to individuals who only *contribute* money into the pool or share. The current Proposed Rule highlights this request from the Law Center and the Association.[13]

The Department also asks in the Proposed Rule whether it should adjust its tip pooling regulations at 29 CFR § 531.54(c)(3) and (d), "to permit managers and supervisors to contribute tips to employer-mandated tip pooling or tip sharing arrangements, provided they do not receive any tips from other employees."[14] Our position has not changed, and we absolutely believe that adjustments to this section is in order.

In some restaurants, it is common for a manager or supervisor in the dining area to have responsibility for serving tables. The restaurant may have a tip sharing arrangement whereby the servers "tip out" a portion of their tips to other employees, such as bartenders, bussers, food runners, or hosts who in various ways help the server to take care of the customers. In that situation, allowing the manager-server to contribute into the tip share, just as the other servers do, in order to facilitate payments to the other tipped employees, in no way undermines the policies

[13] *See* 86 FR 15824.
[14] *Id.*

behind Section 3(m)(2)(A), as *tipped* employees are not sharing their tips with managers or supervisors.

Instead, tipped and non-tipped employees are sharing their tips with tipped employees, a permissible result under the FLSA. Language in the Final Rule, perhaps in 29 CFR § 531.54(b), approving of that type of arrangement would be beneficial to the tipped employees who will thereby stand to receive additional tip-outs from the managers or supervisors contributing into the tip share. As the Department points out, without the adjustments being considered, a situation could exist where severs give a portion of their tips to the bussers, but a manager or supervisor who also waits tables is prohibited from doing the same.[15]

Thus, to answer the Department's question of whether it should "consider allowing managers and supervisors who receive tips to contribute to, but not collect from, employer-mandated tip pooling or tip sharing arrangements," we believe it should. The Department also asks what the benefits and challenges of such an approach are. We believe it creates more of a team environment when the heart of a restaurant operation gets to share in the tips left by customers for good food, clean plates, and a nice environment that all team members contribute to. The prohibition is clear that managers and supervisors should not take tips from employees, but there is no prohibition for them to share their own tips.

As to whether the Department should consider, instead, allowing managers and supervisors who receive tips to contribute to employer-mandated tip pooling or tip sharing arrangements, but receive out of the tip pool no more than what they contributed, we believe the

[15] *See* 86 FR 15824.

statute does not allow for such a setup. Tipping out to other co-workers like, for example, bussers, or tip pools just among non-tipped employees, as described above, are not preempted, but taking out of a tip pool with tipped employees by a manager or supervisor in most circumstances is prohibited under the current statute.

Besides the specific issue addressed above, the Department asks several additional questions with regards to managers and supervisors that we will briefly address below:

1) How common is it for managers or supervisors who satisfy the duties test to perform tipped work?

   In the restaurant industry, it is very widespread. In our industry, it is not uncommon for a manager or supervisor to wipe tables, take orders, or serve food. This occurs on daily basis throughout the country. Tip pools and tip outs have become a way to promote the team environment and thank those that contribute to the restaurant experience, but work in what is known as the "back-of-the-house."

2) Prior to the CAA amendments, how common was it for tipped managers or supervisors who satisfy the duties test to participate in tip pools or tip sharing arrangements?

   In our experience, this was most common in independent and/or small establishments where duties are even less clear. For example, someone would be a "manager" but other than opening the restaurant and assigning tables the manager would work a set of tables like everyone else.

3) Is the language in § 531.52(b)(2) that permits managers and supervisors to keep tips they receive "directly from customers" based on the service that they "directly provide" sufficient to allow tipped managers and supervisors to collect all the tips they have earned from their customer service work?

   In some circumstances, the manager might be the only individual serving tables because it is a slow day or because it is an event outside the restaurant location and only supervisors are managing it. Both are true examples that we have received questions from our members. However, we do believe that if servers are being asked to tip pool/tip share, managers and supervisors should not be allowed to *receive* money from the pool or share but should absolutely be allowed to *contribute* money into a mandatory tip pool/tip share, as outlined earlier.

4) How common is it for tips provided to a manager or supervisor to be commingled with tips provided to other tipped employees? Please describe when and how this would occur. Does this vary based on different industries or different types of establishments within in an industry?

   This question is hard to understand as tips to managers and supervisor should not be "commingled" with tips provided to tipped employees.

5) Should the Department revise the language in § 531.52(b)(2) to clarify that a manager or supervisor may keep their own tips in a scenario in which tips provided to a manager or supervisor are comingled with tips provided to other tipped employees?

   As stated earlier, if servers are being asked to tip pool/tip share, managers and supervisors should not be allowed to *receive* money from the pool or share but should absolutely be allowed to *contribute* money into a mandatory tip pool/tip share.

WHD should not expand recordkeeping requirements.

The Department is also seeking information about whether the recordkeeping requirements in 29 CFR § 516.28 should be revised in a subsequent rulemaking.[16] If the Department proposes such changes, we look forward to commenting specifically on those. At this point, we believe it is important to allow the proposed recordkeeping requirements in the 2020 Tip final rule to move forward and evaluate at a later point in time.

The Department points out that some commenters were concerned with "unscrupulous" employers, but our concern is more with our small members that already have thousand of pages of regulations to comply with without in-house attorneys and other professionals that you would expect in an office environment. As we will address next, the industry is just coming out of over a year of changing daily regulations due to the pandemic and facing a number of new challenges as they attempt to reopen. The Department should try to minimize the burden of recordkeeping on the Industry and concentrate on providing assistance with compliance.

[16] See 86 FR 15824.

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 were 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.

Conclusion

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,

Angelo I. Amador
Executive Director (Law Center)
SVP & Regulatory Counsel (Association)
2055 L Street, NW
Seventh Floor
Washington, DC 20036
P: 202-331-5913
aamador@restaurant.org

Shannon L. Meade
Deputy Director (Law Center)
VP of Public Policy (Association)
2055 L Street, NW
Seventh Floor
Washington, DC 20036
P: 202-331-5994
smeade@restaurant.org