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Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage & Hour Division, U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: National Urban League Comments on Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, Regulatory Information Number (RIN) 1235-AA21.

Dear Ms. DeBisschop,

On behalf of the National Urban League, with 90 local affiliates in 36 states and the District of Columbia, I submit these comments in favor of the Department of Labor's ("Department" or "DOL") notice of proposed rulemaking ("NPRM") to further extend the effective date of three portions of the 2020 Tip final rule, until December 31, 2021. This delay will enable the Department to complete rulemaking and to consider and repropose portions of the previous administration's 2020 tipped worker rule. In addition, the Department has requested comment on the substance of the delayed portions of the Tip Rule, and we include brief substantive recommendations on those portions.

The National Urban League is a civil rights organization dedicated to the economic empowerment of African Americans and other underserved populations. The National Urban League and our affiliate movement have a strong interest in ensuring that employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws, including the minimum wage and overtime protections of the Fair Labor Standards Act ("FLSA" or "Act").

The National Urban League supports the Department's proposed further delay of those portions of the Tip Rule regarding the dual jobs and civil monetary penalties provisions of the Rule, in order to evaluate additional information about the questions of law, policy, and fact raised by these portions of the previous administration's final rule.

The 2020 Rule improperly narrowed the protections of the FLSA for tipped workers in a variety of fast-growing industries including delivery, limousine and taxi, airport workers, parking, carwash, and valet, personal services and retail, in addition to restaurants and hospitality. The federal minimum wage for tipped workers has been stuck at $2.13 since

1991, despite significant increases in the cost of living since then. And too many tipped workers struggle to make ends meet, in part because the industries they work in are characterized by high rates of FLSA violations by their employers. More than 40 percent of the tipped workforce is Black, Latino, or Asian, and Latinas are almost twice as likely to work for tips as white, non-Hispanic men. Compared to tipped white men, tipped Black women take home $5. 00 less per hour and are less likely to work in fine-dining restaurants where tips skew higher.[i] The Department routinely identifies significant wage violations in industries with large concentrations of tipped workers,[ii] who are disproportionately in the communities that the National Urban League and our affiliates serve, and yet under the previous administration, failed to support its new policy change with factual findings that contradict its earlier positions.[iii]

The National Urban League supports the current administration's further delay of the identified portions of the 2020 Tip Rule for the reasons set forth below. We also include brief substantive recommendations for the Department to consider as it proceeds in this rulemaking.

1. **The Tip Rule's rescission of the "80/20" rule on tipped duties permits employers to call more workers "tipped," and pay them the subminimum wage of $2.13/ hour, with nearly no barriers to doing so.**

The Tip Rule allows an employer to require nontipped duties for "any amount of time" when the tipped worker is simultaneously engaged in tip generating duties, and for a "reasonable" amount of time before and after performing tipped duties. This Rule would diminish tipped workers' capacity to earn tips and diminish employer hiring of workers in nontipped occupations (e.g., cleaners, maintenance, prep, and back-office workers). The Rule particularly harms the women and people of color who comprise most of the tipped workforce.[iv]

As the Department recognizes, Section 3(m) only allows employers to take a tip credit for a "tipped employee," defined at section 3(t) as an "employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." This definition requires further explanation, because an individual employee may be employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage).

The "dual jobs" regulation at 29 C.F.R. § 531.56(e) distinguishes between an employee who holds both a non-tipped and a tipped occupation, and a person in a tipped occupation who performs some related non-tipped tasks. Between 1988 and 2018, guidance from the Department clarified the dual jobs regulation with the "80/20 rule," which provided a necessary limit: when an employee spends more than 20 percent of their time during a workweek on activities that are related to the tipped work but do not produce tips, the employee is no longer a tipped employee during the hours spent on related, non-tipped work and must be paid no less than the regular minimum wage for that time.[v]

By removing this bright-line limit on the time for which an employer may take a tip credit for an employee's related, non-tipped work, the Tip Rule threatens to further depress pay for tipped workers. Indeed, the Department acknowledged in the NPRM that tipped employees may "lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage."[vi] Back-of-house employees and workers in non-tipped occupations may also lose out under the Department's amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on "related" tasks like cleaning and food prep that have traditionally been performed by back-of-house staff, it stands to reason that this will drive down wages for—or even eliminate—back-of house positions in restaurants, and related maintenance and prep jobs in other workplaces like hotels, carwashes and parking lots, and service establishments.

The DOL under President Trump justified changing its position on the 80/20 rule because it "was difficult for employers to administer and led to confusion."[vii] To the contrary, the 80/20 rule has been consistently used and accepted by courts and the Department itself over a 30-year period.[viii] In fact, even after the previous administration's DOL released its November 2018 Opinion Letter rescinding the 80/20 Rule, nearly every court to consider it has declined to afford it any deference and has continued to recognize the 80/20 Rule.[ix] We encourage the current Department to use the period of delay to withdraw the portion of the Tip Rule amending the dual jobs regulation and re-propose amendments that establish a standard no less protective than the long-standing 80/20 Rule.

2. **The Tip Rule permits employers to take employees' tips, in violation of the recent Congressional Amendments to the FLSA in 2018.**

The Tip Rule does not comply with the 2018 Congressional Amendments to Section 3(m) of the FLSA, as explained above, and as alleged in the states' legal challenge. Given Congress's clear command that employers may not keep employees tips, employers' use of tips to satisfy their minimum wage obligations should be minimized. Instead, the Tip Rule repeals the longstanding 80/20 rule and substitutes a much weaker standard that will harm tipped workers. In doing so, DOL is in contravention of Congressional intent.

The Economic Policy Institute estimates (conservatively) that if the Tip Rule is allowed to take effect, tipped workers will lose more than $700 million dollars in pay each year,[x] in the midst of the COVID-19 economic crisis in which they have already seen their tips plummet.[xi] And this loss would likely especially harm the women and people of color who are both disproportionately represented in the tipped workforce and have borne the brunt of the pandemic's devasting impacts.

3. **The lawsuit filed by eight states and the District of Columbia merits further review and revision of the Tip Rule.**

Attorneys General of Pennsylvania, Illinois, Massachusetts, Delaware, the District of Columbia, Maryland, Michigan, New Jersey, and New York filed suit against the Department in January raising several legal issues regarding the Tip Rule. The lawsuit focuses especially on the elimination of the 80/20 Rule, and claims that the Rule contradicts the text and purpose of the Fair Labor Standards Act. It also asserts that the DOL in the previous administration violated rulemaking process requirements, including failing to analyze the impact the rule would have on tipped workers.

Proceedings in this case are currently stayed pending the current Department's review of the issues of law, fact, and policy raised by the proposed rule, and the further delay proposed here will allow the Department the time needed to appropriately consider and address these issues through additional rulemaking.

4. The Tip Rule should be delayed because of its improper narrowing of the reasons for assessing civil monetary penalties against employers.

The Tip Rule's redefinition of willfulness improperly *weakens* worker protections, contrary to the language of the FLSA and its recent Congressional amendments, where Congress sought to increase civil penalties, and must be reassessed. Despite Congress's clear intent to provide for civil money penalties for violations of section 3(m) without finding a willful violation, the previous administration's DOL Tip Rule unlawfully add a willfulness requirement. That is contrary to the plain language of the statute, and we appreciate the current Department's efforts to revise this portion of the Tip Rule in separate rulemaking associated with this proposed delay.

Thank you for your attention to these comments on a critical issue facing millions of workers.

Marc H. Morial
President & CEO
National Urban League

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[i] Katica Roy, *Gender Economist Katica Roy: The U.S. Style of Tipping Hurts the Economy -- and Especially Women -- amid COVID-19.* NBC News. (Aug. 27, 2020). https://www.nbcnews.com/know-your-value/feature/gender-economist-katica-roy-u-s-style-tipping-hurts-economy-ncna1238451.

[ii] *See, e.g.*, https://www.dol.gov/whd/resources/strategicEnforcement.pdf.

[iii] *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).

[iv] Women make up 69 percent of tipped workers. Women of color are 28 percent of tipped workers, compared to 18 percent of all workers. NWLC calculations based on U.S. Census Bureau, American Community Survey 2017 one-year estimates (ACS 2017) using IPUMS USA. Figures include all workers employed in a set of predominantly tipped occupations identified by the Economic Policy Institute (EPI). *See* Dave Cooper, Zane Mokhiber & Ben Zipperer, EPI, Minimum Wage Simulation Model Technical Methodology (Feb. 2019), https://www.epi.org/publication/minimum-wage-simulation-model-technical-methodology/

[v] *See* U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); *see also, e.g.*, Belt, 2019 WL 3829459 at *25.

[vi] 2019 Tip Rule, 84 Fed. Reg. at 53,972.

vii *Id.*

viii *See, e.g.*, citations in comments submitted by NELP on February 17, 2021, in favor of the delay of this Rule.

ix *See, e.g.*, citations in comments submitted by NELP on February 17, 2021, in favor of the delay of this Rule.

x Heidi Shierholz & David Cooper, *Workers Will Lose More Than $700 Million Annually Under Proposed DOL Rule*, WORKING ECON. BLOG (Nov. 30, 2019), https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/.

xi *See, e.g.*, One Fair Wage et al., *Take Your Mask Off So I Know How Much to Tip You: Service Workers' Experience of Health & Harassment During COVID-1*9 (Nov. 2020), https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf (finding in a survey of 1,675 food service workers in 5 states and Washington, D.C. that 83% had experienced a decline in tips during the pandemic, with nearly two-thirds of respondents reporting that tips had declined by at least 50%).