



February 5, 2018

Via Electronic Submission (Regulations.gov)

The Honorable R. Alexander Acosta  
Secretary  
United States Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Melissa Smith  
Director of the Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
United States Department of Labor, Room S-3502  
200 Constitution Ave. NW  
Washington, DC 20210

**Re: Request for Information (RIN 1235-AA21)**  
**Proposed Rescission of Tip Regulations Under the Fair Labor Standards Act**

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of California, Illinois, Pennsylvania, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia to comment on – and oppose – the proposal<sup>1</sup> by the United States Department of Labor (“US DOL” or “the Department”) to rescind portions of its tip regulations at 29 C.F.R. part 531 (RIN No. 1235-AA21). Specifically, the undersigned oppose rescission of those regulations that prohibit employers from accessing or retaining portions of tips received by employees. Section 3(m) of the Fair Labor Standards Act (FLSA) establishes the conditions by which an employer may take a partial tip-credit against its minimum wage obligations. Chief among these conditions is the requirement that employees retain all tips. In 2011, the Department promulgated regulations clarifying that section 3(m) “provides the only permitted uses of an employee’s tips” and that these protections against employers’ use of tips “apply irrespective of whether the employer has elected the tip credit”<sup>2</sup> (hereinafter “the 2011 regulations”). Now, in an apparent reversal of its longstanding interpretation of the FLSA, the Department proposes to rescind these 2011

<sup>1</sup> Tip Regulations under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57408 (proposed Dec. 5, 2017) (to be codified at 29 C.F.R. pt. 531) [hereinafter “NPRM”].

<sup>2</sup> Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832, 18841 (April 5, 2011) (codified at 29 C.F.R. pt. 531).

regulations and take the view that employers are free to take, keep, or redistribute employee tips without limitation, so long as they pay employees at least the federal minimum wage of \$7.25 an hour.

The undersigned state attorneys general believe that the rescission of the 2011 regulations would be inconsistent with the long-established cultural and legal understanding of tips as the property of the employees who earn them and state laws reflecting those views. If implemented, the rescission would greatly harm millions<sup>3</sup> of employees in the United States who depend on tips and would create the real potential for customers to be deceived as to whom will receive and benefit from their tips.

This comment is not intended to take any position on the practice of tipping. Indeed, and as is discussed below, the undersigned states take different policy approaches to tip-related issues. But so long as tipping is a widespread and legally recognized practice in the United States, employers should be prohibited from appropriating employee tips for their own uses. Accordingly, the undersigned oppose rescission of the 2011 regulations.

#### **I. In its Origins and to the Present Day, Tips and Gratuities Have Been Understood to be the Property of Employees.**

The custom of tipping has existed in some form since around the end of the Middle Ages, when visitors to private homes of the English landed gentry provided small sums of money to the host's servants.<sup>4</sup> While the practice originally began to reward servants who had gone above and beyond their duties, it quickly became the expectation that visitors would tip all household employees who had tended to them.<sup>5</sup> The custom did not take hold in the United States until after the Civil War,<sup>6</sup> when it gained prominence in the transportation, food service and hospitality industries.<sup>7</sup> As in England, tip recipients in America during this time were seen as separate from those who would bestow tips.<sup>8</sup> However, by the 20<sup>th</sup> century, the majority of

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<sup>3</sup> The US DOL's Wage and Hour Division notes that a valid tip pool includes employees who "customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders." U.S. Dep't of Labor, Wage and Hour Div., Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA) (2016), <https://www.dol.gov/whd/regs/compliance/whdfs15.pdf>. Utilizing that potential "pool" of tipped employees, the Bureau of Labor Statistics provides Occupational Employment Statistics updated as of May 2016. See Bureau of Labor Statistics, May 2016 National Occupational Employment and Wage Estimates, available at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). That statistical survey includes "Major Occupational Group 35-0000 Food Preparation and Serving Related Occupations," which incorporates the following data as to the number of workers in the following occupations: 603,320 bartenders; 499,550 counter attendants, cafeteria, food concession and coffee shop workers; and 2,564,610 waiters and waitresses. Bureau of Labor Statistics, Occupational Employment and Wages, May 2016, <https://www.bls.gov/oes/current/oes350000.htm>. That subset of "tipped" occupations alone includes millions of employees.

<sup>4</sup> Kerry Segrave, *Tipping: An American Social History of Gratuities* 1 (1998).

<sup>5</sup> *Id.* at 1-2.

<sup>6</sup> Akila McConnell, *A Brief History of Tipping*, TripSavvy, May 16, 2017, <https://www.tripsavvy.com/a-brief-history-of-tipping-1329249>.

<sup>7</sup> Segrave, *supra* note 4, at 6.

<sup>8</sup> *Id.*

Americans participated in tipping culture<sup>9</sup> and, for many employees, the possibility of earning tips created the possibility of greater earnings than positions that only paid an hourly wage.<sup>10</sup>

Notably, both in origin and through development in the United States, tips have been gratuities paid directly to the person performing the service as a means by which customers could reward high-quality service and encourage such service in the future.<sup>11</sup> Customers have reacted negatively when this practice was not followed: For example, in the early 1900s, it was common for fine hotels and restaurants to have contractors run hat and coat checks on their premises. The contractors would collect all of the tips received by the checkroom clerks, pay the workers a set wage and keep the rest of the tips.<sup>12</sup> When news of this practice was publicized, patrons stopped tipping because they knew their tip would not directly reward the person performing the service.<sup>13</sup>

As tipping has become standard practice in modern times, however, customers' reasons for tipping have expanded. Customers may tip, for example, to avoid the future embarrassment of running into a waiter that a customer previously stiffed,<sup>14</sup> out of a sense of generosity, or because it is a social norm.<sup>15</sup> Moreover, and particularly since the availability of the tip credit under section 3(m) of the FLSA and many state laws, customers may tip because they believe that service staff are economically dependent upon tips.<sup>16</sup>

However, even if the reasons that consumers tip have evolved over time, employee and customer expectations as to whom should receive tips have not. Customers largely expect and understand tips to be voluntary payments made to the employees performing the service. Tipping has always been about paying the server, rather than the host; the checkroom clerk, rather than the contractor; and the waiter, rather than the restaurateur.

## **II. State Laws are Fundamentally Consistent with these Expectations.**

The historical and cultural expectation that gratuities belong to those employees who earn them is also reflected in many state laws governing tips. The FLSA specifically allows the

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<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 10-12.

<sup>11</sup> See Ofer H. Azar, *Why Pay Extra? Tipping and the Importance of Social Norms and Feelings in Economic Theory*, 36 J. Socio-Econ. 250 (2007) (outlining the economic justifications for tipping and the reasons people choose to tip).

<sup>12</sup> Segrave, *supra* note 4, at 15.

<sup>13</sup> *Id.*

<sup>14</sup> Azar, *supra* note 11, at 255.

<sup>15</sup> Ofer H. Azar, *The History of Tipping—From Sixteenth-Century England to United States in the 1910s*, 33 J. Socio-Econ. 745, 748 (2004).

<sup>16</sup> See, e.g., Azar, *supra* note 11, at 275; see also Susan N. Eisenberg & Jennifer T. Williams, *Evolution of Wage Issues in the Restaurant Industry*, 30 ABA J. Lab & Emp. L. 389, 390-91 (2015) (discussing how amendments to the FLSA mandate the tip credit as a response to tips being used by employers to make up the difference between wages paid and minimum wage).

various states to impose more generous wage and hour protections than exist under the FLSA.<sup>17</sup> As a result, many states have chosen to adopt legal standards that explicitly protect tips as the sole property of the employees who receive them. A second loose grouping of state wage laws, like the FLSA, only explicitly address employee ownership of tips in the context of employers who utilize the tip credit.

A. Many state laws explicitly protect tips and gratuities as the property of the employees who earn them.

In accordance with the customary recognition of tips as a voluntary contribution from patrons for the services provided by employees, California, Washington, and a handful of other states do not permit employers to reap any financial benefit from the tips left for their employees.<sup>18</sup> In such states, employers may not utilize a “tip credit” towards fulfilling their minimum wage obligations or take any part of a gratuity left for an employee. Rather, employees must be paid the same full cash minimum wage paid to non-tipped employees, and state law provides that the tips received by tipped employees are exclusively the property of those employees.<sup>19</sup> These states could not be more explicit that, in all circumstances, gratuities are “the sole property of the employee or employees to whom it was paid, given, or left for.”<sup>20</sup>

Other state wage laws, including those in Massachusetts and New York, permit employers to count some portion of gratuities as a “tip credit” towards their minimum wage obligations but make clear that, aside from this limited exception, gratuities are the property of the employees who receive them.<sup>21</sup>

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<sup>17</sup> See 29 U.S.C. § 218.

<sup>18</sup> According to the US DOL’s Wage and Hour Division, as of January 1, 2018, only Alaska, California, Guam, Minnesota, Montana, Nevada, Oregon and Washington require an employer to pay employees who regularly receive tips a full minimum wage *before* tips. Wage and Hour Div., Minimum Wages for Tipped Employees (2018), <https://www.dol.gov/whd/state/tipped.htm>.

<sup>19</sup> See, e.g., Cal. Lab. Code § 351 (“No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer.”); Wash. Rev. Code § 49.46.020(3) (“An employer must pay to its employees: (a) [a]ll tips and gratuities; . . . Tips and service charges paid to an employee are in addition to, and may not count towards, the employee’s hourly minimum wage.”); Nev. Rev. Stat. § 608.160(1) (“It is unlawful for any person to: (a) Take all or part of any tips or gratuities bestowed upon the employees of that person.” or “(b) Apply as a credit toward the payment of the statutory minimum hourly wage . . . any tips or gratuities bestowed upon the employees of that person.”).

<sup>20</sup> Cal. Lab. Code § 351.

<sup>21</sup> See, e.g., Mass. Gen. Laws ch. 149, § 152A(b) (“No employer or other person shall demand, request or accept from any wait staff employee, service employee, or service bartender any payment or deduction from a tip or service charge given to such wait staff employee, service employee, or service bartender by a patron.”); N.Y. Lab. Law § 196-d (“No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee.”).

Notably, whether or not they permit a tip credit, all of these states allow employees to share tips with other employees through a tip pool; however, employers (and typically management employees) are precluded from sharing in any portion of such a pool.<sup>22</sup> For example, a 2016 Washington state initiative, now codified at RCW 49.46.020, specified that tips may only be paid out to non-exempt employees; employers cannot retain any share of tips left for employees for their own purposes. In California, section 351 of the Labor Code provides that “[n]o employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, . . . .” Thus the statutes and regulations in these states are a legislative expression of the common understanding between patrons and servers that tips are left by guests directly for workers.<sup>23</sup>

For states such as these, the Department of Labor’s 2011 tip regulations have created certainty and uniformity between federal and state law. Under both federal and state law, it is clear that employers who pay an hourly minimum wage may permit or, in some instances, require employees to engage in tip pooling but may never take or appropriate employee tips for their own uses. The proposed rescission of the 2011 regulation would disrupt that uniformity and create a significant, substantive conflict between federal rules and state laws, causing confusion for employers (particularly national employers) and employees alike.

B. Other state tip laws, like the FLSA, do not explicitly address ownership of employee tips outside of the tip credit context.

Another group of state wage statutes, including those of Illinois and Pennsylvania, permit employers to take a tip credit so long as they adhere to the requirements established by section

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<sup>22</sup> See, e.g., Alaska Admin. Code tit. 8 § 15.907(b) (“[A]n employer may not handle or take possession or control of an employee’s tips.”); Del. Code Ann. § 902(d)(2) (“The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees.”); Haw. Rev. Stat. § 388-6 (“No employer may deduct, retain, or otherwise require to be paid, any part or portion of any [tips and gratuities] earned by any employee except . . . when . . . authorized in writing by the employee.”); Me. Rev. Stat. Ann. § 664(2) (“The tips received by a service employee become the property of the employee and may not be shared with the employer.”); Minn. Stat. Ann. § 177.24(3) (“No employer may require an employee to contribute or share a gratuity received by the employee with the employer . . . or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer . . . .”); Mont. Code Ann. 39-3-402(7)(c) (service charges “in lieu of a tip . . . must be distributed directly to the nonmanagement employee preparing or serving the food or beverage or to any other employee involved in related services, pursuant to a tip pool agreement.”); N.H. Rev. Stat. § 279:26-b (“Tips are wages and shall be the property of the employee receiving the tip and shall be retained by the employee” unless of voluntary participation in a tip pool with employees “who participated in providing service to customers.”); N.J. Admin. Code § 12:56-8.4(b) (“Gratuities shall be the property of the tipped employee . . . [and] restored to the tipped employee except when gratuities are pooled, voluntarily . . . .”); 13 NCAC § 12.0303(c) (“Tips belong to the employee for whom they were left by the customer. Employees and employers may not agree that the employee will surrender tips to the employer.”); Utah Admin. Code R610-1-4(D) (“All tips shall be retained by the employee receiving the tips [unless] pooled and divided or shared among those employees who customarily and regularly receive tips.”); Wyo. Stat. Ann. § 27-4-507(a) (“Tips and gratuities received by an employee or employees shall be the sole property of such employee or employees and not payable in whole or in part to the employer or any other person.”).

<sup>23</sup> See, e.g., *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1068 (1990) (“[T]he legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them.”).

3(m) of the FLSA. These laws do not explicitly address employer access to employee tips outside of the tip credit context.<sup>24</sup> In Pennsylvania, the minimum wage is the federal minimum wage of \$7.25 per hour. The Pennsylvania Minimum Wage Act contains language that “mirrors” the FLSA<sup>25</sup> and Pennsylvania law is interpreted in light of federal interpretations of the FLSA.<sup>26</sup> However, in Pennsylvania, employers may pay tipped employees \$2.83 per hour and utilize a tip credit, so long as the employee makes the difference between the hourly rate and minimum wage (\$4.42) in tips and the employee receives “over \$30 in tips for a month.”<sup>27</sup> Further, utilization of the tip credit is only permitted where – as under the FLSA – “(1) [s]uch employe has been informed by the employer . . . [of the details of the tips credit]; [and] (2) [a]ll tips received by such employe have been retained by the employe and shall not be surrendered to the employer to be used as wages to satisfy the requirement to pay the current hourly minimum rate in effect....”<sup>28</sup> In instances where the employer does not take a tip credit and employees are compensated by the employer at the minimum wage of \$7.25 per hour, Pennsylvania’s Minimum Wage Act and regulations, like the FLSA, are silent as to how tips may be allocated. Similarly, states like Illinois and Maryland permit employers to take a tip credit under prescribed circumstances, but do not explicitly address employee ownership of tips in the absence of a tip credit.<sup>29</sup>

The Department’s proposed rescission of the 2011 tip regulations would greatly impact these states, as well. State courts often look to the Department’s regulations for guidance in interpreting their largely parallel state statutes. Currently, the Department’s 2011 regulation helps ensure consistency between the federal law and state provisions that generally follow the FLSA by providing clarity in situations where employers do not take tip credits. If the regulation is rescinded, differing interpretations of the resulting regulatory silence about tip ownership outside the tip credit context may create inconsistencies and confusion. For example, Illinois law does not expressly require that employees retain all tips outside of the context of the tip credit but does define a “gratuity” as “voluntary monetary contributions *to an employee* from a guest, patron or customer in connection with services rendered.”<sup>30</sup> This definition cannot be squared with a US DOL interpretation of the FLSA that leaves employers free to take employee gratuities. However, absent state-level statutory amendments or clarification by state courts,

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<sup>24</sup> States whose laws and regulations do not explicitly prohibit employers from taking tips outside of the tip credit context include: Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Michigan, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, and Virginia.

<sup>25</sup> See *Dept. of Labor and Industry, Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003).

<sup>26</sup> See, e.g., *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 674 (W.D. Pa. 2009) (interpretation of state minimum wage law could be guided by federal interpretation of the FLSA due to similarities between the two laws); see also *Commonwealth v. Penn. Labor Relation Bd.*, 527 A.2d 1097, 1099 (Pa. Commw. Ct. 1987) (finding that state labor law could be interpreted in light of the National Labor Relations Act due to similarities in language and purpose).

<sup>27</sup> 34 Pa. Code § 231.101(b).

<sup>28</sup> 43 P.S. § 333.103(d).

<sup>29</sup> See 820 ILCS § 105/4(c); Md. Code Ann., Lab. & Empl. § 3-419; see also *supra*, note 24.

<sup>30</sup> See 820 ILCS § 105/3(f); see also, Pennsylvania’s statute, which defines “gratuity” as “voluntary, monetary contributions received by an employe from a guest, patron or customer for services rendered.” 43 P.S. § 333.103(i).

employers and employees in Illinois and other states may be uncertain about their rights and obligations under state law should the federal regulations be rescinded.

### **III. The Department’s Stated Reasons for the Rulemaking Fail to Provide Sufficient Justification for Rescinding the 2011 Regulations.**

#### **A. The NPRM’s reference to changes in state laws does not provide justification for a new rulemaking.**

The Department asserts that reconsideration of the 2011 regulation is warranted due to changes in state wage laws.<sup>31</sup> However, this assertion misconstrues the relationship between state wage laws and the FLSA, and fails to justify a new rulemaking.

Courts have consistently recognized that “the FLSA’s ‘savings clause’ makes clear that states may enact wage laws that are more protective than those that are provided in the act.”<sup>32</sup> In other words, “FLSA sets a floor rather than a ceiling on protective legislation.”<sup>33</sup>

Accordingly, the FLSA itself contemplates that states may choose to protect workers above and beyond the “floor” set by federal law. Thus, the fact that some states have sought to raise worker protection standards above federal requirements renders the Department’s decision to undertake a new rulemaking arbitrary. Since the FLSA itself presumes that states will establish higher protections for workers than federal law does, it would be wholly capricious for the Department to institute a rulemaking to weaken worker protections under federal regulation any time states enhance worker protections under their own laws.

#### **B. The NPRM’s reference to judicial decisions about its authority do not provide justification for a new rulemaking.**

There is no legal justification for the Department to rescind its 2011 regulations. The NPRM expresses “serious concerns that [the Department] has incorrectly construed the statute in promulgating its current regulations” to extend to employers who do not claim a tip credit, and the “changed landscape and extensive litigation” since 2011.<sup>34</sup> But nothing has changed since 2011. If anything, the courts have further vindicated the Department’s “position since the 1974

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<sup>31</sup> NPRM, *supra* note 1, at 57401.

<sup>32</sup> *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 247 (2d Cir. 2011) (citing 29 U.S.C.A. § 218(a) (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . State law or municipal ordinance establishing a minimum wage higher than the minimum wage established [by the FLSA]”). *See also Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 838 (7th Cir. 2014) (“federal law does not preempt the state law if the latter is more generous to employees”).

<sup>33</sup> *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 759 (9th Cir. 2010), vacated on other grounds, 565 U.S. 801 (2011).

<sup>34</sup> NPRM, *supra* note 1, at 57399.

amendments that these protections against the use of an employee’s tips apply irrespective of whether the employer has elected the tip credit.”<sup>35</sup>

The NPRM cites to the 2010 decision by the Ninth Circuit in *Cumbie v. Woody Woo, Inc.*,<sup>36</sup> holding that FLSA section 3(m)’s tip retention requirements apply only to employers that avail themselves of the tip credit provision.<sup>37</sup> But the *Woody Woo* case simply does not justify rescission of the 2011 regulations. Indeed, the Department extensively analyzed the case in formulating the 2011 regulations and concluded that “*Woody Woo* was incorrectly decided,” its statutory “construction is unsupportable,” and it runs contrary to the “legislative history of [FLSA], as well as caselaw and opinion letters published shortly after the 1974 amendments.”<sup>38</sup> Moreover, as the Department concedes in the NPRM, the Ninth Circuit subsequently cabined *Woody Woo* to its facts in its 2016 *ORLA* decision, and held specifically that “section 203(m)’s clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule.”<sup>39</sup>

The “extensive” litigation cited in the NPRM amounts to five cases, all of which rely on the since-rejected rationale of the *Woody Woo* case. Three of the cases (two of which are unpublished district court decisions) cite *Woody Woo* and were decided before *ORLA*,<sup>40</sup> and the other two cases (one of which is an unpublished district court decision) unpersuasively seek to disregard *ORLA* and resurrect the *Woody Woo* rationale that it rejected.<sup>41</sup> With no persuasive court holdings to cite, the NPRM relies on the rationale set forth in the dissent to the denial of the petition for rehearing *en banc* in *ORLA*, which also relies on *Woody Woo*—but this only reinforces the fact that this reasoning was ultimately rejected by the very court that devised it.<sup>42</sup>

The Department can, and should, disregard the cases cited in the NPRM because they all rely on an obsolete rationale that has been soundly rejected. At most, the Tenth Circuit’s recent decision in *Marlow* suggests a circuit split,<sup>43</sup> with the far more persuasive side supporting the validity of the 2011 regulations, the clear rejection of the *Woody Woo* rationale in the *ORLA* decision, and the Department’s longstanding practice since 1974. Accordingly, developments in the caselaw since 2011 do not warrant rescission or reconsideration of the 2011 regulations.

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<sup>35</sup> 76 Fed. Reg. 18841.

<sup>36</sup> 596 F.3d 577, 581 (9th Cir. 2010).

<sup>37</sup> NPRM, *supra* note 1, at 57397.

<sup>38</sup> 76 Fed. Reg. 18841-42.

<sup>39</sup> *Or. Rest. & Lodging Ass’n (ORLA) v. Perez*, 816 F.3d 1080, 1088 (9th Cir. 2016), *cited in* NPRM, *supra* note 1, at 57398.

<sup>40</sup> *See Cesarz v. Wynn Las Vegas*, No. 2:13-cv-109, 2014 WL 117579, at \*3 (D. Nev. 2014) (citing *Woody Woo* and ultimately reversed by *ORLA*); *Trejo v. Ryman Hosp. Properties, Inc.*, 795 F.3d 442, 447 (4th Cir. 2015) (citing *Woody Woo* and decided before *ORLA*); *Brueningsen v. Resort Exp. Inc.*, No. 2:12-cv-00843, 2015 WL 339671, at \*4 (D. Utah Jan. 26, 2015) (same), *cited in* NPRM, *supra* note 30, at 57398.

<sup>41</sup> *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1161–62 (10th Cir. 2017) (invoking *Woody Woo* and disregarding *ORLA*); *Malivuk v. Ameripark*, No. 15-cv-2570, 2016 WL 3999878, at \*8 (N.D. Ga. July 26, 2016) (same), *cited in* NPRM, *supra* note 30, at 57398.

<sup>42</sup> *ORLA v. Perez*, 843 F.3d 355, 358 (9th Cir. 2016) (O’Scanlon, J., dissenting), *cited in* 82 Fed. Reg. 57399.

<sup>43</sup> 861 F.3d 1157, 1161–62 (10th Cir. 2017) (“respectfully disagree[ing]” with *ORLA*).



**C. The Department’s failure to release all relevant data would violate the APA’s requirements and renders this rulemaking arbitrary and capricious.**

The Administrative Procedure Act (“APA”) requires that “general notice of proposed rulemaking shall be published in the Federal Register,” including the “terms or substance of the proposed rule.”<sup>44</sup> The purpose of this requirement is to give the affected public an opportunity to provide meaningfully informed comment on the proposal. If recent press accounts are true that the Department conducted but refused to disclose an analysis of the economic impact of this NPRM,<sup>45</sup> the public’s opportunity to provide meaningful comment on the proposal has been undermined in violation of the APA. As courts have explained, the APA “requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.”<sup>46</sup> In particular, “[a]n 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.”<sup>47</sup> It would be arbitrary and capricious for the Department to finalize this proposal without complying with the most basic obligations of the notice-and-comment process.

**IV. If the Department Chooses to Move Forward with the Rescission, it Should Undertake Common-Sense Measures to Lessen the Harm to Employees and Consumers.**

The Department’s proposed rulemaking contradicts centuries-old employee and consumer expectations about tipping and threatens to seriously injure workers and deceive consumers.<sup>48</sup> At present, tipped workers, regardless of how their base wage rate is calculated, are the lawful owners of tips and, with very limited exception, employers cannot partake in an employee’s tips. The proposed rescission completely upends this certainty by failing to define who may participate in tip pools where a worker earns the federal minimum wage. The Notice of Proposed Rulemaking asserts that, by providing employers with greater flexibility to allocate tips among tipped and non-tipped workers, such as cooks and dishwashers, the primary beneficiaries of rescinding the 2011 rule will be the workers themselves.<sup>49</sup> Yet, absent concrete definitions of or limitations on valid tip pool participants, the rescission would permit employers to share in such tip pools or even collect *all* employee tips as their own. In fact, the Notice itself acknowledges that rescinding the 2011 rule would permit employers to use gratuities left for servers to “make capital improvements” or “lower restaurant menu prices”<sup>50</sup> and notes that tips

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<sup>44</sup> 5 U.S.C. § 553(b).

<sup>45</sup> Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses* (Feb. 1, 2018), <https://bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

<sup>46</sup> *American Medical Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

<sup>47</sup> *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982), *cert denied*, 459 U.S. 835.

<sup>48</sup> *NPRM*, *supra* note 1.

<sup>49</sup> *NPRM*, *supra* note 1, at 57407.

<sup>50</sup> *NPRM*, *supra* note 1, at 57408.

may be “utilized in part (or in full) by the employer.”<sup>51</sup> As currently drafted, nothing in the rule would prevent employers from simply pocketing gratuities as additional profit.<sup>52</sup> The results could be devastating for tipped employees and misleading to consumers. Indeed, economists have estimated that the proposed rule would result in employers pocketing \$5.8 billion in tips earned by employees, or 16.1% of all tips, that consumers have paid intending those monies to go to the traditionally-tipped employees who have performed services for them.<sup>53</sup>

- A. Should the Department of Labor rescind the 2011 Regulations, it should limit the harm to employees by promulgating regulations to clarify that tips may be redistributed among restaurant employees only and not to employers.

As acknowledged in the Notice of Rulemaking, rescission of the 2011 rule will lead to decreased overall compensation for at least some currently tipped employees earning at least the federal minimum wage and could result in such employees being deprived of tip income altogether.<sup>54</sup> The importance of gratuities to a tipped employee’s income cannot be overstated. One recent report found that tips account for 58.5 percent of wait staff’s earnings, and 54 percent of bartenders’ earnings.<sup>55</sup>

This loss of income would come from employees who can little afford it, as tipped work is often low-wage work.<sup>56</sup> A 2014 report by the Economic Policy Institute found that the wages of tipped workers “typically fall in the bottom quartile of all U.S. wage earners, even after

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<sup>51</sup> NPRM, *supra* note 1, at 57409.

<sup>52</sup> Indeed, it is not difficult to imagine under the proposed rule how a few wait staff in a higher priced restaurant could effectively subsidize an employer’s entire wage obligation on a Saturday night. For example, if in the course of six hours, ten wait staff waited on five tables and each of the five tables generated a \$20.00 tip, the wait staff would generate \$100.00 a piece, or a total among the ten of them of \$1,000 for the six-hour shift. In a state that follows the federal minimum wage, the cost to the employer for the same ten employees over those six hours at \$7.25 per hour is \$435.00 (6 x \$7.25 x 10). Thus, during that same six hours, the employer could have as many as 12 additional employees earning minimum wage (6 x \$7.25 x 12 = \$522.00) and not expend any money on wages (\$1000 - \$435 - \$522 = \$43). In other words, the \$1000 in tips and gratuities earned by the wait staff can pay for the wages of 22 employees for six hours at minimum wage and resulted in a net profit to the employer of \$43.

<sup>53</sup> Heidi Sheirholz et al., *Employers Would Pocket \$5.8 Billion of Workers’ Tips Under Trump Administration’s Proposed ‘Tip Stealing’ Rule* (2017), <http://www.epi.org/files/pdf/139138.pdf>. EPI’s economic analysis should strongly be considered as part of this rulemaking proceeding, particularly given that the Department reportedly withheld and failed to make public its own analysis showing how much employees would lose in tips under the proposed rule. Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses* (Feb. 1, 2018), <https://bna.com/news/bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>.

<sup>54</sup> NPRM, *supra* note 1, at 57407-57408.

<sup>55</sup> This could translate to an estimated additional \$5.8 billion in revenue for employers. Nat’l Employment Law Project and Rest. Opportunity Ctr. United, *Wait Staff and Bartenders Depend On Tips*, <http://www.nelp.org/content/uploads/NELP-ROC-Data-Brief-Tip-Rule.pdf> (citing Heidi Sheirholz et al., *Employers Would Pocket \$5.8 Billion of Workers’ Tips Under Trump Administration’s Proposed ‘Tip Stealing’ Rule* (2017), <http://www.epi.org/files/pdf/139138.pdf>).

<sup>56</sup> Sylvia A. Allegretto & David Cooper, Econ. Policy Inst. and Ctr. on Wage and Employment Dynamics, *Twenty-Three Years and Still Waiting for Change*, Briefing Paper #379, 9 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

accounting for tips.”<sup>57</sup> And restaurant workers, who comprise 62% of all tipped workers in the U.S., experience poverty at 2.6 times the rate of the U.S. workforce.<sup>58</sup>

Low-wage workers’ susceptibility to living at or below the federal poverty line further compounds the negative impact of the Notice of Proposed Rulemaking. According to a September 2017 GAO report, “[f]amilies with a low-wage worker may be eligible for and use one or more federal social safety net programs. The largest of these programs is Medicaid[.]”<sup>59</sup> According to the report, a hypothetical low-wage worker between ages 25-64 earning the federal minimum wage or below, with calculated annual earnings of \$12,441, could potentially be eligible for Medicaid, SNAP, EITC and ACTC (projected eligibility based on income solely).<sup>60</sup> If impacted workers have reliable income taken from them, it is likely to further jeopardize their ability to make ends meet and potentially force them to turn to already overburdened state and federal social safety net programs.<sup>61</sup>

In order to limit these harms, the Department should at least explicitly bar employers from participating in tip pools or retaining any portion of employee tips if it chooses to finalize the present proposal. This would be consistent with the numerous state laws, discussed *supra*, that permit tip pooling but prohibit employers from participating in such tip pools. Moreover, excluding employers from tip pooling should have no detrimental effect on many of the purposes cited by the Department as reasons for rescission of the 2011 rule, including permitting redistribution of employee tips between traditional “front of the house” and “back of the house” employees, reducing “wage disparities among employees who all contribute to the customers’ experience,” incentivizing better customer service among all employees, and reducing turnover among traditionally non-tipped employees.<sup>62</sup>

B. If the Department rescinds the 2011 rule, at the least, employers should be required to provide notice to consumers if they retain a portion of employee tips.

As discussed earlier, the historical development of tipping and tip laws has led customers to believe that if they leave a tip it will go directly to the person(s) performing the service for which they are tipping. If the 2011 rule is rescinded, customers may be left without a means of ensuring that their money is being used as intended. Courts have found that protection of

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<sup>57</sup> *Id.* at 2.

<sup>58</sup> Rest. Opportunity Ctr. United, *The State of Tipped Workers in America* (2015), [http://rocunited.org/wp2015b/wp-content/uploads/2015/05/OneFairWage\\_SOTW\\_national.pdf](http://rocunited.org/wp2015b/wp-content/uploads/2015/05/OneFairWage_SOTW_national.pdf).

<sup>59</sup> U.S. Gov’t Accountability Office, GAO-17-677, *Low-Wage Workers: Poverty and Use of Selected Federal Social Safety Net Programs Persist among Working Families* (2017), <https://www.gao.gov/assets/690/687314.pdf>.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> Importantly, the *NPRM* itself acknowledges that “[a]ssuming customers are aware of the employer’s [tip] policy, changes to tipping behavior, if they occur at all, may differ depending on whether the tips are redistributed into a tip pool that includes a broader group of employees, *or otherwise utilized in part (or in full) by the employer.*” *NPRM*, *supra* note 1, at 57409 (emphasis added). Arguably, if customers are aware that an employer may take a portion or all of the gratuity they are leaving, customers may be inclined to tip less. Fewer tips would deprive employees of much needed and hard-earned income.

<sup>62</sup> *NPRM*, *supra* note 1, at 57407.

customer expectations surrounding tips is one of the primary incentives for legislatures to pass more explicitly employee-protective state tip laws.<sup>63</sup>

Rescission of the 2011 rule will leave customers in many states under exactly such a mistaken impression that the gratuity they voluntarily choose to provide is going to the employee not the employer. As with hotel coat checks, discussed *supra*, a present day customer might not choose to pay a gratuity if he or she understands that it will be used to “lower menu prices” or make other improvements to the restaurant, rather than to directly reward an individual for providing pleasant or efficient service.

If the Department nonetheless moves forward with the rescission, a common-sense approach to educate consumers would be to require employers to notify their patrons if they retain any portion of employees’ tips or gratuities. Such an approach is not without precedent. For example, some states that permit employers to assess a service or banquet charge to customers also require that the customer receive notice if the employer retains some portion of that charge. In Hawaii, a hotel or restaurant employer must treat any service fee as tip income for the employee performing the service unless the employer “clearly discloses” to the purchaser that the fee is other than a tip for the employees.<sup>64</sup> In Minnesota, a gratuity is defined as “monetary contributions received directly or indirectly by an employee...and includes an obligatory charge assessed to customers, guests or patrons which might reasonably be construed by the guest, customer, or patron as being a payment for personal services rendered by an employee and *for which no clear and conspicuous notice is given by the employer to the customer, guest, or patron that the charge is not the property of the employee.*”<sup>65</sup> (emphasis added). New York Labor Law and implementing regulations impose very specific rules on employers regarding “service charges” for special events, including a requirement that employers must notify their customers when a service charge is not a tip to ensure that customers understand when charges will not go directly to an employee.<sup>66</sup> Washington state law provides that when employers retain service charges they must affirmatively disclose that fact to consumers on menus and receipts<sup>67</sup> and the Attorney General’s Office issued similar guidance

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<sup>63</sup> See, e.g., *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, 79 n.4, 854 N.Y.S.2d 83 (2008) (Authors of New York tip law “sought to end the ‘unfair and deceptive practice’ of an employer retaining money paid by a patron ‘under the impression that he is giving it to the employee, not to the employer.’”); *Bednark v. Catania Hospitality Group, Inc.*, 78 Mass. App. Ct. 806, 809, 942 N.E.2d 1007 (2011) (“The Legislature’s intent in enacting the Act can be plainly discerned from its language and history – to ensure that service employees receive the tips, gratuities, and service charges that *customers intend* them to receive.”) (quoting *DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486, 491, 910 N.E.2d 889 (2009)).

<sup>64</sup> Haw. Rev. Stat. § 481B-14.

<sup>65</sup> Minn. Stat. Ann. § 177.23, subd. 9.

<sup>66</sup> NY Labor Law §196-d prohibits employers from retaining (i) “any part of the gratuities received by an employee” or (ii) “any part of a gratuity or of any charge purported to be a gratuity for an employee.” Implementing regulations imposes specific requirements on employers that use mandatory surcharges for banquets and other special events. 12 N.Y.C.R.R. § 146-2.19. The regulation establishes a rebuttable presumption that event charges supplemental to food, beverage and other specified materials or costs represent event gratuities, and it requires express notification to consumer if an administrative charge is not, in fact, a gratuity. *Id.*

<sup>67</sup> See Wash. Rev. Code § 49.46.160.


requiring clear and conspicuous disclosure for other surcharges, so that customers are not misled.<sup>68</sup> Such a notice requirement would not be unduly burdensome and would protect customers and patrons' right to know if their tips are being used contrary to their expectations.

However, while such notices may be a necessary measure to educate consumers, they will likely decrease the amount of tips paid by customers, as the Department implicitly acknowledges.<sup>69</sup> Accordingly, the better solution – short of maintaining the 2011 regulations – to simultaneously protect both consumers and employees is to ensure that tipping practices are consistent with traditional expectations and prohibit employers from participating in tip pools.


## V. Conclusion


The Department's 2011 tip regulations provide for a clear and administrable rule that the tip credit is the only circumstance in which employers may benefit from employee tips. Rescission of this rule would contradict centuries-old employee and customer expectations about tipping, create a conflict with many more protective state wage laws, and lead to confusion in those states whose laws follow the FLSA. Most critically, it would harm low-wage tipped employees who can little afford to subsidize their employers. For all of these reasons, the undersigned states oppose the Department's proposed rescission of the 2011 tip regulations.

Respectfully submitted,

  
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XAVIER BECERRA  
California Attorney General

  
\_\_\_\_\_  
LISA MADIGAN  
Illinois Attorney General

  
\_\_\_\_\_  
JOSH SHAPIRO  
Pennsylvania Attorney General

  
\_\_\_\_\_  
GEORGE JEPSEN  
Connecticut Attorney General

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<sup>68</sup> Press Release, Office of the Washington Attorney General, Minimum Wage Surcharges Must be Clearly Disclosed (Jun. 23, 2015), <http://www.atg.wa.gov/news/news-releases/ag-minimum-wage-surcharges-must-be-clearly-disclosed>.

<sup>69</sup> See *NPRM*, *supra* note 1, at 57409 (“Assuming customers are aware of the employer’s policy, changes to tipping behavior, if they occur at all, may differ depending on whether the tips are redistributed into a tip pool that includes a broader group of employees, or otherwise utilized in part (or in full) by the employer”).



MATTHEW DENN  
Delaware Attorney General



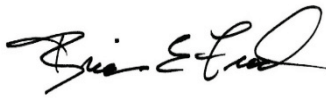
KARL A. RACINE  
District of Columbia Attorney General



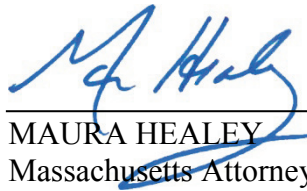
THOMAS J. MILLER  
Iowa Attorney General



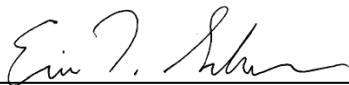
JANET T. MILLS  
Maine Attorney General



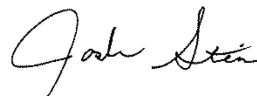
BRIAN E. FROSH  
Maryland Attorney General



MAURA HEALEY  
Massachusetts Attorney General



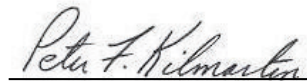
ERIC T. SCHNEIDERMAN  
New York Attorney General



JOSH STEIN  
North Carolina Attorney General



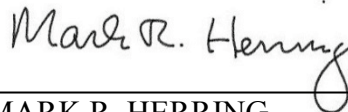
ELLEN F. ROSENBLUM  
Oregon Attorney General



PETER F. KILMARTIN  
Rhode Island Attorney General



TJ DONOVAN  
Vermont Attorney General



MARK R. HERRING  
Virginia Attorney General



BOB FERGUSON  
Washington State Attorney General