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Women would lose $4.6 billion in earned tips if the administration's 'tip stealing' rule is finalized

Overall, workers would lose $5.8 billion

Report • By Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer • January 17, 2018

A correction was made January 23 to put the state data in order in Table 2

The Department of Labor (DOL) has proposed a rule that would make it legal for employers to pocket their workers' tips, as long as they pay those workers at least the minimum wage. The proposed rule rescinds portions of longstanding DOL regulations that prohibit employers from taking tips.[1] We estimate that if the rule is finalized, every year workers will lose $5.8 billion in tips, as tips are shifted from workers to employers.[2] Of the $5.8 billion, nearly 80 percent—$4.6 billion—would be taken from women who are working in tipped jobs.[3]

DOL has masked the fact that this rule would be a windfall to restaurant owners and other employers—out of the pockets of tipped workers—by making it sound as if this rule is about tip pooling. Of course, once employers have full control of tips, one of the things they *could* do with those tips is distribute them to "back of the house" workers like dishwashers and cooks. But the proposed rule *does not require* employers to distribute the tips, so employers would be no more likely to share tips with back-of-the-house workers than they would be to make any other choice about what to do with a business windfall, including using the money to make capital improvements to their establishments, to increase executive pay, or to line their own pockets.

Many employers pocket tips even now, when it is illegal for them to do so (for example, research on workers in Chicago, Los Angeles, and New York found that 12 percent of tipped workers had tips stolen from them by their employer or supervisor).[4] The fact that illegal tip theft is so prevalent underscores that when employers can *legally* pocket tips, many will. And basic economic logic dictates that it is highly unlikely that back-of-the-house workers will get more pay. There is currently no limit to what these workers

can be paid, so employers are already paying their back-of-the-house workers what they need to pay to attract workers willing to work in those jobs. If employers do share some tips with them, it will likely be offset by a reduction in their base pay, leaving their take-home pay largely unaffected.

The economic effects of this rule are as follows: (1) tipped workers will lose $5.8 billion a year in tips, (2) the take-home pay of back-of-the-house workers will remain largely unchanged, and (3) employers will get a $5.8 billion a year windfall. The $5.8 billion is 16.1 percent of the estimated $36.4 billion in tips earned by tipped workers annually and amounts to more than $1,000 per year on average across all tipped workers.[5]

Table 1 breaks down the $5.8 billion by gender and by race/ethnicity, and **Table 2** breaks down the $5.8 billion by state.[6] Table 1 shows that women working in tipped jobs would lose $4.6 billion annually as a result of the rule, while men working in tipped jobs would lose $1.2 billion. In other words, nearly 80 percent of the tips that would be taken by employers as a result of this rule would come out of the pockets of women and their families. (The specific share, calculated from unrounded numbers, is 78.7 percent.) Because women are both more likely to be tipped workers and to earn lower wages, this rule would disproportionately harm them.

Table 1 also shows that white non-Hispanic tipped workers would lose $3.5 billion, black non-Hispanic tipped workers would lose $480.2 million, Hispanic workers of any race would lose $1.4 billion, Asian workers would lose $382.5 million, and tipped workers who are of another race would lose $102.4 million. The differences among these groups can be attributed to several broad factors, including differences among the groups in number of tipped workers, amount of tips earned, and share of tips earned at or above the minimum wage (the last factor matters since, under the proposed rule, employers must pay workers the full minimum wage before they can legally take tips).[7] There are likely many root sources of these underlying differences, including differences in job opportunities and pay, discrimination in tipping, and different concentrations of groups in states that allow employers to take large tip credits.

Tellingly, DOL did not provide an estimate of the amount of tips that will be shifted from workers to employers—even though it was legally required, as a part of the rulemaking process, to assess all quantifiable costs and benefits "to the fullest extent that these can be usefully estimated."[8] EPI easily produced an estimate using a methodology that is very much in the spirit of estimates the Department of Labor regularly produces; DOL obviously could have produced an estimate. But they couldn't *both* produce a good faith estimate (which would necessarily have shown a substantial shift of tips from workers to employers) *and* maintain the fiction that this rule is primarily about tip pooling, so they opted to ignore legally required steps in the rulemaking process.

This is a proposed rule and, as of the writing of this paper, is open for public comment. Until the comment period closes on February 5, anyone can submit a comment, and the Department of Labor is required to read all public comments before deciding what the final rule will look like.[9]

To submit a comment to the Department of Labor on this proposed rule, click here.

Table 1

Estimated tips transferred from workers to employers under proposed tip pooling rule, by gender and race/ethnicity (in millions)

		Range	
	Preferred estimate (in millions)	Low estimate (in millions)	High estimate (in millions)
Total	$5,842.2	$522.9	$13,228.4
By gender			
Women	$4,598.3	$335.8	$8,473.3
Men	$1,243.8	$187.2	$4,755.1
By race/ethnicity			
White	$3,514.8	$356.5	$9,004.1
Black	$480.2	$31.5	$778.0
Hispanic	$1,362.3	$83.6	$2,133.6
Asian	$382.5	$38.8	$1,002.8
Other race/ ethnicity	$102.4	$12.5	$309.9

Notes: The tip pooling rule is a Department of Labor rule that would make it legal for employers to pocket their workers' tips, as long as they pay those workers at least the minimum wage. The methodology for calculating the preferred, low, and high estimates of tips that would be taken from all tipped workers is described in Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017. To get the breakdowns by gender and race/ethnicity, we follow the same methodology, but we do the CPS calculations separately for each demographic group.

Source: EPI analysis of IRS W-2 data, Table 5.A; BLS Quarterly Census of Employment and Wages; Census 2016 Service Annual Survey, Table 2; Exhibit 4.1 in Michael Lynn, "Should U.S. Restaurants Abandon Tipping? A Review of the Issues and Evidence," *Psychosocial Issues in Human Resource Management* vol. 5, no. 1 (2017), 120–159; and Current Population Survey microdata

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Table 2

Estimated tips transferred from workers to employers under proposed tip pooling rule, by state (in millions)

		Range	
	Preferred estimate (in millions)	Low estimate (in millions)	High estimate (in millions)
U.S. total	$5,842.2	$522.9	$13,228.4
Alabama	$95.5	$9.3	$225.9
Alaska	$14.4	$1.6	$38.5
Arizona	$388.1	$28.8	$703.6
Arkansas	$41.1	$4.3	$106.0
California	$90.7	$0.0	$181.4
Colorado	$0.0	$0.0	$0.0
Connecticut	$96.2	$13.1	$320.1
Delaware	$1.7	$0.0	$3.4
District Of Columbia	$2.9	$1.0	$25.6
Florida	$1,050.9	$84.9	$2,070.3
Georgia	$500.3	$32.8	$801.0
Hawaii	$100.0	$9.4	$229.4
Idaho	$57.1	$3.2	$78.8
Illinois	$21.0	$0.0	$42.1
Indiana	$218.5	$19.6	$476.9
Iowa	$110.7	$8.3	$203.3
Kansas	$0.0	$0.0	$0.0
Kentucky	$4.6	$0.0	$9.1
Louisiana	$83.3	$7.5	$182.7
Maine	$31.7	$3.9	$95.5
Maryland	$127.3	$10.6	$257.5
Massachusetts	$187.9	$19.3	$470.8
Michigan	$281.1	$27.4	$668.0
Minnesota	$11.2	$0.0	$22.4
Mississippi	$94.5	$9.9	$241.9
Missouri	$355.6	$28.2	$688.7
Montana	$2.2	$0.0	$4.4
Nebraska	$62.9	$5.3	$130.3

Table 2 (cont.)

	Preferred estimate (in millions)	Range	
		Low estimate (in millions)	High estimate (in millions)
Nevada	$21.1	$0.0	$42.3
New Hampshire	$3.6	$0.0	$7.2
New Jersey	$119.7	$26.5	$646.7
New Mexico	$0.0	$0.0	$0.0
New York	$21.3	$0.0	$42.6
North Carolina	$12.6	$0.0	$25.1
North Dakota	$1.5	$0.0	$3.0
Ohio	$224.0	$25.7	$627.8
Oklahoma	$0.0	$0.0	$0.0
Oregon	$89.7	$12.4	$303.5
Pennsylvania	$24.1	$0.0	$48.2
Rhode Island	$8.1	$1.5	$37.0
South Carolina	$67.5	$6.0	$145.2
South Dakota	$26.7	$2.5	$61.3
Tennessee	$203.5	$21.3	$520.7
Texas	$676.3	$69.4	$1,693.6
Utah	$2.4	$0.0	$4.9
Vermont	$28.0	$2.3	$55.7
Virginia	$88.5	$10.4	$253.2
Washington	$18.0	$0.0	$36.0
West Virginia	$26.9	$1.6	$39.1
Wisconsin	$146.2	$14.6	$355.5
Wyoming	$1.1	$0.0	$2.2

Notes: The tip pooling rule is a Department of Labor rule that would make it legal for employers to pocket their workers' tips, as long as they pay those workers at least the minimum wage. The methodology for calculating the preferred, low, and high estimates of tips that would be taken from all tipped workers is described in Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017. Factored into the above analysis are the following three facts: (1) Fifteen states have more protective state laws so the impact of the rule will be greatly diminished in these states. These are California, Delaware, Illinois, Kentucky, Minnesota, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Utah, Washington, and Wyoming. (2) Four states in the Tenth Circuit without more protective state laws—Colorado, Kansas, New Mexico, and Oklahoma—will likely be unaffected by this rule because of a Tenth Circuit court case that invalidated the 2011 regulation that said employers cannot take tips (i.e., workers in these states have already lost these protections). (3) Four states in the Fourth Circuit without more protective state laws—Maryland, South Carolina, Virginia, and West Virginia—will likely see reduced impact of the rule, i.e., workers in these states have already likely lost some protections because there is uncertainty about the enforceability of federal tip protections due to a Fourth

Table 2 (cont.)

Circuit court case.

Source: EPI analysis of IRS W-2 data, Table 5.A; BLS Quarterly Census of Employment and Wages; Census 2016 Service Annual Survey, Table 2; Exhibit 4.1 in Michael Lynn, "Should U.S. Restaurants Abandon Tipping? A Review of the Issues and Evidence," *Psychosocial Issues in Human Resource Management* vol. 5, no. 1 (2017), 120–159; and Current Population Survey microdata

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Endnotes

1. Tip Regulations under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 232 (December 5, 2017), 57395–57413.

2. Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017.

3. Tipped workers in our sample include those workers in occupations that are predominantly tipped, such as restaurant servers, bartenders, gaming service workers, barbers, hairstylists, and other personal appearance workers.

4. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, 2009*, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009.

5. The methodology for finding that tipped workers earn $36.4 billion in tips annually, and for estimating that, under the proposed rule, $5.8 billion in tips would be shifted from workers to employers, can be found in Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017. To get the $1,000 per tipped worker, we note that IRS W-2 data, Table 5.A, shows that there were 5.1 million taxpayers with social security tips in 2013. We adjust the 2013 number to 2016 using the growth rate between 2013 and 2016 of all employees in the Quarterly Census of Employment and Wages, 6.2 percent, which yields an estimated number of tipped workers in 2016 of roughly 5.4 million. Dividing $5.8 billion by 5.4 million workers yields slightly more than $1,000 per tipped worker.

6. To get the breakdowns by state and race/ethnicity, we follow the same methodology described in our original report's methodology appendix, but we do the CPS calculations separately for each demographic group. See Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017.

7. The differences between different groups can be attributed to five main factors mathematically: (1) Different groups have different numbers of tipped workers. For example, a 2014 report from Sylvia Allegretto and David Cooper shows that two-thirds of tipped workers are women. Further, 61.5 percent are white non-Hispanic, 8.5 percent are black non-Hispanic, 17.7 percent are Hispanic, and 12.3 percent are Asian or another race. (2) Different groups of tipped workers earn different amounts of tips. For example, Allegretto and Cooper's report also shows that the median wage (including tips) of female tipped workers is $10.07, compared with $10.63 for men. Further, for white tipped workers the median wage is $10.25, for black tipped workers it is $10.12, for Hispanic tipped workers it is $9.98, and for tipped workers who are Asian or another race it is $10.63. (3) As we discuss in the methodology appendix in our December 2017 report, different groups have different shares of tips earned *above* their minimum wage. The estimates do not include any tips earned below the minimum wage, since under the proposed rule, employers must pay workers the full minimum wage before they can legally take tips. According to our analysis in the current study, among women working in tipped jobs, 68.8 percent of wages are earned above the minimum wage, whereas among men working in tipped jobs, the share is 76.4 percent. Among white tipped workers it is 70.0 percent, among black tipped workers it is 65.8 percent, among

Hispanic tipped workers it is 74.8 percent, among Asian tipped workers it is 81.2 percent, and among tipped workers who are another race, it is 68.2 percent. (4) Different groups have different shares of tips earned above each worker's "outside option" wage. A tipped worker's outside option wage is the wage he or she could get at a nontipped job. (We determine the outside option wage using regression analysis to predict the wage each tipped worker would likely earn in a nontipped job given their observable characteristics. See the methodology appendix in our previous report.) The estimates do not include any tips earned below a workers' outside option wage, since economic logic dictates that an employer will not reduce a worker's take-home pay lower than what the worker would earn in their outside option, since the employer would likely lose that worker if it did. (5) Different groups are differently concentrated in states that have state law or circuit court cases that affect how much of workers' tips employers will likely be able to pocket. For further details on factors (1)–(2), see Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage*, Economic Policy Institute, July 10, 2014. For further details on factors (3)–(5), see the methodology appendix in Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, *Employers Would Pocket $5.8 Billion of Workers' Tips under Trump Administration's Proposed 'Tip Stealing' Rule*, Economic Policy Institute, December 14, 2017.

8. Maeve P. Carey, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, Congressional Research Service, December 9, 2014.

9. Tip Regulations under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. (December 15, 2017), 59562.