

# **EPI comments on the Department of Labor's proposed rule regarding tip regulations**

**Public Comments** • By Heidi Shierholz and Margaret Poydock • December 10, 2019

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Amy DeBisschop  
Director, Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division (WHD)  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Tip Regulations Under the Fair Labor Standards Act (FLSA) (RIN 1235-AA21)

Dear Ms. DeBisschop,

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI writes in response to the Department of Labor’s proposed rulemaking regarding tip regulations under the FLSA,<sup>1</sup> which seeks to align the Department’s tip regulations with the recently established section 3(m)(2)(B) of the FLSA, as enacted in the Consolidated Appropriations Act of 2018 (CAA). EPI commends the Department’s efforts to implement section 3(m)(2)(B), however, we urge the Department to clarify that employers cannot reduce the wages of “back of the house” staff and supplement their wages with the earnings of tipped employees.

Further, EPI strongly opposes the Department’s proposal to abandon the long-standing “80/20” rule, which provides employers guidance on the use of the tip credit for non-tipped work. EPI also opposes the Department’s proposed change that would make it harder for the Department to collect civil penalties for a wide range of labor violations. We strongly urge Department to withdraw both of these proposals from the rulemaking, and codify a standard at least as protective as the 80/20 rule.

## **The proposed rule should clarify that employers cannot reduce back-of-the-house employees’ wages and have the difference filled in with tips**

In March 2018, through the Consolidated Appropriations Act of 2018 Congress added section 3(m)(2)(B) to the FLSA, which prohibits employers from keeping tips received by employees. Under the FLSA, employers are authorized to establish mandatory tip pools between tipped employees in the “front of the house,” such as bartenders and servers, and non-tipped employees in the “back of the house,” such as dishwashers and line cooks. However, these tip pools are only permissible if two conditions are met: 1) the employer pays *all* employees at least the full minimum wage, before tips (rather than

taking a “tip credit” that counts a portion of employee tips toward its minimum wage obligation), and 2) the employer, managers, and supervisors do not keep any portion of employees’ tips.

In the proposed rulemaking, the Department permits employers to reduce the wages of back of the house staff and supplement their wages with the earnings of tipped employees as long as the employees’ wages are not reduced below the applicable minimum wage.<sup>2</sup> This permissibility is contrary to the intent of Congress when establishing section 3(m)(2)(B) of the FLSA to ensure that employees—not employers—are the sole beneficiary of tips. In order to limit the amount of tips that employers can capture as a result of establishing mandatory tip pools, we urge the Department to clarify that no such activity is permitted.<sup>3</sup>

## The proposed removal of the 80/20 guidance would cost workers millions each year

The recently established section 3(m)(2)(B) of the FLSA makes it clear that employers are not allowed to pocket workers’ tips. But employers can legally “capture” some of workers’ tips by paying tipped workers less in base wages than their other workers. For example, the federal minimum wage is \$7.25 an hour, but employers can pay tipped workers a “tipped minimum wage” of \$2.13 an hour as long as employees’ base wages and the tips they receive over the course of a week are the equivalent of at least \$7.25 per hour. All but eight states have a subminimum wage for tipped workers.<sup>4</sup>

In a system like this, the more non-tipped work that is done by tipped workers earning the subminimum wage, the more employers benefit. This is best illustrated with a simple example. Say a restaurant has two workers—one doing tipped work and one doing non-tipped work—who both work 40 hours a week. The tipped worker is paid \$2.50 an hour in base wages, but gets \$10 an hour in tips on average, for a total of \$12.50 an hour in total earnings. The non-tipped worker is paid \$7.50 an hour. In this scenario, the restaurant pays their workers a total of  $(\$2.50 + \$7.50) * 40 = \$400$  per week, and the workers take home a total of  $(\$12.50 + \$7.50) * 40 = \$800$  (with \$400 of that coming from tips).

But suppose the restaurant makes *both* those workers tipped workers, with each doing half tipped work and half non-tipped work. Then the restaurant pays them both \$2.50 an hour, and they will each get \$5 an hour in tips on average (since now they each spend half their time on non-tipped work) for a total of \$7.50 an hour in total earnings. In this scenario, the restaurant pays out a total of  $(\$2.50 + \$2.50) * 40 = \$200$  per week, and the workers take home a total of  $(\$7.50 + \$7.50) * 40 = \$600$ . The restaurant’s gain of \$200 is the workers’ loss of \$200, *simply by having tipped workers spend time doing non-tipped work*.

To limit the amount of tips employers can capture in this way, the Department of Labor has historically restricted the amount of time tipped workers can spend doing non-tipped work if the employer is paying the subminimum wage. For the past 30 years, the Department has issued guidance that non-tipped work may not exceed more than 20 percent of a

tipped workers time.<sup>5</sup> Known as the 80/20 rule, this guidance was implemented to help ensure employers were not paying tipped workers the subminimum wage for work that non-tipped workers would typically perform. Under the 80/20 rule, employers can only claim a “tip credit”—i.e., pay tipped workers a base wage less than the regular minimum wage—if tipped staff spend no more than 20 percent of their time performing non-tipped functions; at least 80percent of their time must be spent in tip-receiving activities. The protection provided by this rule is critical for tipped workers. For example, in a restaurant, the 80/20 rule prevents employers from expecting servers to spend hours washing dishes at the end of the night, or prepping ingredients for hours before the restaurant opens. Occasionally, a server might play the role of the host, seating guests when a line has formed, or filling salt and pepper shakers when dining service has ended—but such activities cannot take up more than 20percent of their time without employers paying them the full minimum wage, regardless of tips.

If the Department abandons the 80/20 rule as proposed, workers would be left with a toothless protection in which employers would be allowed to take a tip credit “for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.”<sup>6</sup>

With no meaningful limit on the amount of time tipped workers may perform non-tipped work, employers could capture more of workers’ tips. It is not hard to imagine how employers of tipped workers might exploit this change in the regulation. Consider a restaurant that employs a cleaning service to clean the restaurant each night: vacuuming carpets, dusting, etc. Why continue to pay for such a service, for which the cleaning staff would need to be paid at least the federal minimum wage of \$7.25 per hour, when you could simply require servers to spend an extra hour or two performing such work and only pay them the tipped minimum wage of \$2.13 per hour? Or, a restaurant that currently employs three dishwashers at a time might decide they can manage the dish load with only one dedicated dishwasher if they hire a couple extra servers and require all servers to wash dishes periodically over the course of their shifts. Employers could pay servers less than the minimum wage for hours of dishwashing so long as they perform some tipped work right before or after washing dishes.

The Department recognizes that workers will lose out under this change, stating that “tipped workers might 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.”<sup>7</sup> Tellingly, DOL did not provide an estimate of the amount that workers will lose—even though it is 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.”<sup>8</sup> The Department claims it “lacks data to quantify this potential reduction in tips.”<sup>9</sup> However, EPI easily produced a reasonable estimate using a methodology that is very much in the spirit of estimates the Department of Labor regularly produces. In particular, we estimate that as employers ask tipped workers to do more non-tipped work as a result of this rule, employment in non-tipped food service occupations will decline by 5.3% and employment in tipped occupations will increase by 12.2%—shifting 243,000 jobs from being non-tipped to being tipped. Further, we conservatively estimate the proposed

rule would cost workers more than \$700 million annually if finalized.<sup>10</sup> For this reason, we urge the Department to withdraw their proposal to abandon the long-standing 80/20 rule and to instead codify a standard at least as protective as the 80/20 rule.

## The proposed rule makes it harder to hold employers account for workplace violations

As established under the CAA, any person who willfully violates section 3(m)(2)(B) of the FLSA shall be subjected to a civil penalty of up to \$1,100 for each such violation. In the NPRM, however, the Department proposes to weaken the definition of “willful,” creating a vague, weaker standard than the longstanding, bright-line rules in existing regulations. And, in addition to applying the weakened definition of willfulness to protections under section 3(m)(2)(B), the Department shamefully seeks to apply the weaker definition to minimum wage, overtime, and child labor protections that are not at issue in this rulemaking. The new definition of willful should be withdrawn.

## Conclusion

The Economic Policy Institute supports the Department of Labor in seeking to align its tip regulations with section 3(m)(2)(B) of the FLSA. However, we implore the Department to clarify that employers cannot reduce the wages of back of the house staff and supplement their wages with the earnings of tipped employees. We also urge the Department to withdraw its proposed changes to the 80/20 rule and its redefining of the willfulness standard in regards to civil penalties for labor violations.

Sincerely,

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Economic Policy Institute

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1. 84 Federal Register at 53956.
  2. See 84 Fed. Reg. at 53957 and 53968 (“because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-house workers (as long as they do not reduce these employees’ wages below the applicable minimum wage)”).
  3. For an example of how tip pooling can allow employers to capture a portion of workers’ tips even when employers are not taking a tip credit, see Heidi Shierholz, “[A perfect pairing: New tip provisions and a strong minimum wage](#),” *Working Economics* (Economic

Policy Institute blog), March 27, 2018.

4. Economic Policy Institute, “[Minimum Wage Tracker](#)” (website), last modified October 9, 2019.

5. This guidance was in effect from December 9, 1988 until January 16, 2009 and again from March 2, 2009 until November 8, 2018. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-16 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2009-23 (Jan. 16, 2009); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, FLSA 2018-27 (Nov. 8, 2018).

6. 84 Federal Register at 53957.

7. 84 Federal Register at 53972.

8. Congressional Budget Office, “[Cost-Benefit and Other Analysis Requirements in the Rulemaking Process](#),” Publication no. R41974, December 2014.

9. 84 Federal Register at 53972.

10. Heidi Shierholz and David Cooper, “[Workers will lose more than \\$700 million dollars annually under proposed DOL rule](#),” *Working Economics* (Economic Policy Institute blog), November 30, 2019.