EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS

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BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

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C O N T E N T S

EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS

Wednesday, September 18, 2024

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND THE WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Washington, DC, Hon. Kevin Kiley (Chairman of the Subcommittee) presiding.

Present: Representatives Kiley, Grothman, Miller, Burlison, Foxx, Adams, Takano, Hayes, and Scott.

Staff present: Annmarie Graham Barnes, Deputy Communications Director; Mindy Barry, General Counsel; Sheila Havenner, Alex Knorr, Legislative Assistant; Trey Kovacs, Professional Staff Member; Andrew Kuzy, Press Assistant; Georgie Littlefair, Clerk; John Martin, Deputy Director of Workplace Policy/Counsel; Hannah Matesic, Deputy Staff Director; Carson Middleton, Staff Director; Audra McGeorge, Communications Director; Kevin O'Keefe, Professional Staff Member; Jacob Pletcher, Staff Assistant; Seth Waugh, Director of Workforce Policy; Maura Williams, Director of Operations; Gavin Anderson, Minority Intern; Ilana Brunner, Minority General Counsel; Stephanie Lalle, Minority Communications Director; Jessica Schieder, Minority Economic Policy Advisor; Dhrtvan Sherman, Minority Research Assistant; Bob Shull, Minority Senior Labor Policy Counsel; Brashanda McCoy, Minority CBCF Intern; Marie McGrew, Minority Press Assistant; Eleazar Padilla, Minority Staff Assistant; Mason Pesek, Minority Labor Policy Counsel; Veronique Pluviose, Minority Staff Director; Banyon Vassar, Minority Director of IT.

Chairman KILEY. The Subcommittee on Workforce Protections will come to order. I note that a quorum is present. Without objection, the Chair is authorized to call a recess at any time.

Today the Committee convenes to examine an issue that affects millions of hard-working Americans, especially those in our restaurants, bars and hotels: tipped workers. These workers are the face of the American economy, linking our citizens with the goods and services on which their lives depend.

Their livelihoods depend not only on the tips they earn, but also on the policies that govern their pay. Unfortunately, a misguided, Biden-Harris administration rule is putting their jobs and wages at risk. Under the Fair Labor Standards Act, there is a system in place that has been around for decades. It is called the tip credit.

It allows employers to count a portion of an employee's tips toward the minimum wage. This system has worked for years. It allowed tipped employees to be paid a base wage that is less than the Federal standard, as long as their combined earning with tips exceeds the Federal minimum wage. It is common sense, and it helps the workers because most tipped workers earn far more than the Federal minimum wage.

A recent study by the National Restaurant Association found that the median tipped worker earns $27.00 an hour, and that is not an anomaly, it is the norm. The current system gives tipped workers the opportunity to thrive, and it does not just help them, it helps the restaurants and small businesses that employ them.

Unfortunately, across the country we are seeing anti-worker policies that phaseout the tip credit altogether. In Seattle, for instance, raising the base wage for tipped employees led to job losses. One Seattle-based restaurant server said we need to have some balance here because right now we are losing jobs, we are losing hours, we are losing tipped income, and it is not good.

I am grateful to have that worker here today to testify. There are over 4 million Americans working in tipped occupations, and they are telling us very clearly; do not take away the tip credit. In a recent survey 90 percent of tipped employees said they prefer the current system, and 87 percent are afraid that if their employers are forced to pay a higher base wage without counting tips, their earnings will go down.

These workers are telling us the economic reality of their workplaces and we should listen to them. Sadly, the Biden-Harris administration has not listened. The Department of Labor's 2021 Tip Rule restricts the tip credit drastically. What is more, if an employee spends just 30 minutes on duties that do not produce tips, the employer can no longer claim the tip credit at all. It is essentially a requirement on small businesses to track their employees' every movement, minute by minute.

It is burdensome, invasive, and altogether out of touch with the realities of working life. Fortunately, just last month we saw a major victory for common sense. The U.S. Court of Appeals for the Fifth Circuit struck down the 2021 Tip Rule, calling it contrary to the Fair Labor Standards Act.

This ruling was a win for both workers and the small businesses, but the fight is far from over. This Committee is dedicated to supporting workers, small businesses, and the customers who rely on them. The tip credit benefits all three. It provides flexibility for businesses, ensures tipped workers earn more, and helps maintain a thriving service industry.

With that, I look forward to the testimony of our esteemed witnesses, and yield to the Ranking Member for an opening statement.

[The Statement of Chairman Kiley follows:]

STATEMENT OF HON. KEVIN KILEY, CHAIRMAN, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Today, the Committee convenes to examine an issue that affects millions of hard-working Americans, especially those in our restaurants, bars, and hotels -- tipped workers. These workers are the face of the American economy, linking our citizens with the goods and services on which their lives depend. Their livelihoods depend

not only on the tips they earn but also on the policies that govern their pay. Unfortunately, a misguided Biden-Harris rule is putting their jobs and wages at risk.

Under the *Fair Labor Standards Act*, there is a system in place that has been around for decades called the tip credit. It allows employers to count a portion of an employee's tips toward the minimum wage. This system has worked for years. It allows tipped employees to be paid a base wage that is less than the federal standard, as long as their combined earnings, with tips, exceed the federal minimum wage.

It is common sense. It helps the workers, because most tipped workers earn far more than the federal minimum wage. A recent study by the National Restaurant Association found that the median tipped worker earns $27 an hour. This is not an anomaly; it is the norm. The current system gives tipped workers the opportunity to thrive. It does not just help them -- it helps the restaurants and small businesses that employ them.

Unfortunately, across the country we are seeing anti-worker policies that phase out the tip credit altogether. In Seattle, for instance, raising the base wage for tipped employees led to job losses. One Seattle-based server said, "We need to have some balance here, because right now, we're losing jobs, we're losing hours, we're losing tipped income, and it's not good." I am grateful to have that worker here to testify this morning.

There are over four million Americans working in tipped occupations, and they are telling us very clearly: do not take away the tip credit. In a recent survey, 90 percent of tipped employees said they prefer the current system. 87 percent are afraid that if their employers are forced to pay a higher base wage without counting tips, their earnings will go down. These workers are telling us the economic reality of their workplaces, and we should listen to them.

Sadly, the Biden-Harris administration has not listened. The Department of Labor's 2021 tip rule restricts the tip credit drastically. What is more, if an employee spends just 30 minutes on duties that do not produce tips, the employer can no longer claim the tip credit at all. It is essentially a requirement on small businesses to track their employees' every movement minute by minute. It is burdensome, invasive, and altogether out of touch with the realities of working life.

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This Committee is dedicated to supporting workers, small businesses, and the customers who rely on them. The tip credit system benefits all three. It provides flexibility for businesses, ensures tipped workers earn more, and helps maintain a thriving service industry.

Ms. ADAMS. Thank you, Mr. Chairman, and I also want to thank the witnesses for joining us today. In one of the richest countries in the world no one working full-time should be living in poverty. Sadly, that is the reality for millions of low-wage workers in this country.

Currently, under the Fair Labor Standards Act, an employer may pay a tipped employee a sub-minimum wage of no less than $2.13 per hour and use the employee's tips to meet the employer's obligation to pay the Federal minimum wage of $7.25 per hour. However, the set minimum wage results in lower pay, more uncertainty and higher poverty rates for tipped workers than for non-tipped workers.

Through error, or outright wage theft, employers too often fail to ensure that their workers are making the full minimum wage. According to a 2014 report by the White House National Economic Council, and the Department of Labor, more than 1 in 10 surveyed workers in predominantly tipped occupations report that they received hourly wages, including tips, below the Federal minimum wage.

While my republican colleagues may point to a handful of high earning tipped workers as evidence of the system's success, we

must confront the reality of most tipped employees. Tipped workers are unfortunately paid less per hour than non-tipped workers, and they have less access to benefits such as paid sick leave, healthcare, short-term disability, life insurance, and paid vacation.

Now, these workers face systemic challenges, and often suffer from inadequate pay, and rampant abuse. The conditions for tipped workers under the Trump administration were even worse. In addition to the fact that roughly half of all jobs in the leisure and hospitality sectors were lost between February and April 2020.

The Trump Department of Labor pushed to allow low road employers to steal tipped workers hard earned pay. For example, the Trump-era Tip Rule would have allowed employers to take the tips that tipped workers earn, and share them with untipped workers, and managers, as long as the employers pay at least $7.25 per hour, and do not take tip credit—a tip credit. In practice, the rule would allow employers to steal tipped workers' wages to line their own pockets, or subsidize the wages of their non-tipped staff.

According to a 2017 report from the Economic Policy Institute, this rule would have resulted in an estimated 5.8 billion dollars in stolen wages from tipped workers annually. As we look ahead it is clear that republicans are laying the groundwork for Project 2025, which threatens to further erode the protections that workers rely on.

In stark contrast, congressional democrats are committed to advancing legislation that will lift millions of hard-working Americans out of poverty and hold unscrupulous employers accountable. The Raise the Wage Act would gradually increase the Federal minimum wage to $17.00 per hour and phaseout all sub-minimum wages.

The Let's Protect Worker's Act would hold employers accountable by closing loopholes, and enforcing penalties for those who neglect worker's safety and fair compensation. Our economy, our communities and our country are stronger when we reward and support hard working families.

Congressional democrats are committed to raising workers' standards of living through policies like expanding access to affordable childcare, overtime pay, and paid time off to take care of loved ones, and ensuring workers can stand together, and negotiate for better wages and benefits. As we proceed with today's hearing, let us remember the real faces and stories behind these statistics.

Let us work together to build a system that supports and protects all workers. Thank you, Mr. Chairman. I yield back.

[The Statement of Ranking Member Adams follows:]

STATEMENT OF HON. ALMA ADAMS, RANKING MEMBER, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Thank you, Mr. Chairman. I also want to thank our witnesses for joining us today.

In one of the richest countries in the world, no one working full-time should be living in poverty. Sadly, that is the reality for millions of low-wage workers in this country.

Currently, under the *Fair Labor Standards Act*, an employer may pay a tipped employee a subminimum wage of no less than $2.13 per hour and use the employee's tips to meet the employer's obligation to pay the federal minimum wage of $7.25 per hour.

However, the subminimum wage results in lower pay, more uncertainty, and higher poverty rates for tipped workers than for non-tipped workers. Through error or outright wage theft, employers too often fail to ensure their workers are making the full minimum wage. According to a 2014 report by the White House National Economic Council and the Department of Labor, more than 1 in 10 surveyed workers in predominantly tipped occupations report they received hourly wages, including tips, below the full federal minimum wage.

While my Republican colleagues may point to a handful of high-earning tipped workers as evidence of the system's success, we must confront the reality of most tipped employees. Tipped workers are, unfortunately paid less per hour than non-tipped workers, and they have less access to benefits such as paid sick leave, health care, short-term disability, life insurance, and paid vacation. These workers face systemic challenges and often suffer from inadequate pay and rampant abuse.

The conditions for tipped workers under the Trump Administration were even worse. In addition to the fact that roughly half of all jobs in the leisure and hospitality sectors were lost between February and April of 2020, the Trump Department of Labor pushed to allow low-road employers to steal tipped workers' hard-earned pay.

For example, the Trump-era tip rule would have allowed employers to take the tips that tipped workers earn and share them with untipped workers and managers as long as the employers pay at least $7.25 per hour and do not take a tip credit. In practice, the rule would allow employers to steal tipped workers' wages to line their own pockets or subsidize the wages of their non-tipped staff. According to a 2017 report from the Economic Policy Institute, this rule would have resulted in an estimated $5.8 billion in stolen wages from tipped workers annually.

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As we proceed with today's hearing, let us remember the real faces and stories behind these statistics. Let us work together to build a system that supports and protects all workers.

Thank you Mr. Chairman, I yield back.

Mrs. MILLER [presiding]. Pursuant to Committee Rule 8–C, all Committee members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., after 14 days from the date of this hearing, which is October 2, 2024.

Without objection, the hearing record will remain open for 14 days after the date of this hearing to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

I note for the Subcommittee that some of my colleagues, who are not permanent members of this Subcommittee, may be waving on for the purpose of today's hearing. I will now turn to the introduction of our distinguished witnesses.

Our first witness today is Mr. Tom Boucher, who is the Owner of Great New Hampshire Restaurants, Incorporated, which is located in Bedford, New Hampshire, and who is testifying on behalf of the National Restaurant Association.

Our second witness is Mr. Paul DeCamp, who is a Member of Epstein, Becker and Green, P.C., located in Washington, DC, and is a practicing wage and hour attorney.

Our third witness is Ms. Saru Jayaraman, who is President of One Fair Wage in New York, New York.

Our final witness is Ms. Simone Barron, who is Co-Founder of Full-Service Workers Alliance in Seattle, Washington. We thank the witnesses for being here today, and we look forward to your testimony. Pursuant to Committee Rules, I would like to ask each of you to limit your oral presentation to a 5-minute summary of your written statement.

I would also like to remind witnesses to be aware of their responsibility to provide accurate information to the Subcommittee. I will first recognize Mr. Boucher.

STATEMENT OF MR. TOM BOUCHER, OWNER, GREAT NEW HAMPSHIRE RESTAURANTS, INC., ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION, BEDFORD, NEW HAMPSHIRE

Mr. BOUCHER. Thank you, Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee. Thank you for the opportunity to testify today. My name is Tom Boucher, and I am the CEO and owner of Great New Hampshire Restaurant. What began as one small restaurant in 1984, has grown into nine locations employing 800 people, and serving over 2 million guests annually.

I am proud to say we are celebrating our 40th anniversary this year. In 1987 I started as a server at T-Bones, learning every aspect of the business from the ground up. This is not just my story, it is the story of thousands in our industry. The restaurant industry is unique because it provides upward mobility, offering opportunities for anyone regardless of background to start in entry level positions, and build lasting careers through hard work and dedication.

Over 60 percent of Americans have worked in a restaurant. Eight out of ten restaurant owners, including myself started in those same roles. The restaurant industry does not just provide jobs, it provides a path to success offering opportunities for personal growth, financial independence, and entrepreneurship.

That said, running a restaurant is not easy. Margins are razor thin, and well-meaning legislation or regulation, if it does not account for the realities of our industry, and have serious unintended consequences, and today I want to focus on two key issues affecting the restaurants and their employees, tip credit and the Department of Labor's 80/20/30 Rule.

The tip credit is vital to restaurants like mine. It allows employees to earn significantly more than the Federal minimum wage, while helping restaurants manage labor costs. At my restaurant, service consistently earned 20 and 30 dollars an hour, with some earning even more. No tip server ever makes less than minimum wage, and they are protected by the Federal law to ensure that.

Our employees understand how important the tip credit is to their livelihoods. In fact, some of my employees launched a campaign called We Like Our Tips.com to voice their support for keep-

ing the tip credit intact. They know that eliminating the tip credit would limit their earning potential.

We have already seen what happens when tip credit is removed. In New Hampshire, two restaurants switched to a flat hourly wage model, and their servers left for other restaurants where they could earn more through tips. Both businesses eventually closed. The very work that these policies are meant to help end up losing out.

Here in Washington, DC, nearly 1,000 restaurant jobs have been lost after voting members passed Initiative 82 to phaseout the tip credit. A survey found that 86 percent of local restaurant operators believe rising tip minimum wage harms their operations leading to increased prices, reduced staff and closures.

These are real world outcomes of policies that do not consider the unique needs of the restaurant industry. Without the tip credit, labor costs for restaurant operators would skyrocket. We would be forced to substantially raise prices, cut hours, or in the worst case shut down.

The ripple effect would hurt local farmers, suppliers, and other businesses. When restaurants close, the entire local economy suffers. In addition to preserving the tip credit, I would like to address the Department of Labor's 80/20/30 rule. This rule restricted the amount of time tipped employees could spend on non-tipped tasks, creating unrealistic and unnecessary burdens.

In the fast-paced world of restaurants, employees often switch tasks, as we call it "on the fly." A server might reset tables, restock items, or roll silverware, all part of ensuring the best possible customer experience. Tracking and limiting these tasks was just not practical.

It was impossible. Thankfully, the Fifth Circuit of Appeals struck the rule down, recognizing that it did not reflect the realities of the industry. We need to ensure that this kind of burden does not return. That is why we support H.R. 1621, the Tipped Employee Protection Act, to prevent the reintroduction of a similar rule.

Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee, thank you again for the opportunity to speak with you today. In conclusion, I want to emphasize that the decisions made here have real-world consequences.

The restaurant industry is the cornerstone of local economies, providing jobs, fostering community engagement, and offering pathways to economic mobility and personal success. The success of restaurants like mine, depends on policies that allow us to operate substantially, and contribute to the local and national economy.

Eliminating the tip credit or reinstating rigid rules like the 80/20/30 Rule would hurt employees, small business owners, and the communities that rely on us. I urge you to carefully consider the broader impact of these policies and protect the flexibility and structure that allows the restaurant industry to thrive. Thank you for your time.

[The Statement of Mr. Bocher follows:]

Written Testimony of Tom Boucher
CEO and Owner, Great New Hampshire Restaurants, Inc.
Before the House Committee on Education and the Workforce
Subcommittee on Workforce Protections
"Examining the Biden-Harris Attacks on Tipped Workers"
September 18, 2024

Chairman Kiley, Ranking Member Adams, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify before you today. It is an honor to represent the restaurant industry on behalf of the National Restaurant Association. The policies we are here to discuss—specifically the potential elimination of the tip credit and the Department of Labor's 80/20/30 rule—profoundly impact the livelihoods of millions of restaurant operators and workers, and the sustainability of restaurants across the nation.

My name is Tom Boucher, and I am the CEO and owner of Great New Hampshire Restaurants, Inc. This year marks the 40th anniversary of our company. What began in 1984 as a single restaurant has since grown into nine thriving locations. Our success is the result of the dedication of our employees, many of whom have been with us for years. Our mission goes beyond just serving great food—it's about creating lasting opportunities and building careers in an industry defined by hard work, a sense of community, and meaningful engagement.

For me, the restaurant business is more than just a career—it's personal. In 1987, I started as a server at T-Bones shortly after graduating from college with plans for graduate school. However, the restaurant industry's vibrant energy and strong sense of community captivated me. Over the years, I worked my way up from server to dining room manager, then head kitchen manager, and eventually general manager. By 1995, I had become a partner in the company, and today, I am honored to lead a thriving group of restaurants, serving over 2 million guests annually and employing 800 dedicated team members.

Our success is driven by core values that guide every aspect of our business: Executing Greatness, Care & Understanding, Made-from-Scratch, Respect, Courage, Trust & Entrust, and Teamwork. These values define how we operate, helping to grow our employees' careers and deliver exceptional guest experiences. They also underpin our commitment to the communities we serve. In 2014, we launched FEEDNH.org, a nonprofit that has donated over $1.1 million to support families, older adults, and educational initiatives across New Hampshire.

We do more than serve great food—we create careers. The restaurant industry has always been a springboard for professional growth. Nine out of ten restaurant managers and eight out of ten restaurant owners, like myself, began their careers in entry-level positions. The industry has been America's training ground, with 63% of adults having worked in a restaurant at some point in their lives,[1] learning soft skills like leadership, communication, and time management, that hiring managers in the industry, and outside of it, look for in new hires.

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[1] "National Statistics", National Restaurant Association, https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/

Most restaurants in this country are small businesses, operating on tight margins, built on hard work, and reliant on their teams' dedication. This is why policymakers need to understand the specific challenges our industry faces. Well-meaning legislation and regulations can unintentionally hinder job creation and business growth.

Today, I am here to discuss two such policies: the tip credit and the 80/20/30 rule, both of which directly impact the viability of restaurants like mine and the livelihoods of the employees we support.

How the Tip Credit Sustains the Restaurant Industry and Workers

The tip credit is essential to sustaining the restaurant industry's ecosystem. It allows employees to earn significant wages through tips, often far exceeding the federal minimum wage, while providing restaurant owners with the flexibility to manage labor costs. Under the Fair Labor Standards Act (FLSA), the tip credit allows employers to apply a portion of an employee's tips toward meeting the federal minimum wage requirement. This ensures that tipped employees earn at least the minimum wage while allowing restaurant owners to allocate resources to reinvest in their businesses.

Often people call this direct wage a subminimum wage, but it is not. Every tipped worker in a restaurant is making at least the minimum wage – and have the protection of federal law to ensure that.

At my restaurants, servers and bartenders consistently earn more than the federal minimum wage. Across the industry, the median wage for full-service restaurant employees is around $27 per hour, with the top quartile earning over $40 per hour. In fine dining establishments, wages can be even higher, reaching as much as $48 per hour.[2] This income far exceeds what employees would make under a flat minimum wage.

Surveys consistently show that tipped employees overwhelmingly support the tipping model and are opposed to eliminating the tip credit. A CorCom Inc. survey of nearly 4,000 tipped employees found that 90% of respondents preferred the current system, fearing that their earnings would decrease under a flat wage model.[3] Similarly, an Upserve survey revealed that 97% of employees supported the tipping system because it allowed them more control over their income.[4]

The tip credit is essential for restaurant owners to effectively manage labor costs. In an industry that operates on razor-thin margins—typically between only 3 to 5 cents of every dollar of revenue—the tip credit provides the flexibility needed to reinvest in operations, support staff, and offer additional benefits. At my restaurants, the tip credit has allowed us the opportunity to invest in operational improvements, enhance the work environment, and support community initiatives through FEEDNH.org.

At Great New Hampshire Restaurants Inc., some of our team members even launched a grassroots campaign called "welikeourtips.com" to speak out against eliminating the tip credit. They know that high-

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[2] "Tipped Employee Research", National Restaurant Association, https://restaurant.org/getmedia/0abb343e-08af-4502-bda4-201e96bbd93a/web-tipped-employee-research-january-2022.pdf

[3] "Survey: Tipped Employees Nationwide Prefer Keeping the Tip Credit", Minimumwage.com, https://minimumwage.com/2024/07/survey-tipped-employees-nationwide-prefer-keeping-the-tip-credit/

[4] "What Does Your Staff Really Think of 'No Tipping'", Upserve, https://web.archive.org/web/20211116150326/https://upserve.com/media/1612_Content_Infographic_No_Tipping_v1-1.pdf

quality guest service is a hallmark of the restaurant industry, and they want to protect their right to earn a decent wage based on the service they provide.

The Harm of Eliminating the Tip Credit

Eliminating the tip credit would fundamentally disrupt a compensation model that benefits both workers and business owners. Tipped employees, who currently earn well above the minimum wage, would experience a significant reduction in their earnings. For restaurant owners, losing the tip credit would create substantial financial strain, as they would be forced to pay all tipped employees a flat hourly wage, dramatically increasing labor costs. This change would place an especially heavy burden on small, independent establishments that already struggle to remain competitive.

Without the flexibility that the tip credit provides, restaurants like mine would face limited options: raise prices, reduce staff hours, or eliminate positions altogether. In the worst cases, restaurants may be forced to close their doors. I've seen this happen firsthand in New Hampshire, where two local restaurants eliminated the tipping model and moved to a flat wage. Within 18 months, both were forced to close as employees left for higher-paying jobs. These closures didn't just impact workers and their families — the loss of these cherished gathering places affected the local community and businesses that relied on them.

The customer experience would also fundamentally change if the tip credit were eliminated, creating chaos and confusion for customers. According to a National Restaurant Association survey, 75% of customers prefer the existing tipping system[5]. Likewise, a Horizons Media survey found that 81% of restaurant-goers would rather keep tipping than see service charges replace it[6].

The situation here in Washington D.C. provides a cautionary tale. After the city passed Initiative 82, which phases out the tip credit, employment at sit-down restaurants began to fall. According to state-level data from the Bureau of Labor Statistics, nearly 1,000 jobs have been lost since the city began eliminating the tip credit.[7] A survey of restaurant operators in the city revealed that 86% expected the new law to harm their businesses, with 72% predicting they would need to reduce staff or consolidate positions.[8]

The 80/20/30 Rule: A Burden on Restaurant Operations

In addition to the threat posed by the elimination of the tip credit, the restaurant industry recently faced a significant regulatory challenge in the Department of Labor's 80/20/30 rule. This rule placed strict limits on how much time tipped employees could spend on non-tipped tasks, requiring detailed tracking of employee activities. While the rule may seem straightforward in theory, it fails to reflect the fast-paced, fluid nature of restaurant work.

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[5] "How Tip Credit Helps Restaurants, Employees and Customers", National Restaurant Association, https://restaurant.org/getmedia/38f3e0dc-3f22-4a0f-a825-d2454768e7bc/tip-credit.pdf

[6] "Fingers on the Pulse Survey: Consumers Not Ready to Stop Tipping", Horizon Media, https://www.prnewswire.com/news-releases/horizon-media-study-finds-most-consumers-not-ready-to-stop-tipping-300213406.html

[7] "All Employees: Leisure and Hospitality: Full-Service Restaurants in District of Columbia", U.S. Bureau of Labor Statistics and Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/SMU11000007072251101SA

[8] "The Impact of Initiative 82", Employment Policies Institute, https://epionline.org/app/uploads/2023/04/Impact-of-Eliminating-Tip-Credit-for-DC_4-25.pdf

In practice, employees often switch between tasks multiple times throughout a shift. A server might set a table, roll silverware, or refill drinks in-between taking orders and serving food. The rigid thresholds imposed by the 80/20/30 rule—limiting non-tip-producing tasks to no more than 20% of a workweek or 30 continuous minutes—made it nearly impossible to manage operations efficiently. The administrative burden of tracking these activities in real time detracts from the core mission of serving customers and providing a positive dining experience.

Thankfully, the Fifth Circuit Court of Appeals recently struck down the 80/20/30 rule, calling it "arbitrary and capricious."[9] The court recognized that the rule failed to reflect the practical realities of the restaurant industry and imposed unnecessary burdens on operators. However, the threat of its reimplementation still looms, and the restaurant industry remains concerned about the operational challenges it would pose. Restaurant work is dynamic, and regulations that fail to acknowledge this reality create inefficiencies that harm both businesses and employees.

Supporting Practical Solutions – The Tipped Employee Protection Act

The restaurant industry thrives on flexibility and adaptability. We need policies that reflect the realities of our business and support the industry's dynamic nature, not ones that impose unnecessary obstacles. That is why we support H.R. 1612, the Tipped Employee Protection Act, which would prevent future administrations from imposing arbitrary limits on how tipped employees' duties are classified. This legislation would give restaurant owners the stability they need to efficiently run their operations, allowing them to continue focusing on what truly matters—providing excellent service, fostering innovation, and contributing to their communities.

Conclusion

Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee, thank you again for allowing me to testify today. The potential elimination of the tip credit and a reimplementation of the 80/20/30 rule pose significant threats to the restaurant industry, the workers it employs, and the communities it serves.

The tip credit has been a cornerstone of the restaurant industry's business model, enabling employees to earn substantial wages through tips while providing restaurant operators with the flexibility to invest in their operations. Removing it would lead to lower earnings for employees, higher costs for business owners, and a diminished customer experience. Similarly, the 80/20/30 rule creates unnecessary administrative burdens that disrupt the efficient operation of restaurants.

I urge the committee to carefully consider the long-term impacts of these policies. Restaurants are not just businesses—they are vital to our social and economic fabric, providing millions of jobs, fostering connections, and driving local growth. Now more than ever, we need policies that protect jobs, support flexibility, and allow restaurants to continue thriving in the communities they serve.

Thank you for your time and consideration.

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[9] "United States Court of Appeals for the Fifth Circuit. No. 23-50562", Restaurant Law Center v. Department of Labor, https://www.ca5.uscourts.gov/opinions/pub/23/23-50562-CV0.pdf

Mrs. MILLER. Thank you, Mr. Boucher. I will next recognize Mr. DeCamp.

STATEMENT OF MR. PAUL DECAMP, MEMBER, EPSTEIN, BECKER & GREEN, P.C., WASHINGTON, D.C.

Mr. DECAMP. Good morning, Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee. Thank you for inviting me to testify at this hearing to discuss tipped workers. The Fair Labor Standards Act sets forth the Federal requirements regarding minimum wage, overtime, and child labor.

For most workers, the income from their job consists primarily or entirely of wages paid by their employer. Some jobs involve a second, often substantial source of income in addition to employer-paid wages, tips from customers, clients, or patrons.

For nearly 60 years the law has recognized the concept known as the tip credit, which allows employers in certain circumstances to count a portion of the tips their employees receive as satisfying the minimum wage, while paying a lower direct wage.

In essence, the tipped credit acknowledges the reality from the standpoint of ensuring that workers have the protections of the minimum wage, someone who receives $7.25 per hour directly from her employer, is on an equal economic footing with someone who receives at least that same amount in direct wages and tips combined.

In the late 1970's the Department of Labor began parsing the various tasks restaurant servers, bartenders, and other employees perform, trying to identify situations where the Department believed that the employer should not be able to take the tip credit.

This activity culminated in 1988 with the Department's so called 80/20 Rule, an enforcement policy which in general terms, employers lose the ability to take the tip credit for tasks that do not directly and immediately produce tips, if the employee spends more than 20 percent of the work week on those activities.

Nearly every court that considered the issue deferred to the Department's view applying both Chevron Deference and the Supreme Court ruling in *Auer* v. *Robbins*. Beginning in 2009, the Department under four successive administrations, reversed the policy on 80/20 taken by the previous administration.

In 2021, the current administration issued a regulation codifying the 80/20 principle, along with the new concept that an employer may not take the tip credit if a worker spends more than 30 continuous minutes on tasks that do not generate tips. Two trade associations challenged the 2021 final rule in Court.

After oral argument before the United States Court of Appeals for the Fifth Circuit, before the court issued its decision, the Supreme Court handed down its decision in *Loper Bright Enterprises* v. *Raimondo*, which overruled Chevron.

Now, instead of deferring to an agency's preferred interpretation of the statute at the first sign of textual ambiguity, as had been the case for the past 40 years, courts considering the validity of a regulation must independently discern the meaning of the statute, using all the available tools of statutory construction.

Late last month, the Fifth Circuit issued its decision in Restaurant Law Center against Department of Labor, applying Loper

Bright, the court concluded that the 2021 regulation fails under the Administrative Procedure Act, both because it conflicts with the text of the FLSA, and because it is arbitrary and capricious.

The Fifth Circuit emphasized that the statute focuses on an employee's occupation, not how much time she spends pursuing tips. The court then vacated the regulation. H.R. 1612, the Tipped Employee Protect Act, would amend the FLSA in a way that is in line with the Fifth Circuit's recent ruling. The bill clarifies that the tip credit is available so long as the employee receives sufficient tips and hourly earnings to satisfy minimum wage.

This approach is entirely consistent with the historical purpose of the tip credit, ensuring that tipped employees are no worse off than non-tipped employees with respect to the protections of the Federal minimum wage. In recent years there have been various executive and legislative efforts to eliminate the tip credit, which would require employees to pay tipped employees the full minimum wage.

These efforts are, in my view, misguided for several reasons. First, tipped workers currently have total earnings, including tips, that average $15.51 per hour, which is more than double the minimum wage. Second, when given the choice of receiving tips, along with a wage subject to the tip credit, or else an all-in menu pricing concept with no tipping, 97 percent of tipped employees prefer the ability to receive tips.

Third, customers overwhelming prefer the option of tipping, to having that choice taken away from them. Fourth, roughly 3 in 4 American labor economists agree that reducing the tip credit leads to a loss of jobs in service industries.

Finally, economic data show that reducing or eliminating the tip credit does not lead to an increase in employees' weekly earnings. The current tipping system, including the tip credit does not hurt workers, it helps them. Eliminating the tip credit would benefit neither workers nor consumers.

The FLSA enables tipped employees to achieve substantial earnings, and we should continue to allow the law to do its work. This concludes my prepared remarks. I welcome any questions the members of the Subcommittee may have. Thank you.

[The Statement of Mr. DeCamp follows:]

STATEMENT
OF
PAUL DECAMP

ON: **"EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS"**

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES,**
COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

BY: **PAUL DECAMP**
MEMBER
EPSTEIN, BECKER & GREEN, P.C.

DATE: **SEPTEMBER 18, 2024**

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STATEMENT OF

PAUL DECAMP
EPSTEIN, BECKER & GREEN, P.C.

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING

"EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS"

SEPTEMBER 18, 2024

Good morning, Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee.

Thank you for inviting me to testify[1] at this hearing to address the treatment of tipped workers under the Fair Labor Standards Act (the "FLSA").[2] My testimony will focus on the concept of the tip credit; the Department of Labor's efforts to regulate the tip credit based on time and tasks; how those efforts have fared in court; and various recent proposals relating to the tip credit, including H.R. 1612, the "Tipped Employee Protection Act."

I am a member of the law firm Epstein, Becker & Green, P.C., where I co-chair the national Wage and Hour Practice and serve on the firm's Employment, Labor & Workforce Management Steering Committee.[3] I have devoted most of my professional efforts over the past three decades to wage and hour issues. In 2006 and 2007, I served as Administrator of the U.S. Department of Labor's Wage and Hour Division, the chief federal officer appointed by the President of the United States responsible for enforcing and interpreting the Nation's wage and hour laws, including the FLSA. While at the Department, I was personally involved in evaluating compliance issues relating to tipped workers.

My practice focuses on helping businesses pay their people correctly. I have advised clients across the country in a broad range of industries regarding virtually every significant area of wage and hour compliance, including classifying workers as exempt or non-exempt for purposes of overtime and minimum wage requirements, employee versus independent contractor status, identifying compensable work, calculating overtime, providing meal and rest breaks, and more. I also regularly represent businesses in state and federal administrative agency proceedings, as well as class action and

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[1] I am testifying today in my individual capacity. The opinions expressed in my written and oral testimony are my own and do not necessarily reflect the views of my firm, its attorneys, its clients, or anyone else.

[2] 29 U.S.C. §§ 201-219.

[3] Epstein, Becker & Green, P.C. is a national law firm with approximately 360 attorneys focusing in our core practice areas of employment, labor, and workforce management; health care and life sciences; and litigation. We have roughly 160 attorneys in offices across the country advising, counseling, and litigating on behalf of employers large and small, including with respect to the full range of wage and hour issues arising under federal, state, and local laws.

other complex litigation matters throughout the United States. Since returning to private practice in 2008, much of my client work has involved litigating claims relating to the Department's tip credit standards, as well as challenging those standards directly. Those efforts have, among other things, resulted in the recent unanimous decision by the United States Court of Appeals for the Fifth Circuit vacating the current administration's 2021 final rule regarding tipped employees, the tip credit, and supposedly non-tipped tasks.[4]

I have testified before Congress on several prior occasions—both during and after my time with the Department—concerning wage and hour policy and enforcement issues, including before this Subcommittee in 2007, 2014, 2021, 2022, and 2023. I speak and write on these topics frequently, and I am a member of the *Law360* Employment Editorial Advisory Board and the American Employment Law Council.

Today I testify in support of H.R. 1612 and against proposals to eliminate the tip credit for the following reasons:

- First, the tip credit—meaning the provision of the law that allows an employer to count a worker's tips as satisfying a portion of the employer's minimum wage obligation and to pay a direct wage below the minimum wage so long as the total earnings including tips equal or exceed minimum wage—acknowledges the common-sense notion that a dollar in a worker's pocket has the same economic value regardless of whether it originated from an employer as wages or from a customer as a tip. For purposes of protecting a worker's minimum wage rights, it is eminently fair and reasonable to treat tips received in connection with a worker's job as satisfying a portion of the minimum wage rights. Doing so places the tipped worker on the same footing as a non-tipped worker with respect to the minimum level of earnings allowed, no better and no worse.

- Second, tipped employees benefit from current law. Including tips, they have total earnings more than twice the federal minimum wage. When presented with the choice of tipped employment subject to the tip credit versus all-in menu pricing with no tipping, workers overwhelmingly prefer the tipping option.

- Third, customers of restaurants with table service prefer, and by a wide margin, having a tipping option over not having that option. And in states with lesser tip credits and higher cash wage requirements, customers tend to leave smaller tips. The current system, with a significant tip credit under federal law, maximizes both customer and worker satisfaction.

- In the end, eliminating the tip credit would reduce workers' total earnings, while at the same time creating a uniquely privileged class of workers with greater protections under the FLSA than any other category of workers in the country. Instead, leaving the tip credit in place, while allowing employers maximum flexibility to avail themselves

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[4] *See* Rest. Law Ctr. v. Dep't of Lab., — F.4th —, No. 23-50562, 2023 WL 3911308 (5th Cir. Aug. 23, 2024) (vacating Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021) (the "2021 Final Rule")).

of that credit so long as workers receive at least minimum wage in total earnings, will lead to the highest overall incomes for tipped workers, lower menu prices and greater satisfaction for customers, all while reducing administrative and compliance burdens for businesses and fully protecting tipped workers' minimum wage rights.

In light of the title of this hearing[5], I will begin with a review of the history of the FLSA's provisions relating to tipped employees, including the Department of Labor's efforts to regulate so-called "dual jobs."

I. HISTORY OF THE TIPPED WORKER PROVISIONS OF THE FLSA PERTINENT TO THE "DUAL JOBS" ISSUE

The FLSA generally requires payment of a minimum wage, currently $7.25 per hour.[6] In 1966, Congress extended the FLSA's coverage to apply the minimum wage requirement to employees in the hotel and restaurant industries for the first time, and simultaneously created what is "commonly referred to as a 'tip credit.'"[7] Congress designed the tip credit "to permit the continuance of existing practices with respect to tips."[8] The "tip credit" is "an exception that permits employers to pay less than the general minimum wage—$2.13 per hour—to a 'tipped employee' as long as the employee's tips make up the difference between the $2.13 minimum wage and the general minimum wage."[9] The tip credit thus does not operate to reduce an employee's pay below minimum wage, but instead recognizes as "wages" certain tips that employees earn for their work and credits those tips toward the minimum wage those employees must receive.

Under section 3(m) of the FLSA, an employer may take a tip credit with respect to a "tipped employee."[10] Congress defined "tipped employee" in section 3(t) as "any employee **engaged in an occupation** in which he **customarily and regularly receives more than $30 a month in tips**."[11] Thus, so long as the employee is engaged in an occupation in which he or she customarily and regularly receives tips in excess of $30 a month, the tip credit is available.

Contemporaneous dictionary definitions define "engaged" as "occupied; employed"[12] and "occupation" as "the principal business of one's life: a craft, trade, profession or other means of

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[5] The official title of the hearing is "Examining the Biden-Harris Attacks on Tipped Workers." I will limit my remarks today to the legal and policy implications of various recent proposals, as well as discussing several court rulings. My testimony is not meant to incorporate, and should not be construed as incorporating, any particular normative characterization of any legislative or regulatory proposal.

[6] 29 U.S.C. § 206(a)(1)(c).

[7] Montano v. Montrose Rest. Assocs., Inc., 800 F.3d 186, 188 (5th Cir. 2015).

[8] *See* S. Rep. No. 89-1487, at 12 (Aug. 23, 1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

[9] *Id.* (citing 29 U.S.C. § 203(m)).

[10] 29 U.S.C. § 203(m)(2)(A).

[11] *Id.* § 203(t) (emphases added).

[12] *See* 1 WEBSTER'S THIRD INTERNATIONAL DICTIONARY 751 (1961 ed.); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 473 (1967 ed.); *Engage*, BLACK'S LAW DICTIONARY 622 (4th ed. 1957).

earning a living[.]"[13] Reading the ordinary meanings together with the statute, it is clear Congress intended the phrase "engaged in an occupation" to mean participating in the field of work and job as a whole, and did not intend to authorize the Department to eliminate the tip credit based on the time spent on different tasks within the job.[14] Accordingly, so long as the employee is engaged in an occupation in which he or she customarily and regularly receives tips in excess of $30 a month, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute.

II. THE DEPARTMENT'S 1967 "DUAL JOBS" REGULATION

In 1967, the Department issued regulations addressing tipped employment.[15] Those regulations provided that the tip credit applies based on the "occupation" of the employee. One portion of the 1967 regulation, known as the "dual jobs" regulation, addressed situations in which an employee works in two separate occupations for the same employer, one that results in tips and one that does not.[16] That initial version of the regulation specified that the employer may take the tip credit for only the occupation in which the employee customarily and regularly receives tips.[17] The regulation used an example of an employee working in two separate and distinct occupations: "maintenance man" and "waiter":

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. ***Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his or her own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties*** **in an occupation that is a tipped occupation** ***need not by themselves be directed toward producing tips.***[18]

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[13] *See* 2 WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1560 (1961 ed.); *Occupation*, Black's Law Dictionary 1230 (4th ed. 1957).

[14] Congress itself has long viewed several tipped occupations as sufficiently established and well-known that it felt comfortable describing them as occupations that "customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc."—without reservation and without limiting inclusion in that list to specific hours of work or to particular duties that directly and immediately produce tips. S. Rep. No. 93-690, at 43 (Feb. 22, 1974) (legislative history to the 1974 amendments to the FLSA's tip credit, quoted in the Final Rule, 86 Fed. Reg. at 60,116).

[15] The Department codified these regulations at 29 C.F.R. §§ 531.50-.60 (1967).

[16] *See* 29 C.F.R.§ 531.56(e) (1967).

[17] *See id.*

[18] *Id.* (emphasis added).

The emphasized sentences make clear that the Department knew and understood that side work—*i.e.*, duties that do not directly and immediately produce tips—was part and parcel of "engaging" in an "occupation" that "customarily and regularly receives more than $30 a month in tips," as Congress defined "tipped employee" in FLSA section 3(t). This is so because "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" is side work performed by a waitress, and "prepar[ing] his or her own short order" is side work for a counterman. Both Congress and the Department have long recognized employees working as a "waitress" and as a "counterman" to be "tipped employees" because they are "engaged in an occupation" that "customarily and regularly" receives the requisite amount of tips.[19]

Indeed, the original dual jobs regulation makes explicit the Department's recognition and understanding that performing side work duties is an integral part of being a "tipped employee" under the FLSA—*i.e.*, "engaging in an occupation" that "customarily and regularly receives" the requisite amount of tips. This is so because the final sentence of § 531.56(e) specified that "such related duties . . . **need not by themselves be directed toward producing tips**" in order for the tip credit to apply.[20]

III. EMERGENCE OF THE 80% STANDARD

The Department first applied its 1967 "dual jobs" regulation to tasks performed by an employee with a *single* job in a 1979 opinion letter issued by the Wage and Hour Division. In that letter, "the department considered whether a restaurant employer could take a tip credit for time servers spend preparing vegetables for use in the salad bar before the establishment was open to the public."[21] The Department decided that "salad preparation activities are essentially the activities performed by chefs" and thus "no tip credit may be taken for time spent in preparing vegetables for the salad bar."[22]

In a 1980 opinion letter, the Wage and Hour Division addressed restaurant servers spending time "cleaning and resetting tables, cleaning and stocking the server station, and vacuuming the dining room carpet after the restaurant was closed."[23] The Department reiterated the distinction in the 1967 dual jobs regulation between (1) "employees who spend 'part of [their] time' performing 'related duties in an occupation that is a tipped occupation' that do not produce tips" and (2) situations "where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties."[24] Because in the situation under review the "duties were 'assigned generally to the waitress/waiter staff,' the Department found them to be related to the employees' tipped occupation" and, thus, subject to the tip credit.[25] The Department cautioned that the

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19 *See* S. Rep. No. 93-690, at 43.

20 29 C.F.R. § 531.56(e) (1967) (emphasis added).

21 86 Fed. Reg. at 60,116.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

tip credit would be unavailable "if 'specific employees were routinely assigned . . . maintenance work such as floor vacuuming'", as opposed to these tasks being assigned to the wait staff generally.[26]

In 1985, the Department issued an opinion letter considering a scenario in which a restaurant assigned one specific server "to perform preparatory activities" such as "setting tables and ensuring that restaurant supplies are stocked," with those activities amounting to "30% to 40% of the employee's workday[.]"[27] The Department concluded that in that instance, based on the dual jobs regulation then in effect, as well as the earlier opinion letters, "a tip credit was not permissible as to the time the employee spent performing those activities."[28]

In 1988, the Wage and Hour Division amended its Field Operations Handbook (the "FOH"), which is a manual that guides the agency's investigators in applying the various laws the agency enforces when conducting investigations, to address the dual jobs concept.[29] The Wage and Hour Division added FOH section 30d00(e), which stated that the dual jobs regulation "'permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities),' if those duties are 'incidental' and 'generally assigned' to tipped employees."[30] Section 30d00(e) further stated that "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties."[31]

IV. COMPLETE POLICY REVERSALS IN FOUR CONSECUTIVE ADMINISTRATIONS

The Department's 20% limit on side work, which equates to a requirement of actively seeking tips during at least 80% of an employee's working time and has come to be known as the "80/20 Rule", initially was not widely known among workers or employers. The FOH was not originally available via a website as it is today, nor did third parties publish the contents of the FOH. In 1988, and for the first nearly two decades that the 80% requirement represented the Department's policy, the main avenue for a member of the public to even see FOH section 30d00(e) was to submit a Freedom of Information Act request to the Department. That all changed in May of 2007, when the Western District of Missouri issued its decision in *Fast v. Applebee's International, Inc.*[32], allowing an employee's claim of a minimum wage violation based on FOH section 30d00(e) to proceed, denying

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* Judge Graber's partial dissent in *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc), carefully examines this portion of the FOH and demonstrates in detail why that statement of the 20% limit on side work rested on a clear misunderstanding of the 1967 dual jobs regulation. *See id.* at 635-36 (Graber, J., concurring in part and dissenting in part).

[32] 502 F. Supp. 2d 996 (W.D. Mo. 2007)

the employer's motion for summary judgment.[33] That decision received broad attention in the media and kicked off a wave of class and collective actions across the country that continues to this day.

Once the 80% issue achieved broad attention, every administration since that time has done a 180-degree reversal of its predecessor's position. The George W. Bush Administration rescinded the 80% interpretation through an opinion letter issued in early 2009.[34] The Obama Administration withdrew that letter within the first few months of taking office.[35] In November 2018, the Trump Administration reissued the 2009 opinion letter from the Bush years and promulgated further guidance noting that the agency had updated the FOH to eliminate the 80% requirement.[36] In 2020, that same administration issued a final rule to codify in the regulations an interpretation of the dual jobs concept consistent with the 2009 opinion letter.[37] That rule had an effective date of March 1, 2021.[38] Upon taking office in January 2021, the current administration extended the effective date for the 2020 rule and then proceeded with the rulemaking currently at issue, which nullified the key portions of the Trump-era rule.[39]

V. THE DEPARTMENT'S MOST RECENT STATEMENT OF ITS POSITION: THE 2021 FINAL RULE

The Department issued the 2021 Final Rule after a notice and comment period. The 2021 Final Rule changes the Department's prior regulations by concocting a previously unknown framework—the "tipped occupation"—for evaluating availability of the tip credit. That concept, however, does not appear, and finds no support, in the statute, and imposes a regulatory regime in conflict with the plain language Congress wrote into the FLSA.

A. The 2021 Final Rule replaced the 1967 dual jobs regulation, which focused on two distinct, non-overlapping jobs, with a new standard focused solely on whether each task within a *single* job directly and immediately generates tips.

The 2021 Final Rule modified subsection (e) and added new subsection (f) to 29 C.F.R. § 531.56, creating a multi-layered definition of a term found nowhere in the statute: "tipped occupation." The 2021 Final Rule defined "tipped occupation" in an entirely circular manner: "An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation."[40] That linguistic legerdemain allows the Department to create a brand new standard for what it views as "performing work that is part of the tipped occupation," and to decree that "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's

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33 *See id.* at 1001-04.

34 86 Fed. Reg. at 60,117.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 60,118.

40 All references to § 531.56(f) refer to the version that took effect on December 28, 2021.

tipped occupation."[41] The Department then proceeded to devise three distinct categories of "work" that it deems to fall within or outside of the non-statutory term "tipped occupation."

First, the 2021 Final Rule posited a category of activity it calls "tip-producing work."[42] According to the 2021 Final Rule, this is work that actually "produces tips," and "includes all aspects of the service to customers for which the tipped employee receives tips," such as a server "providing table service" and a bartender "making and serving drinks."[43] The 2021 Final Rule allowed employers to take a tip credit for all time an employee spends on "tip-producing work."[44]

Second, the 2021 Final Rule established a category referred to as "directly supporting work."[45] According to the 2021 Final Rule, this is work "performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work," such as a server "refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables."[46] The 2021 Final Rule also created a new multi-part "substantial amount of time" limitation for "directly supporting work":

> An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:
>
> (i) The directly supporting work exceeds a 20 percent workweek tolerance, which is calculated by determining 20 percent of the hours in the workweek for which the employer has taken a tip credit. The employer cannot take a tip credit for any time spent on directly supporting work that exceeds the 20 percent tolerance. Time for which an employer does not take a tip credit is excluded in calculating the 20 percent tolerance; or
>
> (ii) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent tolerance in paragraph (f)(4)(i) of this section.[47]

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41 29 C.F.R. § 531.56(f).

42 *Id.* § 531.56(f)(2).

43 *Id.* § 531.56(f)(1)(i), (f)(2)(i)-(ii).

44 *Id.* § 531.56(f).

45 *Id.* § 531.56(f)(3).

46 *Id.* § 531.56(f)(3)(i), (ii).

47 *Id.* § 531.56(f)(4).

The Department explained that under the 2021 Final Rule, idle time when business is slow and an employee is waiting to perform the core tasks of his or her occupation, such as a restaurant server waiting for customers to arrive between when the lunch crowd leaves and the dinner crowd arrives, counts not as "tip-producing work," but rather as "directly supporting work" subject to the 20% limitation:

> In response to comments asking how to categorize a tipped employee's down time, when the employee has started their shift and is waiting for customer service to commence but is otherwise not performing any customer service work or work in support of customer service work, the Department notes that this question is answered by the revised definitions in the final rule. In this circumstance, where the employee is not providing service to customers for which the tipped employee receives tips, **that time cannot be categorized as tip-producing work under the revised definition**. Because the tipped employee is available to immediately provide customer service when the customer arrives, however, the time is being spent in preparation of the customer service, **and is therefore properly categorized as directly supporting work**.[48]

Third, the 2021 Final Rule referred to work "that is not part of the tipped occupation." According to the 2021 Final Rule, this is work that the Department has deemed "does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work."[49] The Department deemed "[p]reparing food, including salads," to be "not part of the tipped occupation" of a server, and "[c]leaning the dining room" to be "not part of the tipped occupation" of a bartender.[50] The 2021 Final Rule provided zero tolerance for "not part of the tipped occupation" work: "If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time."[51] The 2021 Final Rule carved all work the Department deems "not part of the tipped occupation" from the tip credit even though employees falling within the statute's definition of "tipped employee"—*i.e.*, "engaged in an occupation that customarily and regularly" receives the requisite amount in tips—frequently perform such duties and activities.

The 2021 Final Rule's brand new, and completely different, regulatory regime is untethered to Congress's definition of "tipped employee." Nothing in the statute purports to limit the availability of the tip credit to whether an employee performs specific job duties or tasks that directly and immediately produce tips. Instead, if the employee regularly receives at least $30 a month in tips from his or her job, regardless of how or why the employee gets those tips, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute. That is the law Congress wrote, and it precludes the Department's new standard for the tip credit in the Final Rule.

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[48] 86 Fed. Reg. at 60,130 (emphases added).

[49] 29 C.F.R. § 531.56(f)(5)(i).

[50] *Id.* § 531.56(f)(5)(ii).

[51] *Id.* § 531.56(f)(5)(i).

VI. HOW THE COURTS ADDRESSED DUAL JOBS BEFORE *LOPER BRIGHT*

The first federal appeals court to consider the Department's 80/20 approach to dual jobs and the tip credit was the United States Court of Appeals for the Eighth Circuit, which in 2011 upheld the Department's position in *Fast v. Applebee's International, Inc.*[52] In short, the Eighth Circuit concluded that the Department's 1967 dual jobs regulation was ambiguous and that the Department's interpretation of that regulation in the form of the 1988 version of the Field Operations Handbook is controlling under *Auer v. Robbins*.[53]

In 2017, a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit determined that the 80/20 standard was not a reasonable interpretation of the 1967 dual jobs regulation and rejected it as unworthy of *Auer* deference.[54] The following year, however, an en banc panel of that same court reached the opposite conclusion, determining that the statutory phrase "engaged in an occupation" is sufficiently ambiguous to trigger deference to the 1967 dual jobs regulation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*[55], and that the Department's 80/20 standard was a reasonable interpretation of that regulation entitled to deference under *Auer*.[56] Three judges dissented from the en banc ruling.

In 2021, while the Department's position was in flux amid the withdrawal of the 1988 Field Operations Handbook verbiage setting forth the 80/20 concept, the Trump Administration's efforts to codify into regulations a position very different from the 80/20 rule, and the Biden Administration's efforts to negate that rulemaking and to replace it with what would eventually become the 2021 Final Rule, the United States Court of Appeals for the Eleventh Circuit adopted the 80/20 concept as its own interpretation of the 1967 dual jobs regulation, with one member of the three-judge panel rejecting that approach.[57]

In each of these three cases—*Fast*, *Marsh*, and *Rafferty*—the starting point was *Chevron* deference to the 1967 dual jobs regulation, followed by *Auer* deference to the Department's views about that regulation.

VII. DUAL JOBS LITIGATION AFTER *LOPER BRIGHT*: THE FIFTH CIRCUIT REJECTS THE 2021 FINAL RULE

On June 28, 2024, the Supreme Court of the United States handed down its decision in *Loper Bright Enterprises v. Raimondo*[58], one of the most consequential administrative law rulings of the past forty years. Generations of lawyers had become accustomed to courts viewing *Chevron* as a command to abandon statutory interpretation at the first hint of textual ambiguity, at which point the courts

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52 638 F.3d 871 (8th Cir. 2011).

53 519 U.S. 452 (1997).

54 *See* Marsh v. J. Alexander's LLC, 869 F.3d 1108 (9th Cir. 2017).

55 468 U.S. 837 (1984).

56 *See* Marsh v. J. Alexander's LLC, 905 F.3d 610 (9th Cir. 2018) (en banc).

57 *See* Rafferty v. Denny's, Inc., 13 F.4th 1166 (11th Cir. 2021).

58 144 S. Ct. 2244 (2024).

were to give controlling deference to the agency's interpretation of the statute, even if it differed from how the court would construe the statute. The agency's views would control unless its construction were patently unreasonable, which in practice was a nearly insurmountable standard for a party challenging a regulation to meet.

Simply put, *Loper Bright* overruled *Chevron*. Now, when faced with ambiguous statutory text, "instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[59] No longer must courts allow agencies to define their own authority to regulate; the role of determining the agency's authority now rests squarely with the courts, even where the statutory text contains a measure of ambiguity, as so many statutes do.

While *Loper Bright* was working its way through the courts, the Restaurant Law Center and the Texas Restaurant Association brought a challenge to the Department's 2021 Final Rule, contending that the regulation is contrary to the FLSA as well as being arbitrary and capricious. The district court upheld the regulation under *Chevron*, concluding that the statutory phrase "engage in an occupation" is ambiguous, and that the Department's interpretation in the 2021 Final Rule is permissible.[60]

Loper Bright came down about two months after the United States Court of Appeals for the Fifth Circuit heard oral argument in the challenge to the 2021 Final Rule. On August 23, 2024, the Fifth Circuit issued its unanimous decision rejecting the 2021 Final Rule.[61] The court performed its own careful, complete, and independent analysis of the statutory language and concluded that the Department's attempt to parse availability of the tip credit based on the amount of time spent on tip-producing tasks was "contrary to the Fair Labor Standards Act's clear text" and thus "it is not in accordance with law" under the Administrative Procedure Act.[62] The court also held that because the 2021 Final Rule "imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious."[63] The court concluded its opinion as follows: "Accordingly., we REVERSE both the district court's order granting summary judgment to DOL and its order denying summary judgment to the Associations. We RENDER summary judgment for the Associations and VACATE the Final Rule."[64]

VIII. H.R. 1612, THE "TIPPED EMPLOYEE PROTECTION ACT"

In March of 2023, lawmakers introduced H.R. 1612, known as "The Tipped Employee Protection Act." The bill would, if enacted into law, eliminate the ambiguous "engaged in an occupation" verbiage from section 3(t) of the FLSA, the phrase that the Department used as the basis for its 80/20 standard. In its place, the bill would define "tipped employee" as anyone, regardless of job duties,

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[59] *Id.* at 2266.

[60] *See* Rest. Law Ctr. v. Dep't of Lab., No. 1:21-CV-1106-RP, 2023 WL 4375518 (W.D. Tex. July 6, 2023). The author was lead counsel for the plaintiffs in that litigation, joined by Kathleen Barrett of Epstein, Becker and Green and Angelo Amador of the Restaurant Law Center.

[61] Rest. Law Ctr. v. Dep't of Lab., — F.4th —, No. 23-50562, 2023 WL 3911308 (5th Cir. Aug. 23, 2024)

[62] 2023 WL 3911308, at *1.

[63] *Id.*

[64] *Id.* at *11.

who receives enough in tips to cover any tip credit the employer takes, so long as the employer pays at least the minimum cash wage specified in the FLSA for tipped employees. The bill would also allow the employer some flexibility with regard to the time period, ranging from one day to as much as a month, for determining whether the tips plus cash wages qualify the worker as a tipped employee.

If enacted, this bill would once and for all get the Department out of the business of trying to micromanage restaurant, hotel, and casino work at the task level. It would make clear that the whole point of the tip credit is to make sure that tipped workers are on an equal footing with non-tipped workers. The FLSA has never been about conferring upon tipped employees minimum wage rights beyond those of other workers, even though the Department has for more than 30 years tried to take a contrary position in that regard.

I strongly support H.R. 1612 as being in line with the purpose of the tip credit. It also happens to line up well with that the Fifth Circuit declared just last month in rejecting the Department's 80/20 standard as contrary to the current statutory text.

IX. EFFORTS TO ELIMINATE THE TIP CREDIT

In April of 2021, the President issued Executive Order 14026, entitled "Increasing the Minimum Wage for Federal Contractors." Section 3 of that Executive Order phased out the tip credit for workers on covered contracts as of January 1, 2024. In addition, there have been various legislative efforts in recent years to eliminate the tip credit from the FLSA generally.

These efforts are, in my view, misguided, mainly because they are unnecessary and would not make tipped employees better off; to the contrary, they would earn less as a result. Restaurant workers have repeatedly demonstrated that they prefer the tip credit.

Three recent studies examine the data regarding tipped employees, taking into consideration not only the hourly wages and tip credit, which together constitute the employees' "wages" under the FLSA, but also their tips, thereby painting a much more complete picture of their economic circumstances.[65] These reports make several key findings:

First, tipped workers have *total* earnings (i.e., including tips) that average $15.51 per hour, more than twice the current federal minimum wage.[66]

Second, as tipped minimum wages increase, customer tipping decreases. States with lower tipped minimum wages see higher average tip percentages than states with higher tipped minimum wages.[67]

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[65] *See* David Neumark & Emma Wohl, *Do Higher Tipped Minimum Wages Reduce Race, Ethnic, or Gender Earnings Gaps for Restaurant Workers?* (Employment Policies Institute Sept. 2024); Rebekah Paxton, *The Case for the Tip Credit: From Workers, Employers, and Research* (Employment Policies Institute (June 2023); David Neumark & Maysen Yen, *Tipped Workers, Minimum Wage Workers, and Poverty: Analyzing the Redistributive Impact of Eliminating Tip Credits* (Employment Policies Institute Feb. 2021).

[66] Paxton at 3.

[67] *Id.* at 8.

Third, when the tipped minimum wage increases, restaurants shift their hiring preferences and elect to hire "higher-educated or higher-skilled workers, pricing out lower-skilled workers[,]" thereby harming "young, lower-educated workers[.]"[68]

Fourth, when faced with the alternatives of tipped employment subject to the tip credit or all-in menu pricing with no tipping, *97 percent* of tipped employees prefer the tipping option.[69]

Fifth, 81% of restaurant customers prefer traditional tipping to "no-tip alternatives."[70]

Sixth, numerous restaurants that have shifted to a no-tip approach have found themselves forced to return to a tipping model due to high numbers of employees leaving to pursue other employment opportunities that allow for tips.[71]

Seventh, tipped workers are approximately 40% less likely than other nominally minimum wage workers to fall below the poverty line.[72]

Eighth, there is a broad consensus among American labor economists, with approximately three out of four agreeing that reducing the tip credit, and thereby increasing the cash wage tipped workers must receive, reduces employment.[73]

Lastly, the available economic evidence does not support the conclusion that raising the tipped minimum wage reduces disparities in weekly earnings among female, Hispanic, or African-American tipped workers as compared to Caucasian male tipped workers. To the contrary, regression analysis demonstrates that "none of the demographic groups have their weekly earnings raised by [increases in] tipped minimum wages."[74]

Taken together, these findings confirm that the tip credit does not harm workers; it helps them. When given the choice, tipped employees prefer tipped employment to non-tipped employment. The tip credit provisions of the FLSA ensure that tipped employees are no worse off than other minimum wage employees, and the reality of tipping practices leads to tipped employees receiving total earnings nearly double those of the typical minimum wage employee. Ending the tip credit will help no worker or consumer. Moreover, no worker who wants an hourly wage at or above minimum wage needs to choose a tipped position. Workers seek out tipped jobs precisely because these positions offer the opportunity to achieve significant total earnings.

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68 *Id.* at 9.

69 *Id.* at 3.

70 *Id.* at 4.

71 *Id.* at 14-16 (discussing experiences at nine different restaurant concepts that tried a no-tipping approach).

72 Neumark & Yen at 1, 9-11.

73 Paxton at 6.

74 Neumark & Wohl at 24-25.

X. CONCLUSION

For these reasons, I encourage the Subcommittee to give consideration to H.R. 1612 and to reject efforts to eliminate or to reduce the tip credit. Chairman Kiley, Ranking Member Adams, and members of the Subcommittee, thank you for the opportunity to share these views with you today. Please let me know what else I can do to help you in this matter.

Mrs. MILLER. Thank you, Mr. DeCamp. I will now recognize Ms. Jayaraman.

STATEMENT OF MS. SARU JAYARAMAN, PRESIDENT, ONE FAIR WAGE, NEW YORK, NEW YORK

Ms. JAYARAMAN. Jayaraman. Good morning, my name is Saru Jayaraman, I am the Co-Founder and President of One Fair Wage. I am also the Director of the Food Labor Research Center at the University of California Berkeley. For the last 22 years, we have spent, actually thousands and thousands of hours collecting surveys from tens of thousands of restaurant workers and tipped workers across the country.

They have overwhelmingly told us, after decades, that their top concern is their wages, which makes sense, knowing that the restaurant industry is by far the absolute lowest paying employer in the United States of America. Every year the U.S. Department of Labor puts out a list of the ten lowest paying jobs. Seven of the ten are in the restaurant industry, in fact, the seven lowest paying, and four of the seven are tipped occupations, even when you take tips into account.

That is because the wage structure in the restaurant industry dates back to Emancipation. Prior to Emancipation, waiters in the United States were mostly white males. They actually received a full wage, no tips. After Emancipation, restaurants sought the ability to hire newly freed black people, black women in particular, not pay them a wage, and force them to live entirely on a new concept that had just come from Europe.

Now in Europe tips were always on top of a wage, never instead of a wage. It was Emancipation and Jim Crow America that allowed restaurants to change the concept of tipping for the first time in world history from being an extra bonus on top of a wage, to becoming the entirety of the wage itself.

That became law in 1938, as part of the New Deal, and is the origin of the sub-minimum wage for tipped workers, which is a ridiculous $2.13 an hour today. Today, still, 160 years later since Emancipation, tipped workers are overwhelmingly women, disproportionately women of color, more than two-thirds women. They are largely women working in very casual restaurants and bars across the country.

Their median wage, including tips, according to the American Community Survey is $15,000.00. That is including tips, and that is an average of $7.40 an hour including tips. That is a median, meaning half of the workers earn less. That has resulted in an enormous amount of economic instability.

It results in the fact that tipped workers earn—suffer from three times the poverty rate of other workers, use food stamps at double the rate of other workers, and have the highest levels of wage theft, of any industry in the United States, according to the U.S. Department of Labor, and every Department of Labor in the United States.

There are seven states that have done it differently for decades, California, Oregon, Washington, Nevada, Minnesota, Montana and Alaska, and today we bring findings, looking at the last couple of years since the pandemic comparing the seven states that have had

a full minimum wage to the 43 states that have not. The seven states have outperformed the 43 states on every measure.

They have outperformed the 43 states in terms of restaurant establishment growth, higher in the 43 states—in seven states since the pandemic. They have outpaced 43 states with a sub-minimum wage in terms of employment growth in restaurants, and they have outpaced the 43 states in terms of wages, including tips.

Washington State, where Ms. Barron is from, has actually outpaced all 43 states according to the National Restaurant Association's data itself. Washington State has outpaced other states in terms of establishment growth, and employment growth.

The seven states are doing well. They provide a full minimum wage with tips on top. Tipping is robust in those states, it is the same or higher as it is in the 43 states with the sub-minimum wage for tipped workers. The pandemic made this disparity between the states much worse.

With the pandemic workers reported that their tips went down, harassment went up. Two-thirds of tipped workers reported they could not get unemployment insurance because in most states they were told their wages were too low to qualify for benefits. With the extreme amounts of both tip reduction and harassment increase, 1.2 million restaurant workers walked off the job, saying we no longer—70 percent reported that we are leaving because we no longer can put up with the low wages in this industry.

As a result, we have tracked thousands of restaurants across the country that have raised wages, in fact, to the full minimum wage and higher with tips on top in order to recruit and retain staff. There is no better data to show that workers want this, than the fact that they left the industry in droves, saying they cannot tolerate the wage structure in the industry any longer.

It is why workers have been winning wage increases in city after city, State after State. It is why it is moving with so much momentum right now, and why we are having this hearing today. Thank you.

[The Statement of Ms. Jayaraman follows:]

TESTIMONY TO THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE

By Saru Jayaraman, President of One Fair Wage
& Director of the University of California Berkeley Food Labor Research Center
September 18, 2024

My name is Saru Jayaraman, and I am the President of One Fair Wage and the Director of the UC Berkeley Food Labor Research Center. On behalf of the 300,000 service workers and over 1000 'high road' restaurant employers who are members of One Fair Wage, I thank you for allowing me to testify regarding tipped workers' needs and conditions.

The restaurant industry, and the service economy in general, is undergoing massive upheaval, with thousands nationwide, raising their wages to at least $15 an hour plus tips in order to recruit staff at a time when workers are indicating they are unwilling to work for anything less. Policy to raise wages and end the subminimum wage for tipped workers is essential not only because workers are in crisis, but also because independent restaurateurs agree that they will not be able to fully reopen without policy change to raise wages and end the subminimum wage for tipped workers.

Even prior to the pandemic, the subminimum wage was problematic, as a direct legacy of slavery that disproportionately impacts the lives of women and people of color. At Emancipation, the service industry, namely railroad, hotel and restaurant lobbies, sought to hire recently-freed Black people and not pay them anything, forcing them to live entirely on tips.[1] This legacy continues today in 43 states, where tipped workers can earn as little as $2.13 an hour from their employers based on federal minimum cash wage, and are required to make up the rest in tips.[2] Nationally, there are 5,500,000 tipped workers who are 69 percent women and 32 percent people of color. Ending this low-wage carve out positively impacts an overall restaurant industry of over 11,500,000 workers nation wide.[3]

Prior to the pandemic, the restaurant industry was the largest and fastest growing industry in the country - all while being the largest employer of tipped workers, who earn some of

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[1] Jayaraman, Saru, *Forked: A New Standard for American Dining*, (Oxford University Press, 2016)
[2] U.S. Department of Labor. (September 2021). Minimum Wages for Tipped Employees. Wage and Hour Division. https://www.dol.gov/agencies/whd/state/minimum-wage/tipped.
[3] OFW analysis of American Community Survey data, 2018- 2022 5-Year Sample. Steven Ruggles, Sarah Flood, Ronald Goeken, Megan Schouweiler and Matthew Sobek. IPUMS USA: Version 12.0 [dataset]. Minneapolis,

the lowest wages in the country. Tipped workers, who are more than two thirds majority women who work in casual restaurants earning very little in tips, live in poverty and rely on public assistance at double the rate of the general workforce.[4] Tipped workers have struggled with twice the poverty rate of other workers and the highest rates of sexual harassment of any industry because they must tolerate inappropriate customer behavior to feed their families in tips.[5,6]

Women, in particular, faced the highest rates of sexual harassment when compared to all other industries.[7] Women tipped workers experience even greater rates of sexual harassment than their non-tipped counterparts in the industry: half versus only a quarter (49 percent vs. 26 percent).[8] The pandemic has only made conditions worse for women and people of color in the industry.

Research has also shown that within the industry racial discrimination from employers and customers has yielded a wage gap between Black women and white men in 'front-of-house', tipped positions of $6.19 per hour.[9] As long as these workers must rely on tips to feed their families, they are subject to the biases and harassment of customers.

Finally, the two-tiered wage system has resulted in the restaurant industry having the highest rates of wage theft of any industry in the United States. A 2010 US Department of Labor comprehensive study of restaurants found an 84% violation rate with regard to employers complying with the rules surrounding the two-tiered wage system, including the requirement for employers to ensure that tips are bringing workers to the full minimum wage or paying workers the difference themselves.[10] Our 2023 survey of 2000 restaurant

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[4]Allegretto, S. and Cooper, D. (2014) Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage. Economic Policy Institute. https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/.

[5] Allegretto, S. et al. (July 2014). Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage. Economic Policy Institute. https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/.

[6] One Fair Wage. (March 2021). The Tipping Point: How the Subminimum Wage Keeps Income Low and Harassment High. https://onefairwage. site/wp-content/uploads/2021/03/OFW_TheTippingPoint_3-1.pdf.

[7] Johnson, S.K. and Madera, J. M. (January 2018). Sexual Harassment Is Pervasive in the Restaurant Industry, Here's What Needs to Change. Harvard Business Review. https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change.

[8] One Fair Wage Robert Wood Johnson Foundation Study (forthcoming). From June 6, 2022 until June 2023, One Fair Wage conducted surveys with over 1000 workers in Illinois who reported that they are current or former tipped workers. The survey asked primarily about working conditions in the restaurant industry since the start of the pandemic. An online version of the survey was sent to a pool of tipped service workers across the country, and an in-person version was utilized by surveyors in Colorado, Michigan, Illinois, Louisiana, Ohio, New York and Puerto Rico. This data is not exhaustive

[9] One Fair Wage. (September 2022). Intentional Inequality - Black Women's Equal Pay Day. https://onefairwage.site/intentional-inequality

[10] Weil, D. Boston University. (May 2010). Improving Workplace Conditions Through Strategic Enforcement. U.S. Department of Labor. https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf.

workers nationwide found that 50% reported regularly not receiving enough tips to bring them to the full minimum wage and their employer not making up the difference.[11]

With such high rates of violations, until we end the subminimum wage for tipped workers, greater regulation and enforcement has been critical to ensure that tipped workers receive at least the basic protections all other workers receive, including the minimum wage. The Trump Administration ended the 80/20 rule, which had for years required employers to ensure that subminimum wage tipped employees interact with customers who could provide tips at least 80% of the time[12]. The Biden Administration restored the 80/20 rule, which had been critical to ensure that workers are not being asked to do work that cannot produce tips while being paid a subminimum wage that requires them to get tips in order to earn the minimum wage.[13] Similarly, given the very high rates of non compliance with these rules, the Biden Harris Administration's increased enforcement of the rules surrounding the two-tiered wage system have been essential to ensure tipped workers earn at least the minimum wage and do not have their tips misappropriated by management or co-workers who should not be in a tip pool[14].

In contrast, in 2017, the Trump Administration attempted to make tips the property of owners rather than workers.[15] We organized 400,000 tipped workers and their allies to submit comments to the US Department of Labor under Trump, resulting in federal legislation passed in 2018 with bipartisan support that made tips the property of workers permanently and guaranteed that employers cannot take workers' tips.[16]

The Trump Administration also limited when civil monetary policies could be assessed against employers that stole tips; under these limiations, employers could only be held liable for stealing tips if workers could prove that they had done so willfully and/or

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[11] One Fair Wage Robert Wood Johnson Foundation Study (forthcoming). From June 6, 2022 until June 2023, One Fair Wage conducted surveys with over 1000 workers in Illinois who reported that they are current or former tipped workers. The survey asked primarily about working conditions in the restaurant industry since the start of the pandemic. An online version of the survey was sent to a pool of tipped service workers across the country, and an in-person version was utilized by surveyors in Colorado, Michigan, Illinois, Louisiana, Ohio, New York and Puerto Rico. This data is not exhaustive

[12] Shierholz H. et al. (December 2017) Employers would pocket $5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule. Economic Policy Institute. https://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/.

[13] Federal Register. (October 2021). Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal. National Archives. https://www.federalregister.gov/documents/2021/10/29/2021-23446/tip-regulations-under-the-fair-labor-standards-act-flsa-partial-withdrawal.

[14] Shierholz H. et al. (December 2017) Employers would pocket $5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule. Economic Policy Institute. https://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/.

[15] Ibid.

[16] U.S. Department of Labor. (Sept 2024). Tip Regulations under the Fair Labor Standards Act (FLSA). https://www.dol.gov/agencies/whd/flsa/tips.

repeatedly - rules that were never in the Fair Labor Stardards Act[17]. The Biden-Harris Administration fixed this limitation on tipped workers' rights, by making it clear that workers would be able to obtain recompense for stolen tips regardless of the limitations placed on tipped workers' rights by the Trump Administration[18].

A Different Way: 7 Fair Wage States

Seven states have always required a full minimum wage with tips on top - California, Oregon, Washington, Nevada, Minnesota, Montana and Alaska.[19] These states have had the same or higher restaurant sales per capita, small business restaurant growth rates, restaurant industry job growth rates, and tipping averages as the 43 states with a subminimum wage.[20]

In fact, according to the United States Bureau of Labor Statistics, the number of establishments in subminimum wage states grew from 537,130 to 567,975 or an increase of 5.74 percent. While fair wage states grew at a faster rate at 6.05 percent from 128,613 to 136,405. This is a 5.4 percent difference than subminimum wage states. A gap in business growth that will only continue to naturally widen if left unchecked.[21]

Workers in these 7 states have also reported one half the rate of sexual harassment as the states that allow tipped workers to be paid a subminimum wage as little as $2.13 an hour.[22]

Impact of the Pandemic

During the pandemic, service and tipped workers across the country faced significantly higher rates of job losses and economic insecurity, with losses highly concentrated among women of color.[23] In May of 2020, our survey found that as many as 60 percent of service workers either did not qualify or were unsure if they qualified for unemployment

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[17] Shierholz H. et al. (December 2017) Employers would pocket $5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule. Economic Policy Institute. https://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/.

[18] Ibid.

[19] ROC United. (2018). Better Wages, Better Tips: Restaurants Flourish with One Fair Wage. New York, NY: ROC United. https://chapters.rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

[20] ROC United. (2014). The Great Service Divide: Occupational Segregation & Inequality in the US Restaurant Industry. https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-GreatService-Divide2.pdf.

[21] U.S. Bureau of Labor Statistics. (Sept, 2024). Quarterly Census of Employment and Wages. Private, NAICS 722 Food services and drinking places, All States and U.S. 2021- 2023 Annual Averages, All establishment sizes. https://data.bls.gov/PDQWeb/ew.

[22] National Restaurant Association. (March 2022). Restaurant Owner Demographics Data Brief. https://restaurant.org/getmedia/ad96e3a8-4fb1-492d-a5ae-0b3dd53a61ef/nra-data-brief-restaurant-owner-demograph- ics-march-2022.pdf.

[23] Ewing-Nelson, C. (January 2021). All of the Jobs Lost in December Were Women's Jobs. National Women's Law Center. https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf.

insurance.[24] Many tipped workers returning to work in restaurants experienced sharp declines in tips, increased hostility in response to enforcing COVID-19 safety measures, and increased sexual harassment from customers. By December 2020, 41 percent of workers nationwide reported an increase in sexualized comments from customers.[25] Hundreds of women shared stories of male customers asking them to take their mask down so that they could know how much to tip them.[26]

Workers Have Had Enough - Post Pandemic Recovery

These conditions and the persistence of a subminimum wage have led many tipped and service industry workers in general to leave the industry altogether.[27] The pandemic devastated the industry, seeing a sharp decline in both the number of establishments and the number of people willing to work under these conditions. Now, not four years later, the industry is recovering because the very same people who cannot make a living wage still need what little money in their pockets they can receive to live and in turn bolster the economy themselves. From 2021 to 2023, the United States Bureau of Labor Statistics reported in the Quarterly Census of Employment and Wages data of food services and drinking places employment growth in food services and drinking places within fair wage states outpaced subminimum wage states by 4 percentage points – 31 percent difference. While subminimum wage states saw employment in these establishments increased by 13 percent (8,709,708 workers in 2021 to 9,813,752 in 2023), employment increased by 17 percent in fair wage states (1,949,942 workers in 2021 to 2,272,162 in 2023).[28]

This may lead to the concern of one of the most inaccurate myths about raising the minimum wage, that raising wages leads to job losses. Not only is it an over simplification to equate raising wages would directly lead to a driver in job losses, it also neglects how increased wages drive workers toward open positions and to create more value in their work. Our survey found that over half (53 percent) of restaurant workers were considering leaving the industry and, unsurprisingly, over three-quarters (76 percent) reported their top reason for leaving was due to low wages and tips. This shift in power among tipped and service workers has spurred some restaurant owners and state governors to blame

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[24] One Fair Wage. (May 2020). Locked Out By Low Wages: Service Workers' Challenges With Accessing Unemployment Insurance During COVID-19. New York, NY: One Fair Wage. https://onefairwage.site//wp-content/uploads/2020/11/OFW_LockedOut_UI_COVID-19_-FINALUPDATE.pdf.

[25] One Fair Wage. (December 2020). Take off your mask so I know how much to tip you: Service Workers' Experience of Health & Harassment During COVID-19. New York, NY: One Fair Wage. https://onefairwage.site/wp-content/uploads/2020/12/OFW_COVID_WorkerExp_MA_4.pdf.

[26] Ibid.

[27] Selyukh, A. (July 20, 2021). Low Pay, No Benefits, Rude Customers: Restaurant Workers Quit At Record Rate. NPR. https://www.npr.org/2021/07/20/1016081936/low-pay-no-benefits-rude-customers-restaurant-workers-quit-at-record-rate.

[28] U.S. Bureau of Labor Statistics. (Sept, 2024). Quarterly Census of Employment and Wages. Private, NAICS 722 Food services and drinking places, All States and U.S. 2021- 2023 Annual Averages, All establishment sizes. https://data.bls.gov/PDQWeb/ew.

workers and prematurely cut unemployment benefits, which resulted in little to no effect on employment rates nor workers willingness to return to the industry for subminimum wages[29],[30].

In response to the massive staffing crisis that resulted from the pandemic, thousands of restaurants nationwide have risen above the myth and raising wages in order to recruit enough staff to fully reopen.[31] Since September 2021, we have found more than 7,000 restaurants paying an average wage of $13.50 plus tips.[32] [33]

Many of these restaurant owners have told us that they cannot do it alone; they need policy that will end the subminimum wage for tipped workers for two reasons: 1) to create a level playing field, in which all employers have to raise wages; and 2) they need policy that will signal to thousands of workers that there will be permanent policy change to raise wages that will make it worth returning to work in restaurants.

National Momentum and Support to Pass One Fair Wage

As a result of the massive upheaval in the restaurant industry, states across the country have been ending the subminimum wage for tipped workers.

With industry-wide wage increases, there is national momentum for change; in November 2022, 76 percent of Washington, DC voters voted to raise the wage for tipped workers from $5.35 to the full minimum wage of $16.10 per hour. In September 2023, Chicago City Council voted this bill out of committee 9-3, and they are about to pass One Fair Wage into law on October 4, 2023.[34] Finally, the Michigan Supreme Court just made Michigan the eighth state to end the subminimum wage for tipped workers, raising wages for 1.2 million workers statewide.[35] One Fair Wage policy is moving on the ballot in Massachusetts and as legislation in, IL MD, NY and many other states.

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[29]Chaney-Cambon, S. and Dougherty, D. (September 2021). States That Cut Unemployment Benefits Saw Limited Impact on Job Growth. Wall Street Journal. https://www.wsj.com/articles/states-that-cut-unemployment-benefits-saw-limited-impact-on-job-growth-11630488601.

[30] One Fair Wage. (July 2021). The Impact (or Lack Thereof) of Ending Unemployment Insurance on Restaurant Workers' Willingness to Work for Subminimum Wages. New York, NY: One Fair Wage. https://onefairwage.site/wp-content/uploads/2021/07/OFW_HelpWanted.pdf.

[31]Black, J. (September 2021). How yo Make an Unloved Job More Attractive? Restaurants Ticker With Wages. New York Times. https://www.nytimes.com/2021/09/20/dining/restaurant-wages.html.

[32]One Fair Wage. (September 2021). Raising Wages to Reopen: Restaurants Nationwide Raising Wages to Save Their Businesses After COVID-19. New York, NY: One Fair Wage. https://onefairwage.site/wp-content/uploads/2021/09/OFW_RasingWagesToReopen_3.pdf.

[33] OFW Employer Database

[34] Chicago Eater, September 2023. https://chicago.eater.com/2023/9/19/23881229/chicago-tipped-minimum-wage-ordinance-one-fair-wage-victory-restaurant-association-saru-jayaraman

[35] Michigan Supreme Court. (July 2024). MOTHERING JUSTICE v ATTORNEY GENERAL. https://www.courts.michigan.gov/siteassets/case-documents/uploads/opinions/final/sct/165325_115_01.pdf.

President Biden has been a champion of raising the minimum wage and ending the subminimum wage for tipped workers, including this policy in his federal Raise the Wage Act that was part of his initial $1.9 trillion COVID-19 relief package[36]. In 2021, while addressing restaurant owners concerns regarding the labor shortage, President Biden urged employers to pay higher wages to workers, and specifically called out the need to pay tipped workers a $15 minimum wage plus tips[37]. By passing One Fair Wage, legislators can both align with President Biden's agenda and allow independent restaurant owners across the states to fully reopen, and their workforce to fully recover.

[36] Jacobson, L.(January 2021). What's in Joe Biden's $1.9 trillion American Rescue Plan?. PolitiFact.https://www.politifact.com/article/2021/jan/15/whats-joe-bidens-19-trillion-american-rescue-plan/.
[37]Brest, M. (July 2021). Biden tells restaurateurs to pay workers more amid labor shortage. Washington Examiner. https://www.washingtonexaminer.com/news/biden-restaurant-increase-wages-labor.

Mrs. MILLER. Thank you, and finally I will recognize Ms. Barron.

STATEMENT OF MS. SIMONE BARRON, CO-FOUNDER, FULL-SERVICE WORKERS ALLIANCE, SEATTLE, WASHINGTON

Ms. BARRON. Good morning, and thank you Chairman Kiley, Ranking Member Adams, for the opportunity to testify. My name is Simone Barron, and I have been a tipped worker in the full-service restaurant industry for 36 years. I have worked in several cities across the country, including Indianapolis and Chicago, but I am coming to you today from Seattle, Washington, where I have been a tipped worker for the past 24 years.

Washington State eliminated its tip credit in the 1980's and in 2014, when Seattle passed the $15 Now wage law, I was making nearly $10.00 an hour plus tips. As of today, the rates are $19.97 per hour for the largest operators, and $17.25 per hour for the smallest. These rates are set to increase to over $20.00 per hour for both large and small operators on January 1, 2025.

I wish I were coming to you today to say that our former Council member, Kshama Sawant, who championed the $15 Now movement, was correct in her statement that $15.00 an hour would lift 100,000 workers out of poverty.

I wish I was bringing you better news today, to say that this has all worked out somehow, and that I am living better than ever before, but I cannot. The minimum wage hike in Seattle is devastating my industry, my job, and my income. Seattle is approaching its 11th consecutive wage hike since the wage law went into effect. We did not even stop raising the wage during the COVID pandemic.

Since the mandatory wage hike started, hundreds of restaurants have closed or moved out of the area. Those that remain are forced to reinvent the wheel by changing how they do business.

As the wage hike without a tip credit has gradually eroded our industry, workers like myself have been subject to surcharges, service charges, non-transparent pay models, elimination of tip lines, elimination of tipping, mandatory tip pooling to pay non-tripped workers—thank you Patty Murray—elimination of support staff jobs, elimination of hours and shifts, and in many cases loss of jobs as restaurants have closed.

The looming hike on January 1, 2025, promises to bring more of the same with the expectation of more layoffs, rising costs and menu prices, and even more closures. What this does to the service industry is bad enough, but what it is doing to workers like myself is devastating.

Our opportunity to maximize our income under a traditional tipping structure is being stripped away, and this pushes tipped workers closer to making minimum wage, while raising the cost of living for all of us. Cutting hours forces to take on two or more jobs, just to work enough to earn a paycheck. The elimination of jobs means more people are vying for fewer and fewer opportunities to work.

The minimum wage hike in Seattle has created instability for workers, and it is especially true since the COVID pandemic. With every next wage hike, one more shift gets cut, one less guest comes in, and another job opportunity dries up. Since the pandemic, I

have yet to find footing in the industry that I have always found stability in.

The industry that helped me go to school, raise a child, and pursue my passions seems to have become unreliable, unsettled, and unbalanced. These wage hikes are negatively affecting non-tipped workers as well. My friend works for a major produce provider in Seattle, and he explained to me that his company is now pivoting to providing pre-prepped vegetables to restaurants because those restaurants can no longer afford to employ a prep cook.

What is about to happen in Seattle with the next wage hike has been described by our small business owners as a wipeout. When they raise the wage again, the total compensation credit that was built into the wage hike for our smallest businesses is set to expire.

They will now be required to pay the same that all the larger employers pay. Their labor will go from $17.25 an hour to north of $20.00 an hour on January 1st. Last week, our local industry leaders held a town hall. They mentioned that because of this impending wage hike on January 1st, menu prices would need to increase, pay structures would have to change, and business models would need to adapt.

All of this will result in labor costs being passed on to customers, while workers like myself will bear the brunt, facing the potential elimination of tips, and a predicted wave of layoffs. Things are not so great in Seattle.

I would dare any economist here to keep an eye on what's happening in my city, my home, watch the business closures, look at how many jobs we have to have, measure how the cost of living goes up every time that wage goes up, and you tell me how this is helping me, and workers like me, because I cannot. Thank you very much. I look forward to your questions.

[The Statement of Ms. Barron follows:]

Testimony of Simone Barron before the House Committee on Education and the Workforce Subcommittee on Workforce Protections

"Examining the Biden-Harris Attacks on Tipped Workers"

Wednesday, September 18th, 2024

Good Morning, and thank you, Chairman Kiley and Ranking Member Adams, for the opportunity to testify.

My name is Simone Barron. I have been a tipped worker in the full-service restaurant industry for 36 years. I have worked in several cities across the country, including Indianapolis and Chicago, but I am coming to you today from Seattle, Washington, where I have been a tipped worker for the past 24 years.

Washington State eliminated its tip credit in the 1980s, and in 2014, when Seattle passed the $15now wage law, I was making nearly $10 an hour plus tips. As of today, the rates are $19.97 per hour for the largest operators and $17.25 per hour for the smallest. These rates are set to increase to over $20 per hour for both large and small operators on January 1, 2025.

I wish I were coming to you today to say that our former Council Member, Kshama Sawant, who championed the $15Now movement, was correct in her statement that $15 an hour would lift 100,000 workers out of poverty. I wish I were bringing you better news today to say this has all worked out and that I'm living better than before. I can't. The minimum wage hike in Seattle is devastating my industry, my job, and my income.

While it is true that workers are making a higher wage, the economic reality resides in the details. Workers like myself who work under a tipped compensation model are being pushed further toward the margins due to the impacts of each minimum wage hike.

Seattle is approaching its 11th consecutive wage hike since the wage law went into effect. We didn't even stop raising the wage during the Covid Pandemic.

Since the mandatory wage hike started, hundreds of restaurants have closed or moved out of the area. Those that remain are forced to reinvent the wheel by changing how they do business. As the wage hike without a tip credit has gradually eroded our industry, workers like myself have been subject to surcharges, service charges, non-transparent pay models, elimination of tip lines, elimination of tipping, mandatory tip pooling to pay non-tipped workers, elimination of support staff jobs, elimination of hours and shifts, and in many cases loss of jobs as restaurants close.

The looming hike on Jan 1, 2025, promises to bring more of the same with the expectation of massive layoffs, rising costs and menu prices, and even more closures. What this does to the service industry is bad enough, but what it does to workers like myself is devastating.

Our opportunity to maximize our income under a traditional tipping structure is being stripped away. This pushes tipped workers closer to making minimum wage while raising the cost of living for all of us. Cutting hours forces us to take on two or more jobs just to work enough to earn a paycheck. And the elimination of jobs means more people are vying for fewer and fewer opportunities for work.

The minimum wage hike in Seattle has created instability for workers. It used to be that you could stay at one restaurant for many years if you made your money, were treated well, and enjoyed your team. Now, we have jobs disintegrating into nothing as the money goes away due to a compensation model change or suddenly finding yourself unemployed because the owner just gives up and throws in the towel. I've personally found this as my experience, and it is especially true since the Covid pandemic. With every next wage hike, one more shift gets cut, one less guest comes in, and another job opportunity dries up. Since the pandemic, I have yet to find my footing in the industry I've always found stability in. The industry that helped me go to school, raise a child, and pursue my passions seems to have become unreliable, unsettled, and unbalanced.

These wage hikes are negatively affecting non-tipped workers as well. My friend works for a major produce provider in Seattle. He explained that his company is now pivoting to providing pre-prepped vegetables to restaurants because those restaurants can't afford to employ a prep cook. Another friend, a General Manager from a local chain, told me that they would no longer hire a salaried manager. That any manager hired from here on out will be hourly, with less benefits, so they can lessen their costs in that way.

What's about to happen in Seattle with the next wage hike has been described by our small business owners as a wipeout. When they raise the wage again, the total compensation credit that was built into the wage hike for our smallest businesses is set to expire. That means that the smaller restaurants that were given a small break and allowed to pay two dollars under the regular minimum wage will now be required to pay the same that larger employers pay. Their labor will go from $17.25 to north of $20 on January 1.

Last week, our local industry leaders held a town hall to highlight that Seattle, already one of the most expensive dining-out cities in the nation, is getting exponentially more expensive come January 1. They mentioned that because of the impending wage hike, menu prices would need to increase, pay structures would have to change, and

business models would need to adapt. All of this would result in labor costs being passed on to customers, while workers would bear the brunt, facing the potential elimination of tips and a predicted wave of layoffs.

For me, I'm feeling the impact once again. At my previous job with a smaller employer, I was under a tip pool system, and even though I worked nearly 40 hours a week, I couldn't make enough to cover my bills because I had to share all my tips with other employees. I had no choice but to move on to a large chain restaurant, hoping they could withstand the next wage hike for at least another year. But less than eight months into my current job, and with the upcoming wage increase, they've already cut most support staff hours and reduced server shifts to just 1 to 3 days a week. Even with the holidays approaching, my manager says there might not be any additional shifts, as the economy and wage hikes are hurting the business.

So, things are not so great in Seattle. I would dare any economist here to keep an eye on what is happening to my city, my home. Watch the business closures, look at how many jobs we have, measure how the cost of living goes up every time the wage goes up, and tell me how this is helping me, and workers like me make it.

Chairman KILEY. Thank you very much for your testimony. Under Committee Rule 9, we will now question witnesses under the 5-minute rule. The Representative from Missouri, Mr. Burlison, is recognized for 5 minutes.

Mr. BURLISON. Thank you, Ms. Barron. I found your testimony to be very compelling, particularly because you are living it. Often you have people up here talking about how you and other tipped workers should—what you should believe, and what you should think.

I would think that that would be very demeaning, and belittling, to have someone, you know, someone telling you that you just do not know what you are talking about what is best for you.

Ms. BARRON. Absolutely. One of the things that is really sort of just completely weird to me is that we have Ms. Jayaraman, representing voices of the restaurant industry. As far as I am concerned, Ms. Jayaraman is a labor activist from Berkeley.

She has not worked in the restaurant industry. She is not an industry worker. She has not walked a mile in my shoes. For her to claim that she is the voice of restaurant workers like myself, I do not get it, and most of the people that I know in the restaurant industry do not even know who she is, and how she can be a voice for lifting workers, I do not know how that can happen. It is really—it does not make sense to me.

Mr. BURLISON. Yes, it seemed that there is a lack of understanding of basic economics, and the results of some of these decisions that are made. You do not have to have an economics degree because you are experiencing it firsthand, right?

Ms. BARRON. Yes. I am experiencing it firsthand. I mean, I live it every day. I see it every day. I live in Seattle, where these policies have absolutely devastated us, and more is coming. I have—all my friends work in the industry, and the stories that we get every day, that I get every day.

Oh, Simone, you know what? I have to get another job. Why? Oh, well they just cut all of our shifts. Me personally, I am affected as

well. My shifts have been cut now from four to five shifts a week down to two, and maybe one a week if I am lucky, and that is because this impending hike that is coming on January 1, and I am not the only one.

Mr. BURLISON. Right, because if you require the employers to pay more, then you eliminate the tipped credit, then the only way to accomplish that is to cut hours, right? Cut staff?

You have fewer people working and providing services. It is more expensive to pay those people, and the costs of everything goes up, so that you have fewer people working, and the people—and everybody is having to pay more.

Ms. BARRON. Exactly, and one of the biggest things, the first thing that always happens is the support staff gets cut. We are talking about entry level jobs here. Those are usually entry level jobs into the restaurant industry. Those are your bussers, your service assistants, those are, you know, those tend to be people of color, if you want to talk about it that way, people who are just starting out in the industry, maybe this is their first job in America even.

Those jobs are getting cut. They are just getting cut.

Mr. BURLISON. Can you talk or touch a little bit upon—I am sure you have seen the proposal, proposed change to eliminate the taxes on tips.

Ms. BARRON. Yes.

Mr. BURLISON. That is actually going in the opposite direction. To me this is a war against tipped workers, but I think that this proposed change by the Trump administration might actually—you could respond to what your thoughts are on that.

Ms. BARRON. Well, I will just—I do not know how they are going to work out, no tax on tips. I think it is fantastic though. The reason why I am saying, you know, if we were sitting here talking about we want, higher wages, even if we have a higher wage like $17.00 or more in Seattle, if I am working in a restaurant that is really, really booming, and I make a lot of tips 1 week, all of the taxes come out of that paycheck.

I worked over Mother's Day weekend. I made a lot of tips. Even though I had that higher wage, my paycheck, my wage paycheck was only $25.00. To me, it is not about the wages, the flat wage that I am getting, it is about the tips that I am getting. If we have no tax on that, then I guess then I would maybe benefit a little bit from having a higher wage, but it is all about the tipping, it is all about the tipping.

Mr. BURLISON. Mr. Boucher, can you touch on the costs of complying with all the regulations, the burden of that, and the impact on your businesses?

Mr. BOUCHER. Sure. I have actually done the calculus a number of times over the years, and I think you alluded to this, that there is no question that we would have to cut staff and increase prices. In our business model, we operate on a three-legged stool approach to decisionmaking.

We operate, make decisions what is best for the employee, what is best for the customer, and what is best for the business. They all have to balance that three-legged stool. In this case, all three lose. All three would lose because we would cut hours, cut staff,

guests would get worse service, and the business already operating on three to five cents of profit of every revenue dollar that comes in, would shrink as well.

It would just devaState our business approach of the three-legged stool.

Mr. BURLISON. Thank you. My time has expired.

Chairman KILEY. I now recognize the Ranking Member, Dr. Adams for 5 minutes.

Ms. ADAMS. Thank you, Mr. Chairman. Ms. Jayaraman, one of the major differences between republican and democratic administrations is the manner in which the focus is placed on how to pay tipped workers for time spent on activities, for which they cannot earn tips. First, for the benefit of those among us who may not have worked in a full-service restaurant, can you explain what side work is?

Ms. JAYARAMAN. Yes. Absolutely. First of all, as I mentioned, I represent 300,000 restaurant and service workers, 150,000 petitions from workers were delivered to Congress saying people want a raise, a full minimum wage with tips on top. Part of the reason that they say that, why so many workers have been asking for this is because there is such a high level of wage theft, the highest-level effect of wage theft of any industry.

The U.S. Department of Labor has reported an 84 percent violation rate with regard to employers complying with the rules surrounding the two-tiered wage system, and one of them has to do with side work. The fact that there is plenty of work that tipped workers are asked to do, that does not allow them to actually get tips, rolling napkins, setting up tables, putting ketchup bottles, or mustard bottles on the table, condiments, all the things that—well, wiping glasses.

All the things, rolling silverware, all the things that set up a table, but do not allow you to interact with guests. It was really very problematic to see rules taken away during the Trump administration protections—taken away for workers doing side work to ensure that while they are doing side work, they are not being paid continuously a sub-minimum wage.

We need to ensure that workers are only doing that for 20 percent of their time or less, so that most of the time they actually have the ability to get the tips that get them to the full minimum wage.

Ms. ADAMS. Is it correct that time spent on side work is time spent not earning tips?

Ms. JAYARAMAN. Not earning tips.

Ms. ADAMS. Okay. Walk us through how the 80/20 Rule matters for restaurant workers.

Ms. JAYARAMAN. Right. That is what I was saying—that there is a very high level, unfortunately, of wage theft. That means employers engaging in activities that do not allow workers to get the full minimum wage, or have their rights protected.

When you have employers having workers do lots of side work, not able to access tips, they then are not able to get enough tips to bring them to the full minimum wage, which is why in our surveys we found 50 percent of workers say I regularly, consistently

experience times when tips do not bring me the full minimum wage, and the employer does not make up the difference.

Ms. ADAMS. What was the Trump administration's approach to paying restaurant workers for activities such as side work?

Ms. JAYARAMAN. I want to say that the Trump administration's first act coming into office, was to push to make tips the property of owners, rather than workers, which was the most egregious thing that any administration had ever done to tipped workers. When we want to talk about an attack on tipped workers, the most precious thing tipped workers have is their tips, on top of their wages.

The fact that the Trump administration tried to make tips the property of owners, rather than workers was the first real attack on tipped workers. The second was to remove protections that they had, that would allow them to actually earn a full minimum wage with tips.

Clearly, if they are allowed—if an employer is allowed to pay them a sub-minimum wage, while doing excessive amounts of side work, they actually cannot then access enough tips to bring them to the full minimum wage.

Ms. ADAMS. Ms. Jayaraman, what are your thoughts regarding the argument that paying a full minimum wage with tips on top would kill business and reduce tipping?

Ms. JAYARAMAN. Yes, so as I mentioned, there are seven states that have already—require a full minimum wage with tips on top. Our research shows that not only have they consistently had higher small business growth rates, job growth rates, tipping averages in the 43 states, but in fact, during the pandemic they had done—they much outperformed the 43 states with the sub-minimum wage.

More recently, one fair wage, a full minimum wage with tips on top was passed in Flagstaff, D.C., and we are seeing more restaurants, more jobs, and higher wages including tips.

Ms. ADAMS. Okay, so your testimony linked the tip credit and sub-minimum wage for tipped workers with discrimination and sexual harassment, so how does a tip credit make that possible?

Ms. JAYARAMAN. With an overwhelmingly female population, over two-thirds. These workers are vulnerable to harassment from customers in order to have to, you know, feed their families and tips. They have to put up with all kinds of inappropriate customer behavior in order to feed their families and tips, which is why the industry has the highest rates of harassment of any industry.

Ms. ADAMS. Thank you very much. Mr. Chair, I yield back.

Chairman KILEY. The Representative from Wisconsin, Mr. Grothman, is recognized for 5 minutes.

Mr. GROTHMAN. Thank you. First of all, I guess for Mr. Boucher or Mr. DeCamp, I guess part of the debate here today, or what the previous speaker said, kind of implies that people are almost destitute here if they are working as a server or a bartender.

I talked to some of the employers in my district, just a regular variety sports bar, and even they are amazed at the amount of money that their employees are getting in tips. Could either of you give a suggestion as to what either the wait staff or the bartenders

are making, say—first of all, in general, and second on say a Friday night?

Mr. BOUCHER. Yes. I would be happy to answer it. As I mentioned in my testimony, our servers are in between $20.00 and $35.00 an hour when you include their hourly wage plus tips. In fact, we at times are challenged with trying to promote a tipped employee into a management position because there are times where they are earning more, especially as you indicate on those busier weekend nights.

Our higher end concepts, with the higher check average, they earn a significant amount of income, and it is difficult sometimes to recruit them to want to become a manager.

Mr. GROTHMAN. Do they make more than you guys sometimes?

Mr. BOUCHER. I am sorry?

Mr. GROTHMAN. Do they make more than you guys sometimes? Your managers? I am sure they do.

Mr. BOUCHER. That is what I am saying. There are times, yes.

Mr. GROTHMAN. Yes. I mean I was talking to one of my guys recently. His folks are making more than yours, but Mr. DeCamp, do you think $20.00 to $25.00 bucks an hour on tips, or do most people make more than that?

Mr. DECAMP. It depends very much on the restaurant, but on average they are doing very well, and with most of the restaurants that I work with, the front of the house employees, the servers, the bartenders and what not, tend to have total earnings that are well above what the kitchen staff are earning, the cooks, the prep cooks.

Mr. GROTHMAN. Yes, way more.

Mr. DECAMP. Right. Those are the positions that people want in the restaurants because they are lucrative, so the idea that most tipped employees are on the edge of starvation is just wrong. That ignores the economic reality.

Mr. GROTHMAN. Can you give me a crack at what people are making, you think, an hour?

Mr. DECAMP. Right. The current economic data that we have seen suggests that the average tipped employee across the United States between their cash wages and their tips is earning $15.51 an hour. That is across all restaurant concepts.

Mr. GROTHMAN. Well, they ought to come to other places because I think they make more than that, but if that is what you think. According to the National Restaurant Association, tipped workers earn a median wage of nearly four times the current Federal minimum wage.

Can you discuss the earnings? Well, we kind of covered that. I am sorry, how high do you think people get in your restaurant if the better people work a little bit harder? What do you think they can work their way up to hourly?

Mr. BOUCHER. As I said, there are times where I have seen—I will just give you the number. We have employees that make between $75,000.00 and $100,000.00 a year in a tipped capacity.

Mr. GROTHMAN. All right, that is what I thought. You can do that. Not maybe at a base place.

Mr. BOUCHER. Yes.

Mr. GROTHMAN. A little nicer than average, a particular busy place. I will ask you here now if you have a detailed breakdown

as to what an average day would look like with you tracking the hours of your tipped employees. Should the 30 continuous minute rule be finalized?

Do you want to give us an idea of the amount of paperwork that is going to have to go into that?

Mr. BOUCHER. You are talking about the 80/20?

Mr. GROTHMAN. Right.

Mr. BOUCHER. It is impossible. It is impossible to track, and we did it as best as we could, but it is—you would have to have—I would have to hire someone literally, to stand there and keep track of every 2 minutes someone is rolling silverware, as she indicated, or—and I would argue that these other tasks that are being done, that is part of the service that they are giving the customer.

If they are not rolling silverware for that guest, they are just throwing silverware and a napkin on a table, that is not exactly what our guests want. I would argue that these other non-tipped timing is all part of the guest experience.

Mr. GROTHMAN. I will give you one other question, and these are great jobs, like many people I worked in the service business when my first jobs were out there, but could you let us know when you are hiring somebody, how much training, or that sort of thing, goes into before you allow them to become wait staff?

Mr. BOUCHER. Yes, our servers are trained for at least seven shifts, depending on their experience, sometimes ten, and they are paid minimum wage for those shifts.

Mr. GROTHMAN. Okay. Within 2 weeks you can take the job. I mean this could be compared to other jobs, you know, a tech school degree, and maybe be an apprentice for a couple years, within 2 weeks if I apply to your place to be wait staff, 2 weeks from now I could be making, you know, the $25.00.

Mr. BOUCHER. $25.00 an hour, yes. In some cases, that is people with no experience at all.

Mr. GROTHMAN. Right. You can even have an 18-year-old just hired like that.

Mr. BOUCHER. Correct.

Mr. GROTHMAN. Okay. Thank you.

Chairman KILEY. The Representative from California, Mr. Takano is recognized for 5 minutes.

Mr. TAKANO. Thank you, Mr. Chairman. I want to thank the witnesses for being here today. The title of this hearing, Examining the Biden Harris Attacks on Tipped Workers, makes it obvious that my colleagues across the aisle would like to frame their agenda as pro-worker.

There is nothing pro-worker about advocating for the continuation of a sub-minimum wage. The two-tier wage system that tipped credits have created costs workers billions of dollars a year in wage theft, and employer violations of regulations designed to protect tipped workers occurs at alarmingly high rates.

While there are many employers who ensure that their employees are being fairly paid, unscrupulous employers who seek to save on labor costs or skim off the top of earned tips are costing American workers their livelihoods.

Too many tipped workers in this country are unable to make a sustainable living. Ms. Jayaraman, approximately 5.1 percent of all

workers live in poverty, but for tipped workers the share is much higher, 11.3 percent. What role does the tipped credit play in pushing workers into poverty?

Ms. JAYARAMAN. I would ask, I would challenge anybody here, any of you Congress members to try to live on $2.13 an hour, with the bulk of your income coming from tips from your constituents, depending on whether they like your smile, or they like the way you behave, or your body, or whether you let them touch you, which is the reality for the overwhelming majority of tipped workers in the United States, who are overwhelmingly women, disproportionately women of color.

We have the highest rates of single mothers of any occupation, having to put up with all kinds of inappropriate behavior from customers in order to feed their children in tips. Why are they at more than twice the rate of poverty of other workers? It is because tips are unreliable.

Tips go up. They go down, they go up and down shift to shift, week to week, season to season, month to month, but your rent and your bills do not go up and down every week, month, season to season.

The instability of tips is why so many workers find quite often their tips do not bring them to the full minimum wage. In fact, as I have said, 50 percent of workers say regularly they experience sometimes tips not bringing them to the full minimum wage, and the employer not making up the difference because as the U.S. Department of Labor found, an 84 percent violation rate with regard to employers complying with these rules.

The combination of the ridiculously low wage, the instability of tips, and the non-compliance with these rules results in workers earning too little to feed their families, which is why the people who feed us use food stamps at double the rate of other workers.

Mr. TAKANO. Thank you so much for that. This tip credit system also means that employers are relying on customers, as you have said, to make up the full employee's wage, and they often do not get to, even the Federal minimum.

You already described how the model puts at risk workers in the workplace, and you eluded to specifically discrimination and harassment. That is what tipped workers often have to endure in their jobs. Is that right?

Ms. JAYARAMAN. That is right. Professor Katherine McKinnon, who is the Nation's leading scholar on sexual harassment coined the term, "sexual harassment," has said that the restaurant industry and tipped workers, in particular, have the highest rates of sexual harassment of any industry because they have to rely on unstable tips and the biases and harassment of customers in order to get those tips.

She also has said that there is no policy she has seen in her decades of work on this issue more effective at cutting sexual harassment than actually providing these workers with a full minimum wage, with tips on top.

It got worse with the pandemic, thousands of women reported to us I am regularly asked, "Take off your mask, so I can see how cute you are before I decide how much to tip you."

That was so pervasive. We ended up working with Professor McKinnon to coin a new term, "Maskual Harassment." That strikes me as so humiliating and undignified for any human being who does not have the right to a full minimum wage and has to—this sort of leverage over them to permit that harassment.

I mean the trouble that it would take to stand up to that when they are on the verge—when they are in poverty. Some opponents of paying tipped workers the full minimum wage claim that tipped workers do not want a full minimum wage with tips on top. What evidence do you have to the contrary?

Ms. JAYARAMAN. 147,000 petitions to Congress, and 1.2 million workers who walked off the job saying we no longer can put up with these wages.

Mr. TAKANO. I thank you, and I yield back.

Chairman KILEY. The Representative from Illinois, Ms. Miller is recognized for 5 minutes.

Mrs. MILLER. Thank you. Mr. Boucher, how do you think a policy to end taxes on tips would help your employees, and would that be a positive incentive for restaurant workers?

Mr. BOUCHER. I think this is a flash in the pan political moment discussing that. It is something that I cannot even wrap my head around how that would even play out in the tax code, and so I really do not have an opinion on that issue because I do feel it is a political statement currently because of the election that is coming up.

Mrs. MILLER. Certainly, it would help the employees, though?

Mr. BOUCHER. I would think so, but there is always going to be ways around that, and I think, you know, where is the Federal Government going to get the money to reconcile all those taxes that are not going to come in?

Mrs. MILLER. Well, I want to thank you for creating small businesses that provide jobs and benefit local communities. I am sorry that D.C. bureaucrats continue to think that they know how to run your business better than you do, especially after all the damage that they did to Main Street during COVID. Thank you, and I yield back.

Chairman KILEY. The Ranking Member of the full Committee, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Ms. Jayaraman, you have indicated that eliminating the tip credit and the sub-minimum wage would not reduce tips, and would not have an effect on employment or business. Do you have research to show that?

Ms. JAYARAMAN. Absolutely. As I said, we just—we have years of research showing that the seven states, compared to the 43 states have the same or higher small business growth rates, establishment growth rates, job growth rates, and tipping averages.

We have a new report today showing that over the last couple of years since the pandemic, the seven states have actually outpaced the 43 states with higher establishment growth rates, higher employment growth rates, and higher overall incomes, including tips, compared to the 43 states with the sub-minimum wage.

Since the pandemic we are seeing a gap between the seven and the 43 grow, with the seven states providing a full minimum wage doing better.

Mr. SCOTT. Thank you, and could you provide that research for us?

Ms. JAYARAMAN. On the Record, yes.

Mr. SCOTT. Thank you. In eliminating the tipped credit, how would that make life better for workers, rather than increasing the—just increasing the minimum wage, eliminating the tipped credit, what effect would that actually have on workers?

Ms. JAYARAMAN. Yes, so since we are seeing so much evidence that the states that have a full minimum wage with tips on top, are doing better, in terms of as I said, job growth, establishment growth, we know that workers would have the ability to grow in the industry.

Most importantly, they would have the stability, economic stability that they are not allowed in the states that provide a sub-minimum wage. In sub-minimum wage states, workers have to rely on tips that fluctuate to get them to the base wage, or higher.

That, as I said, changes day to day, month to month, week to week, shift to shift. A breakfast shift, you get a lot less in tips than a dinner shift. The instability of having to rely, and the stress of having to not know what you are going to earn when you go to work is the major difference.

Knowing what you are going to earn, and what you can count on from your employer then gives you the confidence to reject harassment, and that is why we are seeing that the seven states with a full minimum wage with tips on top, have one half the level of sexual harassment, as the states that have a sub-minimum wage.

Why? Workers in those states tell us we can count on a wage from our boss. We are not as reliant on customers to feed our families, so we get tips, but we do not have to put up with anything and everything from customers because we have that base wage.

Mr. SCOTT. Now, you mentioned schemes that could result in wage theft because of side work. Are there other schemes where you could essentially steal the worker's tips?

Ms. JAYARAMAN. The biggest problem we hear from workers is, as I said, they regularly work shifts where their tips do not bring them to the full minimum wage, and the employer does not make up the difference. That is one.

The second thing we hear a lot about is people who are not supposed to be in the tip pool, whether they are managers, or non-tip staff in the tip pool, reducing the amount of tips that workers are receiving.

The third thing we hear is I am asked to do work that is not tipped work, and I am paid a sub-minimum wage, and I do want to point out Darden is the world's largest employer of tipped worker—U.S. largest employer of tipped workers, world's largest full service restaurant company.

A few years ago in their shareholder report, they actually announced to shareholders that they would be trying to move to have all their workers earn a sub-minimum wage, regardless of what they do.

It is clear as long as there is a sub-minimum wage, there is an incentive for employers to have workers do all kinds of work. Whether it is side work, or it is cleaning bathrooms, or it is back of house work, and try to be able to pay them the sub-minimum

wage. That is why we need protections for workers who earn the sub-minimum wage that most of the time they are tipped workers earning tips.

Mr. SCOTT. Well, if the protection would be if you get caught you have a penalty, are the penalties sufficient?

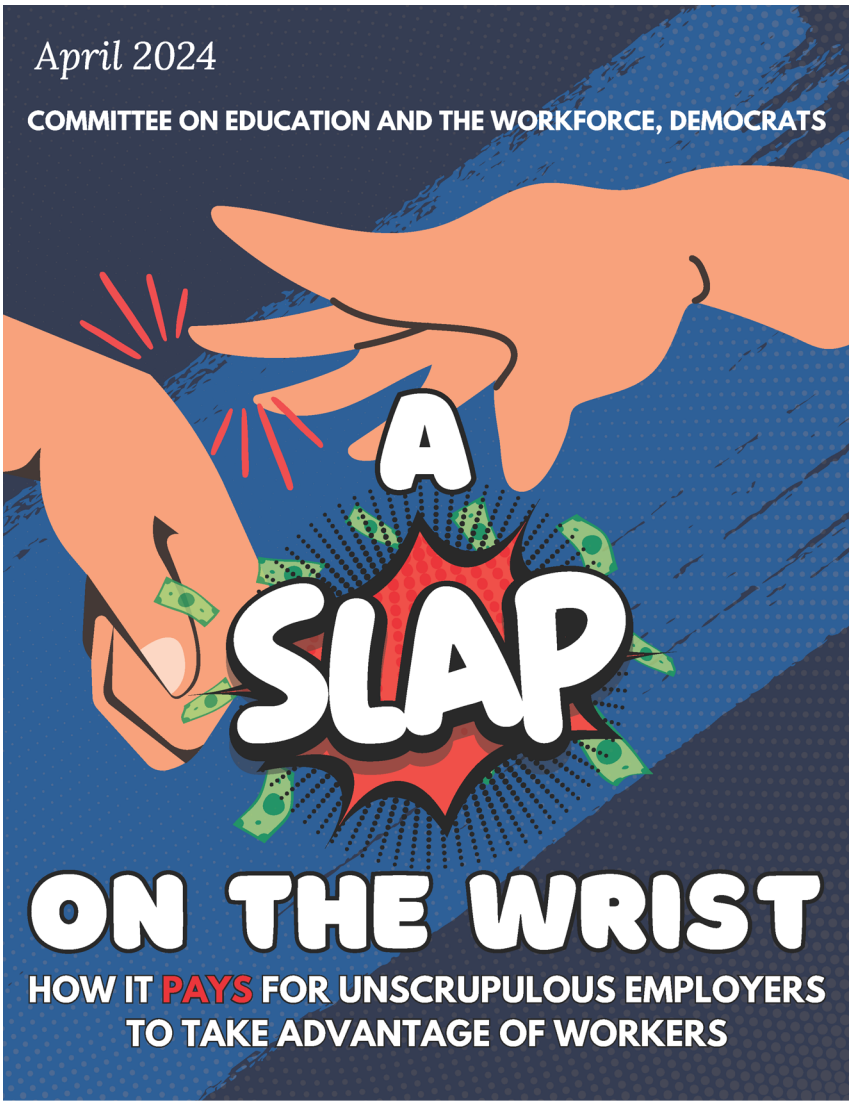
Ms. JAYARAMAN. The penalties are non-existent, and most employers end up fighting these kind of charges for years. By the time that a worker may even see some kind of restitution of their wages, it is years later. The amount of money has generally very much decreased.

They are settling for something a lot less than what they are owed, and so, no. Employers do not have any real incentive to follow the law because they can delay payment for so long.

Mr. SCOTT. Thank you. Mr. Chairman, I have a unanimous request that the democratic staff document called, A Slap on the Wrist, How it Pays for Unscrupulous Employers to Take Advantage of Workers, a document that was developed by the democratic staff be entered into the record.

Chairman KILEY. Without objection.

[The information of Mr. Scott follows:]


April 2024
COMMITTEE ON EDUCATION AND THE WORKFORCE, DEMOCRATS
A
SLAP
ON THE WRIST
HOW IT PAYS FOR UNSCRUPULOUS EMPLOYERS
TO TAKE ADVANTAGE OF WORKERS

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INTRODUCTION

Our nation's labor and employment laws are a covenant with workers. They secure the most basic promises of work for over 167 million people in the United States labor force[1]—the rights to earned wages, a safe workplace, and to organize and collectively bargain, among others.

But what happens when these laws are broken?

In such cases when an employer violates a worker protection law, they can be subject to a civil monetary penalty. These penalties—levied by federal agencies—are calculated based on various factors, such as the type and severity of the violation, the size of the employer, and the minimum and maximum allowable penalty, among other considerations. This tool aims to not only enforce compliance with the law, but also to deter future violations. However, civil monetary penalties are only effective when the assessed amount imposes enough of a cost on an unscrupulous business to make adhering to the law cheaper than violating it.

Regrettably, civil monetary penalties for labor and employment laws are egregiously low, to the point that if an employer is caught committing a labor violation the penalty amounts to the "cost of doing business" rather than a deterrent.[2] Under federal law, bosses stealing from their workers' paychecks can be liable for a lower amount than was originally taken.[3] The situation is more dire for workers seeking to unionize due to the absence of monetary penalties on employers who illegally interfere or retaliate.[4] It likely costs more for a business to become an annual member of the U.S. Chamber of Commerce ($300-$2,500)[5] than it would if they were to illegally fire a worker for union activity.

Corporations that break the law are paying next to nothing in penalties for endangering workers' lives and livelihoods.[6] For instance, when a worker is killed on the job, the maximum penalty is a little over $160,000 but, in practice, the median penalty that's been assessed is approximately $14,000.[7] For some context, according to a 2023 executive benefits survey, the median car allowance for CEOs was $15,000.[8] It should not be the case that the median penalty assessed on a workplace where a worker is tragically killed is less than the monetary perk that certain CEOs are provided to drive their cars.

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The highest punishment for an unscrupulous business illegally hiring children for long hours and dangerous jobs is a mere $15,629.[9] Yet, this is far less than the civil monetary penalties that can be assessed for defective consumer products. In that case, the maximum is up to $120,000 per individual violation and over $17 million for a series of related violations.[10] It is not right that the penalty for illegally hiring children for dangerous jobs is just a fraction of what can be assessed for the unsafe toys with which kids may play.

Lamentably, the instances cited earlier are not the only examples of penalties for violations of labor law falling far short than those in other statutes. There are numerous examples of non-labor and employment laws authorizing higher penalties than the ones that uphold basic worker protections, such as:

- Under the *Clean Air Act*, a polluter could be assessed over $450,000 in penalties for poisoning the air; however, the maximum for intentionally or repeatedly poisoning a worker is $161,323.[11]

- It would take approximately 41 child labor violations at the maximum level ($15,629) to match the current cap on penalties under the *South Pacific Tuna Act*—$639,908.[12]

- Under the *Preventing Illegal Radio Abuse Through Enforcement Act*, the Federal Communications Commission can penalize pirate radio broadcasters up to $119,555 per day per violation, up to a maximum of nearly $2.4 million.[13] However, the inflation-adjusted penalty for repeated or willful minimum wage and overtime violations is just $2,451; and for cheating workers out of their tips, the maximum inflated-adjusted penalty is $1,373.[14] It seems fair to ask whether the monetary penalty for stealing workers' wages and tips should be exponentially less than the one for stealing radio.

- A violation of the *Sponge Act (1914)*, which imposes certain prohibitions on catching commercial sponges from the waters of the Gulf of Mexico or the Straits of Florida, incurs a peak penalty of $2,103.[15] Meanwhile, a group health plan or health insurance company that refuses to appropriately cover mental health care and treatment for substance use disorder faces no monetary penalty.

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Federal labor and employment laws, including laws that safeguard affordable health care, are not mere suggestions, rather they are guaranteed protections for workers and children. Unfortunately, civil monetary penalties for worker protection violations are significantly weak and too low to deter violations. Without appropriate penalties, unscrupulous employers have no incentive to follow the law and workers face the brunt of the harm and damage.

This report highlights several laws with weak or nonexistent civil monetary penalties and underscores the urgency to strengthen each law's penalty regime. To ensure that America meets its obligation to workers and their families, it is imperative that Congress acts to responsibly raise civil monetary penalties to secure workers' rights and prevent violations.

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LOW CIVIL MONETARY PENALTIES FAIL TO DELIVER FOR WORKERS AND CHILDREN AND ARE STUCK IN THE PAST

Type of Violation	Applicable Law	Maximum Civil Monetary Penalty as of 2024	Year of the Last Increase in Statute*	U.S. President at the Time of the Last Increase in Statute	Price of a First-Class Stamp at the Time of the Last Increase in Statute
Child Labor Violation	*Fair Labor Standards Act*	$15,629	2008	George W. Bush	42¢
Child Labor Violation that Causes Death or Serious Injury	*Fair Labor Standards Act*	$71,031	2008	George W. Bush	42¢
Repeated or Willful Minimum Wage or Overtime Violation	*Fair Labor Standards Act*	$2,451	2008	George W. Bush	42¢
Tip Violation	*Fair Labor Standards Act*	$1,373	2018	Donald J. Trump	50¢
Violation of Rights to Organize and Collectively Bargain	*National Labor Relations Act*	$0	1935	Franklin D. Roosevelt	3¢
Serious Safety and Health Violation	*Occupational Safety and Health Act*	$16,131	1990	George H. W. Bush	25¢
Repeat or Willful Safety and Health Violation	*Occupational Safety and Health Act*	$161,323	1990	George H. W. Bush	25¢
Other Safety and Health Violation	*Occupational Safety and Health Act*	$16,131	1990	George H. W. Bush	25¢
Parity in Mental Health and Substance Use Disorder Benefits Violation	*Mental Health Parity Act/Mental Health Parity and Addiction Equity Act*	$0	1996/2008	Bill Clinton/George W. Bush	32¢/42¢

*Not accounting for inflation adjustments

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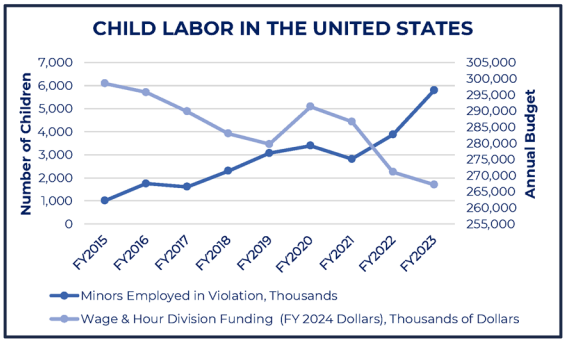
PENALTIES FOR ILLEGALLY EMPLOYING KIDS

The scourge of child labor that Congress sought to eliminate more than 85 years ago with the passage of the *Fair Labor Standards Act of 1938* (FLSA) is on the rise in the 21st Century. The FLSA establishes national labor standards, including protections for children in the workforce, and provides that penalties be assessed on employers who violate the law.[16] Protections for most child workers include limiting the working hours of children, limiting the sorts of job duties that children can perform, and specifying that children cannot work during school hours during the months when school is in session.[17] According to the most recently available enforcement data from the Department of Labor's Wage and Hour Division, the agency with primary responsibility for enforcing the FLSA, the number of children involved in child labor violations has skyrocketed by 472 percent from 1,012 in Fiscal Year (FY) 2015 to 5,792 in FY 2023—and these are solely the cases that have been detected by an increasingly resource-strapped and understaffed Wage and Hour Division.[18]

Recent high-profile exposés of companies illegally employing and overworking children in dangerous jobs have unveiled the horrific reality behind child labor statistics with story after story of young children working under hazardous conditions, staffing overnight shifts, handling dangerous chemicals, and forgoing school.[19]



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- A *New York Times* investigation discovered instances where children were made to "stitch 'Made in America' tags into J. Crew shirts[,] … bake dinner rolls sold at Walmart and Target, process milk used in Ben & Jerry's ice cream and help debone chicken sold at Whole Foods."[20]

- In Alabama, a subsidiary of the Hyundai Motor Company was found employing dozens of children in its metal stamping plant that produced car parts for the automaker.[21] The plant has been repeatedly cited by the Occupational Safety and Health Administration for numerous safety and health violations, including crush and amputation hazards.[22]

- Across 16 McDonald's franchise stores in Louisiana and Texas, federal investigators uncovered numerous child labor violations with over 80 children under the age of 16 operating dangerous machinery and working long and late hours.[23]

- In Kentucky, an 11- and 13-year-old were employed for months in a distribution center to operate forklifts and pick up warehouse orders.[24]

- Hundreds of children, as young as 10 years old, increasingly populate the roofing workforce—often working long hours and at least 30 feet off the ground without fall protection or safety training.[25]

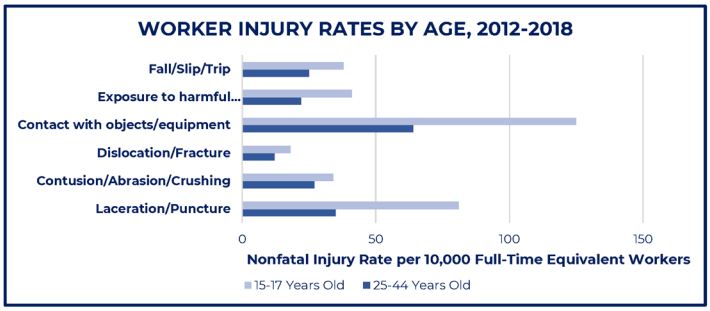
- Packers Sanitation Services Inc., a third-party staffing firm that primarily provides labor contracts for sanitation services, was found to have illegally employed over 100 children between the ages of 13 and 17 years old during school hours and on overnight shifts. Across eight states, children were hired to handle toxic cleaning chemicals and sanitize dangerous meat processing equipment, such as "back saws, brisket saws[,] and head splitters."[26]

"This shadow work force extends across industries in every state" with some children, as young as 12 years old, working in slaughterhouses, factories, and lumberyards.[27] The illegal use of child workers is not an issue with one unscrupulous employer, sector, or region of the country, it is a national crisis.

The resurgence of child labor has placed the health and safety of children at serious risk. Young workers face higher rates of occupational injury compared to their adult counterparts.[28] Between 2012 to 2018, approximately "3.2 million nonfatal, job-related

injuries to young workers were treated in hospital emergency departments."[29] The National Institute for Occupational Safety and Health found that young workers had to seek emergency medical care for on-the-job injuries at a rate up to 2.3 times higher than older adult workers.[30] According to a news investigation, the number of workers under the age of 18 suffering from workplace injuries and illnesses has nearly doubled over the last decade.[31] Children in workplaces are not suffering from mere cuts and scrapes, their welfare and lives are at stake:

- At a Perdue Farms poultry plant in Virginia, a 14-year-old child, tasked with cleaning and sanitizing the chicken slaughterhouse on an overnight shift, had his arm caught on an assembly belt with "hard plastic teeth…tearing open his forearm down to the bone." The child spent two weeks in the hospital and had three separate surgeries.[32]
- In Florida, a 15-year-old, on his first shift, suffered "second-degree burns on 20 to 30 percent of his body" after falling from a roof and onto hot tar.[33]
- In Mississippi, at another poultry facility, a 16-year-old boy was killed while sanitizing a meat processing machine that entangled the child. The death was the third instance of a fatal injury at the plant in under three years.[34]
- In June 2023, a 16-year-old employed at a landfill facility was killed at work after being crushed between a tractor and its trailer.[35]



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In addition to the health and safety risks in workplaces, children working excessive hours, beyond the allowable limits under federal requirements, can hamper their schooling and development. According to one study, high school students who worked 20 or more hours in a week while enrolled in school were found to have worse academic and behavioral outcomes, as well as a higher incidence of substance abuse, relative to students working under 20 hours.[36]

Civil penalties for child labor violations are, according to the Department of Labor itself, "not high enough to be an effective deterrent" against exploitive and oppressive child labor.[37]

Currently, the maximum penalty for violating federal standards on child labor is $15,629 per violation, with violations resulting in serious injury or death incurring a maximum of $71,131.[38] Recent enforcement actions against child labor illustrate the inadequacies of existing penalties, even for the most egregious violations:

- In Utah, a federal investigation discovered 22 14- and 15-year-old children working up to 46-hour work weeks and starting shifts after midnight at a restaurant supply company. The employer was assessed a penalty under $17,000—equivalent to an average penalty of approximately $754 per child.[39]
- At a Tennessee McDonald's, the franchise operator was assessed $3,258 in penalties for hiring a 15-year-old worker "who suffered hot oil burns while using a deep fryer."[40]
- In violation of federal child labor restrictions on acceptable occupations, a Georgia contractor employed a 16- and 17-year-old to work near the storage and transportation of explosives. The employer assigned the teenagers to bore and enclose holes for dynamite placement. The Wage and Hour Division imposed $5,592 in civil penalties.[41]
- In Ohio at a lathe mill, a 15-year-old child was illegally hired to operate a sawmill and subsequently injured after being "entangled in the gears of a powered wood processing machine." The employer was cited a little over $22,000 for the violation.[42]

Unscrupulous employers effectively have no incentive to adhere to the law as they can exploit children and place them in harm's way and, if caught, face a fine that is not commensurate with the violation.

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PENALTIES FOR STEALING WORKERS' WAGES

The FLSA also created the nation's first minimum wage and maximum workweek.[43] Today, the FLSA continues to uphold a basic promise of work—the right to wages workers have earned.

Unfortunately, the practice of low-road employers failing to pay workers the full amount of wages and withholding earned benefits to which they are entitled—known as wage theft—is rampant across the country.[44] Wage theft occurs in various ways, including paying workers less than the legal minimum wage, failing to pay for hours in excess of a 40-hour work week (overtime), making employees work off-the-clock, taking illegal deductions from wages, and confiscating tips.[45] While the FLSA provides a national wage floor, workers across the country can be legally owed varying wages depending on the location of their workplace as the FLSA does not supersede state or local laws that offer greater protection.[46] Under the FLSA, wage theft occurs when employers fail to compensate their workers with at least the federal minimum wage of $7.25 per hour and premium pay for overtime hours.[47] In some states, the state wage law explicitly recognizes workers' right to all wages earned even if it is above the applicable minimum wage.[48]

To be clear, unscrupulous employers are not simply skimming pennies from workers' hard-earned paychecks, in multiple instances they are stealing thousands and even millions of dollars in violation of federal law:

- In South Carolina, federal investigators recovered nearly $392,000 in back pay and liquidated damages for 31 workers after discovering two supermarkets and a restaurant, connected to one individual, failed to pay the federal minimum wage to tipped and non-tipped workers and earned overtime pay.[49]

- In May 2023, a federal jury found an employer guilty of stealing $22 million from over 7,500 workers by failing to compensate workers for hours actually worked and overtime.[50] This case is the largest verdict ever secured by the Department of Labor under the FLSA.

- In Florida, an employer was ordered to pay back over $450,000 after federal investigators found the business had illegally exempted 75 grocery store workers from earning overtime pay for additional hours.[51]

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- In September 2023, the Department of Labor obtained a court order to compel the owners and operators of 14 Subway restaurants in the San Francisco area to repay 184 workers $475,000 in stolen wages. Workers were denied minimum wage, overtime, and tips.[52]

Overall, wage theft is a multi-billion dollar problem. Each year, employers steal at least $15 billion from workers' paychecks in minimum wage violations alone,[53] with all forms of wage theft possibly exceeding $50 billion annually in stolen compensation.[54]

To put this in perspective, according to the most recently available data from the Federal Bureau of Investigation, robberies accounted for an estimated $482 million in losses in 2019 and $598 million in losses in 2018.[55] If you combined the losses from robberies from both of those years, it would still be roughly 50 times less than the total wage theft losses in one year. Dollar-for-dollar, wage theft is larger than all forms of property crime combined.[56]

The theft of pay workers are legally entitled to—both under federal and state laws—disproportionately harms lower paid and vulnerable segments of the labor force.[57] Victims of minimum wage violations are over three times as likely to be in poverty,[58] and those same violations also push working families into poverty and lead to an increase in the use of public assistance programs.[59] Even though wage theft under the FLSA is a portion of the cumulative estimates from across the country, it remains a significant threat to workers' livelihoods.

The FLSA provides the Department of Labor's Wage and Hour Division with two enforcement tools for wage violations: 1) backpay and liquidated damages and 2) civil monetary penalties.[60] Unfortunately, both provisions are simply inadequate at addressing and deterring wage theft. Currently, employers found liable for unpaid wages, tips, and overtime are required to pay workers back the stolen wages, as well as pay an "equal amount as liquidated damages."[61] However, under the FLSA, workers suffering from minimum wage violations are unable to recover the total amount of stolen wages, and instead are only entitled to the difference between their actual pay and the federal minimum wage and an equal amount in damages.[62]

On top of backpay and damages, the Wage and Hour Division can impose civil monetary penalties on law-breaking employers to serve as an additional disincentive. However, the current penalty levels are far too low to be a meaningful deterrent. In fact, meager penalties for wage theft remain a decades-old problem. In 1981, the General Accounting Office concluded "many employers appear to have willfully violated the [FLSA] and that current

enforcement actions have not resulted in penalties that would deter these violations."[63] Today, the inflation-adjusted ceiling on civil monetary penalties is just $2,451 for repeated or willful minimum wage and overtime violations.[64] Even though Congress amended the FLSA in 2018 to include protections against tip theft and authorize a civil monetary penalty equivalent to minimum wage and overtime violations,[65] the maximum penalty, accounting for inflation, for stealing workers' tips is only $1,373.[66] According to Jenn Round, a fellow at the Center for Innovation in Worker Organization at Rutgers University, "some companies are doing a cost-benefit analysis and realize it's cheaper to violate the law, even if you get caught."[67]

The limitations on civil monetary penalties mean that unscrupulous employers who steal workers' wages are charged low penalties that are nowhere close to the original stolen amount. For example, in one instance, federal investigators discovered extensive wage theft by a security provider and recovered nearly $550,000 in stolen wages for 778 workers.[68] However, the employer was solely fined $50,000, amounting to, on average, roughly $64 in penalties for each affected worker.[69] In another occurrence, multiple restaurants were ordered to provide $283,061 in back pay and tips for failing to pay the federal minimum wage and overtime, as well as allowing managers and the owners to collect from the tip pool, while only incurring a penalty of $11,419.[70] The rampant scope of wage theft in the United States, as well as the harm and burden, especially on low wage and vulnerable workers, underscores the urgency to raise penalties and secure a bedrock worker right.

PENALTIES FOR VIOLATING WORKERS' RIGHTS TO ORGANIZE

In 1935, President Roosevelt signed the *National Labor Relations Act* (NLRA) into law. The landmark legislation guaranteed private sector workers the right to organize and collectively bargain over pay, benefits, and working conditions with their employer.[71]

There is a clear advantage for workers who belong to a union. The average median union worker is paid approximately 20 percent more than the median nonunion worker.[72] In the private sector, union workers are 26 percent more likely to be offered health insurance through work, 12 to 15 percent more likely to have paid leave, and 53 percent more likely to have defined-benefit pension plans.[73] In addition to other direct benefits, unionization has spillover effects on nonunion workplaces by raising the floor on labor standards, and thus compelling nonunion employers to adjust to remain competitive with respect to worker recruitment and retention.[74]

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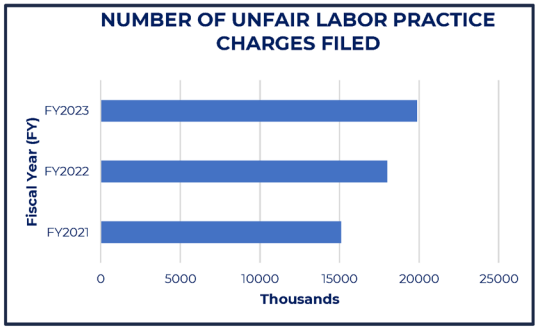
In recent years, there has been a surge in workers organizing to improve their working conditions, such as workplace safety protections, as well as access to health care and paid leave.[75] The National Labor Relations Board, the federal agency tasked with enforcing the NLRA, reported a 3 percent increase in election petitions for union representation for FY 2023 compared to the year before, and the highest number of petitions since FY 2015.[76] This uptick builds upon the dramatic increase seen in FY 2022 where the agency recorded a 53 percent increase in petitions over FY 2021.[77] In 2023, the number of workers represented by unions rose by 191,000, bringing the overall number to 16.2 million.[78] In addition to the rise in worker organizing, public support for labor unions remains strong at 67 percent approval.[79]

While the momentum and popularity of unionization is growing, union density is not making the same strides. For decades, union membership in the United States has been on the decline after peaking in the 1950s when over one-third of the workforce belonged to a union.[80] In 2023, only ten percent of America's workers were members of a union.[81]

For decades, unscrupulous employers have taken advantage of weaknesses in the NLRA to thwart workers' organizing efforts. In 2016 and 2017, employers were accused of breaking the law in 41.5 percent of all private sector union elections.[82] During the same period, employers were charged with illegally terminating organizing workers across 1-in-5 elections.[83] The anti-union attacks have only grown in recent years. In FY 2023, the National Labor Relations Board reported a 10 percent uptick in unfair labor practice charges compared to the 17,988 charges filed the year before, building upon the 19 percent increase between FY 2021 and FY 2022.[84]



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According to an analysis of worker organizing drives, between 2016 and 2021, 87 percent of employers conducted anti-union campaigns that consisted of "threats, interrogation, promises of improvement, and surveillance."[85] In fact, 75 percent of employers forced workers to attend captive audience meetings to listen to anti-union speech by management, 62 percent held supervisor one-on-one meetings with workers to threaten or interrogate them about their union activity, and nearly 40 percent threatened workers with full or partial workplace closures.[86]

With the emergence of the "union-avoidance" industry, employers have also embraced the practice of hiring professional anti-union firms and consultants to combat unionization.[87] Employers spend approximately $433 million each year on anti-union consultants to guide employer campaigns against workers' independent decision to unionize, which is likely an underestimate due to underreporting by employers.[88] Some consultants have been found to be paid $350 an hour or $2,500 or more a day for their services.[89] In fact, the e-commerce giant, Amazon, reportedly spent $20,000 per week for each anti-union consultant.[90]

Unscrupulous employers can get away with doing these things and violating workers' rights because the NLRA lacks basic enforcement tools, such as the ability to assess civil monetary penalties, to deter violations, or unfair labor practices. Under current National Labor Relations Board precedent, when an employer is found to have, for example, unlawfully fired an employee for protected union activity, the employer is required to reinstate the employee; post a notice of employees' rights under the NLRA; and pay the employee back wages, as well as potentially provide compensation for other documented harms suffered due to the employer's unfair labor practice, minus what the worker earned if they had gotten another job in the meantime.[91] While the goal of such "make-whole" remedies is to restore a worker to the pay and benefit level they had at the time of the employer's unfair labor practice, they impose no additional cost on the employer for violating the law. Rather, an employer ends up responsible only for paying what they would have paid if they had not unlawfully discriminated against the employee. Firing workers for protected union activity is essentially "cost-free" and remains extremely effective in stopping an organizing drive, sending a chilling effect throughout the labor force. Additionally, for other serious violations, such as illegal threats to close the workplace if the union prevails, employers are merely subjected to a cease-and-desist order and directed to post a notice in the workplace. Again, this remedy is often imposed years later, once all appeals are exhausted.

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To effectively deter NLRA violations by employers, it is imperative that the National Labor Relations Board be able to impose civil monetary penalties based on relevant factors, such as the seriousness of the violation, employer's past actions, and size of the firm. Without civil monetary penalties, employers can act with impunity and face no additional cost for violating workers' rights. Workers will bear the brunt of the costs of such unlawful actions by losing their job or being denied the benefits of union membership.

PENALTIES FOR UNSAFE WORKPLACES

In 1970, President Nixon signed the landmark *Occupational Safety and Health Act* (OSH Act) into law, providing the federal government the authority to produce and enforce health and safety standards to protect the well-being of our nation's workers from various occupational hazards and diseases.[92] The historic legislation empowered the creation of the Occupational Safety and Health Administration (OSHA) to carry out the vital task of assuring "safe and healthful working conditions for working men and women."[93] The OSH Act provides workers, at a high level, the legal right to be safe and whole at work and for employers to guarantee that right.[94] Under the law's framework, along with enforcement by OSHA, workers can raise concerns about hazards without facing retaliation, obtain training to remain safe and healthy, decline dangerous tasks, as well as be protected overall, among other rights.[95]

Since 1970, OSHA's efforts have significantly reduced workplace deaths, injuries, and illnesses. When OSHA was first authorized in 1970, 38 workers were killed on the job every day.[96] Decades later, that figure has fallen to 14 deaths per day in a workforce double the size.[97] Workplace injuries and illnesses have also declined from 10.9 per 100 workers in 1972 to less than 3.3 per 100 workers in 2013.[98] Several studies found that inspections and penalties reduce injury rates without harming employment, sales, or firm survival.[99]

However, contrary to the objectives of the OSH Act, too many workers continue to be exposed to hazardous conditions. In 2022 alone, over 3.5 million workers were injured or sickened through their job—which is an underestimate due to gaps in data collection and reporting.[100] Each year, approximately 120,000 workers die because of occupational diseases.[101] The total economic burden of occupational harm in the U.S. was roughly $250 billion in 2007[102] ($377 billion in 2024 dollars). Much of this burden falls on low-wage workers, pushing them into poverty.[103] Not only are the hazards to workers currently at untenable levels, but workplace deaths are also on the rise. Between 2018 to 2022, over 25,000 workers suffered *fatal* injuries on the job.[104] In 2022, 5,486 workers were killed at

work—a 15 percent increase from 2020.[105] The fatal occupational injury rate, or the number of worker deaths per 100,000 full-time employees, saw an uptick to 3.7 in 2022, which is the highest annual rate since 2008.[106]

According to an expert who testified before the Committee on Education and Labor, "the primary flaw in our worker safety laws is not the rules we impose but the lack of consequences for breaking those rules."[107]

Currently, when an employer violates a workplace health and safety standard, the OSH Act provides for civil monetary penalties to "encourag[e] compliance and deter[] violations."[108] When proposing penalties, OSHA is required to consider four factors: 1) "the gravity of the violation; [2)] the size of the employer's business; [3)] the good faith efforts of the employer; and [4)] the employer's history of previous violations."[109] However, as noted in a 1992 report on OSHA penalties by the General Accounting Office, OSHA and the Occupational Safety and Health Review Commission, the independent federal agency responsible for resolving OSH Act-related disputes,[110] are not required to consider the economic benefit of noncompliance that an employer may receive for ignoring worker health and safety requirements.[111] Additionally, OSHA is restricted to a narrow range within which it can calculate penalties for violations. In 2024, the minimum penalty for a *serious* violation—when there exists "a substantial probability that death or serious physical harm could result"[112]—is $1,190 and the maximum is $16,131.[113] Employers who intentionally endanger workers, repeatedly fail to adhere to regulations, or engage in both acts only face a minimum penalty of $11,524 for each violation.[114]

After a citation with a preliminary monetary penalty is issued, it can be further diminished due to a loophole in the OSH Act that fails to require employers to correct or eliminate occupational hazards while contesting OSHA citations.[115] The process to resolve employer contestations can play out over many months or years.[116] This elongated process has forced OSHA to often lower penalties on employers in agreed settlements to compel timely compliance and abatement of workplace hazards.[117] Otherwise, employers can file objections over citations to drag the timeline out and evade accountability, while workplace hazards persist or worsen.

As a result, civil monetary penalties for OSHA violations are often exceedingly low. According to an analysis of OSHA enforcement data, in FY 2023, the average penalty issued for a serious violation was $4,597.[118] The median civil monetary penalty imposed on employers for a preventable worker death was $14,063.[119]

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In instances where workers are seriously harmed, OSHA penalties pale in comparison to the damage caused. For example, in Ohio, a devastating explosion at a foundry killed one and injured 15 others due to the failure of the employer to adhere to the well-known and required lockout/tag out procedures.[120] Even though 16 workers were harmed with one being killed, OSHA proposed a mere $62,500 in fines against the employer.[121] In February 2022, the failure by a roofing contractor to utilize mandated fall protection resulted in a 15-year-old worker falling from the top of a two-story home and suffering "severe head and spinal injuries, and spend[ing] six days in a hospital." While the employer was assessed for child labor violations separately, they were only cited $8,702 in penalties by OSHA for worker health and safety violations.[122]

At the beginning of 2023, a 28-year-old farmworker, on his first day, was exposed to a heat index of approximately 90 degrees and died while harvesting vegetables due to the heat. OSHA found that the employer failed to protect the worker from heat exposure and proposed $15,625 in penalties for the worker's death.[123] In comparison, the penalty was higher than the average penalty for heat-related deaths. Between 2017 and 2022, OSHA's average penalty on employers for failing to protect workers from fatal heat-related illness was approximately $8,500, with some worker deaths yielding just a $2,000 penalty.[124] While an appropriate monetary value cannot be assigned to a person's life, the civil monetary penalties under the OSH Act are significantly less than the $10 to $12 million some federal agencies have developed as estimates for the value of a statistical life when conducting regulatory cost-benefit analysis and calculating risk reduction.[125]

The OSH Act "places responsibility on employers to protect workers from hazards and to comply with the law."[126] However, without a significant deterrent, unscrupulous employers will continue to ignore health and safety regulations and endanger the lives of their employees.

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PENALTIES FOR FAILING TO PROVIDE ESSENTIAL MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS

In 1974, Congress enacted the *Employee Retirement Income Security Act* (ERISA), an expansive law that established base standards to safeguard the security of workers' job-based benefits, including employer-sponsored health coverage.[127] Since ERISA's enactment, the landscape of employer-provided health plans has significantly transformed, with nearly 165 million people today receiving coverage through a job-based group health plan in the United States.[128] To ensure the Department of Labor is able to fulfill its statutory duty of ensuring the security of employee benefits, Congress has repeatedly amended ERISA to address new and emerging issues that undermine access to health benefits for working people.[129] While substantive progress has been made in ensuring access to comprehensive coverage, through landmark reforms such as the *Patient Protection and Affordable Care Act* (ACA),[130] barriers remain for workers and their families—particularly with respect to coverage of behavioral health care.

Currently, there is a substantial unmet need for high-quality behavioral health care in the United States. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), in 2022, approximately 23.1 percent of adults, or about 59.3 million people, had a mental illness and 48.7 million people aged 12 or over had a substance use disorder.[131] However, only about half of adults with mental illness received health services to treat their condition and only a quarter of individuals with a substance use disorder received the necessary treatment.[132] SAMHSA found that cost is a commonly cited barrier to care, including for a majority of individuals experiencing mental illness.[133]

Access to behavioral health care is critical to overall health and wellness. Mental illnesses are closely linked to physical health problems, such as diabetes, stroke, and heart disease, while, conversely, chronic physical illnesses can increase the risk of mental illnesses.[134] Individuals living with serious mental illness experience dramatically higher mortality rates than the overall population—dying as much as 25 years earlier overall—usually as a result of treatable conditions.[135] The COVID-19 pandemic further underscored the importance of equitable access to quality behavioral health care services. During the pandemic, the number of individuals reporting symptoms of depression or anxiety increased, with young adults being disproportionately impacted.[136]

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Advocates and policymakers have long sought to protect workers covered by job-based plans from the discriminatory treatment of behavioral health by group health plans and insurers by improving parity in coverage. Parity refers to the principle that coverage of mental health and substance use disorder (MH/SUD) services be no more restrictive than coverage of medical and surgical health services—reducing barriers and excessive out-of-pocket costs for working families when they obtain MH/SUD services. In short, parity ensures that MH/SUD is treated similarly to other kinds of health care services. Congress has taken several steps to improve parity, beginning in 1996 with the bipartisan *Mental Health Parity Act*,[137] which provided that annual or lifetime dollar limits for mental health care could not be more restrictive than those imposed on medical and surgical services.

In 2008, Congress took further action to bolster coverage by enacting the bipartisan *Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008* (MHPAEA).[138] MHPAEA greatly expanded parity protections by prohibiting large group health plans and issuers that provide MH/SUD benefits from imposing financial requirements or treatment limitations that are more restrictive than the predominant financial requirements or treatment limitations applied to substantially all covered medical and surgical benefits. The requirements of MHPAEA and its implementing regulations extended parity to SUD services and apply to both quantitative and non-quantitative treatment limitations, such as step therapy, prior authorization, network design, and other barriers to care.[139] The ACA further strengthened behavioral health coverage by requiring small employer plans to cover treatment of MH/SUD as an Essential Health Benefit and by applying parity to coverage purchased in the individual market.

Despite historic legislative progress to strengthen coverage of behavioral health care, enforcement agencies continue to face challenges in making parity a reality and workers struggle to access affordable MH/SUD care. The Employee Benefits Security Administration (EBSA) within the Department of Labor is the primary federal enforcement agency of MHPAEA's requirements with respect to private sector group health plans.[140] Its enforcement powers include the authority to make investigations, audit plans, and mandate the submission of reports, books, and records,[141] as well as the authority to enjoin acts or practices that violate the statute or to obtain other appropriate equitable relief with respect to violations.[142]

EBSA has several limitations that undermine the agency's ability to enforce parity violations. On top of a base budget that has remained generally flat for the last decade while operating costs have increased and staffing has declined,[143] EBSA faces statutory

limitations that prevent it from assessing monetary penalties or bringing enforcement actions directly against insurers for parity violations.[144] Without the authority to assess appropriate penalties for noncompliance, group health plans and insurers have little incentive to comply and appropriately cover workers' MH/SUD treatment costs. In a 2022 report to Congress, the Departments of Labor, Health and Human Services, and the Treasury (Tri-Departments) found widespread violations of MHPAEA by health plans, including impermissible limits on treatments for autism and opioid use disorder.[145] Forty percent of plans and health insurance issuers requested deadline extensions in response to EBSA's enforcement activities, leading the agency to conclude "that many plans and issuers were deficient in their statutory obligation."[146] In the 2023 follow-up report, the Tri-Departments again documented significant noncompliance, which presents a substantial barrier to workers' access to behavioral care.[147] EBSA observed that in some cases plans and issuers provide only information needed to document a parity analysis while not providing information sufficient to determine compliance with MHPAEA's substantive requirements.[148] The agency found efforts to improve compliance helped facilitate access to benefits by removing prior authorization requirements and other barriers to accessing MH/SUD services.[149]

The Tri-Departments' 2022 report, supported by its 2023 report, also made several legislative recommendations that would eliminate barriers to accessing mental health benefits and enhance enforcement of the law. Among other recommendations, the Departments recommend Congress: (1) establish civil monetary penalties for MHPAEA violations and (2) expressly provide authority to DOL to enforce the requirements against health insurance issuers and service providers for group health plans. In 2017, under President Donald Trump, the President's Commission on Combatting Drug Addiction and the Opioid Crisis, a bipartisan group chaired by then-Governor Chris Christie (R-NJ), similarly recommended that DOL be granted enforcement authority against issuers and the authority to impose monetary penalties for parity violations.[150] The Commission determined that existing enforcement powers were inadequate and that DOL's ability to assess civil monetary penalties "would encourage private insurance companies, and employers, to satisfy their legal obligations under MHPAEA."[151]

Given that the United States is in the midst of a mental health crisis, and with overdose deaths on the rise in recent years,[152] it is more important than ever to ensure America's working families can afford the health care they need. While MHPAEA has greatly improved coverage of MH/SUD benefits for workers and their families, compliance continues to be an issue. Without meaningful parity in coverage of mental health care and

treatment for substance use, hundreds, if not thousands of Americans will not seek the necessary treatments due to cost. Congress empowered the federal government to enforce the law, but the current tools lack teeth. Thus, to ensure the objectives of parity are achieved and that millions of people have equal access to critical behavioral health care, the Department of Labor must be given additional tools and explicit authority to levy monetary penalties to deter violations.

CONCLUSION

America's labor and employment laws defend workers from harm and exploitation. They protect our children by keeping them away from sawblades and slaughterhouses where they can be maimed or killed. Our country's laws grant workers the freedom to organize and collectively bargain without the fear of retaliation. They also safeguard the wages and benefits that workers have rightfully earned through their labor.

Unfortunately, unscrupulous employers are emboldened to violate these foundational worker rights and protections because of the weak civil monetary penalties assessed in response. Under some labor and employment laws, workers are worse off as employers face no monetary penalty and can break the law cost-free. Monetary penalties are supposed to serve as a deterrent and hold employers accountable for labor violations. However, today, they have simply become a "cost of doing business." Penalties for killing a worker or child, stealing workers' hard-earned pay, or denying the proper coverage of workers' mental health care pale in comparison to other laws. This must be addressed. The proper balance must be restored so workers are sufficiently protected, and the laws successfully fulfill their purpose.

Congress must act to responsibly raise civil monetary penalties for labor violations. Worker rights and protections are not mere suggestions. To ensure workers and children are protected, the cost of violating the law should not amount to a slap on the wrist.

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Chairman KILEY. The Chairwoman of the full Committee, Dr. Foxx, is recognized for 5 minutes.

Mrs. FOXX. Thank you, Mr. Chairman, and I want to thank our witnesses for being here today. Ms. Barron, critics of the tip credit sometimes refer to it as a sub-minimum wage. Do you believe it is a fair characteristic of the wages earned by tipped workers?

Ms. BARRON. No. I do not think it is a fair description of that at all. I believe a tip credit is a tool. It is a mutually beneficial, economic tool that is used to keep a restaurant sustainable, to keep tipped workers making high above the minimum wage, and keep back of the house workers making competitive wages. That is what a tip credit it.

It is not a sub-minimum wage. It is an economic tool. I am a restaurant worker. I do I know this and nobody else does?

Mrs. FOXX. Thank you. As someone who waited tables all through high school and college, I worked hard for my tips, and I was very glad to get them. Mr. Boucher, I understand you have been both a restaurant worker, and a business owner in the State of New Hampshire, where employers may utilize the tip credit.

What are the benefits of being able to utilize the tip credit, and what might it mean for your business if that option were eliminated?

Mr. BOUCHER. First, it allows employees that are tipped to, we actually phrase it this way. They are actually kind of running their own business in their section, right? If you have four tables, you have the ability to earn as much or as little as you want, based on your service, based on how well you are taking care of the guest.

By eliminating that, they may not be as incentivized to work, as you have just indicated, as hard as you did. Second, I have already said the economics of it would be devastating for our company.

Mrs. FOXX. Well, thank you very much. Again, I have always thought that being able to tip people was a sign of good service, or not so good service, and as I see tipped workers as entrepreneurs basically. They are able to really, really make a difference to their customers.

Mr. DeCamp, the Fifth Circuit recently vacated the Biden-Harris administration's 2021 tip regulations. This is the first time a court has scrutinized the Labor Department Rule since the Supreme Court overturned Chevron Deference. Can you explain why the Fifth Circuit had concerns with the 80/20/30 standard in the Biden-Harris Rule?

Mr. DECAMP. To put it very succinctly, the court concluded that the Departments 80/20/30 regulation was not based on the text of the statute. The statute defines tipped employees a certain way, by reference to their occupation and their tips. What the Department of Labor did was something completely different.

They based it on the time sheet. They based it on tasks, and what the court said was that Congress never authorized the Department to micromanage the activity of restaurant work at that level. It is simply a minimum wage statute.

Mrs. FOXX. Well, we have seen throughout the time of the Biden-Harris administration that it overstepped its bounds all of the time. It would like to be all three branches of government. It fails often to administer the law, as we write it here in Congress, and

it is unfortunate we have to rely so much on the courts to remind the administration that it is the executive branch, and it is its role to administer the laws, not make the laws.

Again, I want to thank all of our witnesses for being here today, and shedding light on this very important subject, and I thank you, Mr. Chairman. If you need my time, I yield it back to you. If not, I yield.

Chairman KILEY. Thank you very much, Dr. Foxx. I will now recognize myself for 5 minutes. Ms. Barron, you have worked as a tip worker in Seattle in Washington State, where they eliminated the tip credits. You have gotten something of a preview of where this new rule from this administration would take us.

In your experience would you say that your fellow tipped workers, that they prefer the tip system?

Ms. BARRON. Absolutely. They prefer tips over a flat wage. Tips provide us the opportunity to maximize our income, and make more than any employer is either willing, or can afford to pay. Why would we not want to do that?

Chairman KILEY. Yes. Well said. You say in your testimony here that with the elimination of the tip credit, workers like myself have been subjected to surcharges, service changes, non-transparent pay models, elimination of tip fines, elimination of tipping. I mean for all the millions of tip workers across America, with this new rule, do you think it would be fair to say that they are coming after your tips?

The bureaucrats in Washington, DC. are coming after your tips?

Ms. BARRON. Absolutely, and I will give you an example, and that is the Tip Pooling Rule. The one that Patty Murray changed the Federal Labor Standards Act language that allows employers to take our tips. If you want to talk about wage theft, the opportunity to wage theft, to take our tips so that they can pay back of the house workers, or non-tipped workers because they cannot afford to pay the high wages.

They cannot afford to keep back of the house wages competitive, so now we have in all the one fair wage states, this Tip Pooling Rule, that allows the employers to take our tips and pay non-tipped employees. That—it is ludicrous. We are making a lot less money.

Chairman KILEY. Thank you very much. I think that is an important takeaway from this hearing is that they are coming after your tips. Bureaucrats in Washington, DC.

Ms. JAYARAMAN. Just like Trump did, right? During the Trump administration.

Ms. BARRON. Trump did not do that, Patty Murray did that.

Chairman KILEY. Excuse me, I was not speaking to you, Ms. Jayaraman. Okay. Mr. Boucher, you are a restaurant owner, is that correct?

Mr. BOUCHER. I am.

Chairman KILEY. You testified that you have actually seen examples of restaurants closing down altogether because of the elimination of tipping. Can you explain a little bit about the cause and affect there?

Mr. BOUCHER. Sure. There were two restaurants in New Hampshire. I will not name them right now, but they went to that model where they paid their employees a flat wage, then they had it on

their menus that customers did not have to tip, and that was reflected in their pricing of the menu.

It resulted in these employees—they did not last. One restaurant, I think, closed in 6 months, and one did not even last a year because these employees—think about it. Do you want to work Saturday night for $15.00 an hour, or would you rather work Monday lunch for $15.00 an hour?

What happened was these employees said you know what, I am going to work $15.00 an hour at lunch for this restaurant. I am going to get a tipped job at this other restaurant, and so they eventually lost all their employees because they could make more in a tipped wage environment.

Chairman KILEY. Yes. We have seen this in California with the COVID shutdowns, and other very bad policies that caused restaurants to shut down, and in that case, it hurts not just the workers, but you know, you have families who save money to go to their favorite restaurant once a month. It is not there anymore.

You have couples who go there every year on their anniversary. You have folks who their one night out a week, they like to go to this place with their friends, suddenly it is not there. I think that is another takeaway from this hearing is that the bureaucrats in D.C. are coming after your favorite restaurant.

Now, of course, I do not want to paint with too broad a brush when it comes to folks at the Department of Labor, because we have Mr. DeCamp here, who was the administrator of the Wage and Hour Division and had a very different set of priorities when he was there.

I think one of the things you mentioned in your testimony is that surveys actually show overwhelmingly that workers prefer the tip model, right?

Mr. DECAMP. Well, that is correct. I mean, I think everybody would like to have their cake and eat it too, and have a very high cash wage, and keep all their tips, but that is not the reality. When faced with the practical reality of either a cash wage plus—a subminimum wage plus tips, or a higher flat wage, workers overwhelming want the opportunity to get tips.

Chairman KILEY. Yes. It is like 90 percent, or something like that?

Mr. DECAMP. 97 is the research I have seen.

Chairman KILEY. Yes. It is interesting, we saw similar numbers with another policy that has been fiatted by the Department of Labor, the Independent Contractor Rule, where they want to force people out of the Independent Contractor model, even though 90 percent prefer that model.

Now, they want to force people, take away their tips, even though 90 percent say they prefer getting tips. What do you think is going on here? I mean you were in charge of the Wage and Hour Division there. There is new leadership now, and they are consistently enacting policies without involving Congress that specifically do exactly the opposite of what workers want.

What do you think is behind all this?

Mr. DECAMP. I think it is bureaucratic arrogance. Agencies get used to the courts rubberstamping what they do. I think that is going to change now that Chevron has been overruled, and I think

that agencies are going to be held more strictly accountable to adhering to the laws that Congress enacts.

Chairman KILEY. Thanks very much. My time has expired, and I will now recognize the Representative from Utah, Mr. Owens for 5 minutes.

Mr. OWENS. Thank you, so much. I appreciate it. Thank you guys for being here. I want to start off with Ms. Jayaraman.

Ms. JAYARAMAN. Jayaraman.

Mr. OWENS. Thank you so much, sorry about that. Okay. I noticed the passion as you talked about the changes the Trump administration made coming in. I guess my first question, I looked at your background, very impressive, BA from University of California, JD from Yale Law University.

How much time have you spent as a tip worker?

Ms. JAYARAMAN. I represent 300,000 workers.

Mr. OWENS. No, no. I have been very specific.

Ms. JAYARAMAN. I myself, my family owned restaurants. I worked——

Mr. OWENS. No. That is not my question. How much have you spent? How much time have you spent as a tip worker? You personally?

Ms. JAYARAMAN. I have not been a tipped worker.

Mr. OWENS. Okay, thank you. How much time have you spent as an owner?

Ms. JAYARAMAN. I spent 10 years as an owner.

Mr. OWENS. No, no, in other words——

Ms. JAYARAMAN. As a restaurant owner, I spent 10 years.

Mr. OWENS. Your family or you?

Ms. JAYARAMAN. Me. Our organization had a restaurant.

Mr. OWENS. All right. Organization or you? I am talking about small business owner now. There is a difference in an organization——

Ms. JAYARAMAN. I started an organization. Our organization opened three restaurants.

Mr. OWENS. Did you actually open them yourself, or your organization opened it?

Ms. JAYARAMAN. As the President of the organization, I opened the restaurants.

Mr. OWENS. Okay. I think there is a difference in your concept of ownership, and Mr. Boucher here.

Ms. JAYARAMAN. I do not think so, because I started them. I hired people. I did all the same things that an employer did.

Mr. OWENS. Okay. Well,——

Ms. JAYARAMAN. Yes.

Mr. OWENS. I will say this because you are sitting next to a tip worker, and it seems to be a disconnect to me. You are very confident as you listen to somebody who is telling you you are destroying her business. Can I ask you this? You are making now, I am sure, a very past six-figure income, does your income change when Cracker Barrel, Chili's, Applebee's, My Pizza, Red Lobster, TGI, these are all the companies who have left California because of the Tip Law.

There are 10,000 people who have lost their jobs since September through January because of this mandatory Tip Law. Does your income change if you get it wrong?

Ms. JAYARAMAN. That does not make any sense because California has had a full minimum wage with tips on top for over 50 years, so it does not make sense for businesses to have left in the last couple of months.

Mr. OWENS. I reclaim my time. I reclaim my time.

Ms. JAYARAMAN. It does not have anything to do with that.

Mr. OWENS. Well, it does.

Ms. JAYARAMAN. Yes.

Mr. OWENS. A $20.00 minimum wage——

Ms. JAYARAMAN. That is not what we are talking about today.

Mr. OWENS [continuing]. Let me just finish. The direct impact of a $20.00 minimum wage has been these companies leaving California, the ones you just highlighted as being such a great place to be. 10,000 people have lost their jobs. How many of those 10,000, because of a $20.00 minimum wage because bureaucrats have decided how this industry should work.

Ms. JAYARAMAN. None of those jobs or businesses are tipped workers or tipped employees. If you look at Denny's, which is a very large employer of tipped workers, the CFO of Denny's——

Mr. OWENS. I want to reclaim my time. I want to reclaim my time please.

Ms. JAYARAMAN [continuing]. Has indicated that Denny's is growing faster in California, than in any State in the United States because they pay their people a full minimum wage.

Mr. OWENS. Just because you say so does not mean it is so, okay. Now, I played NFL for 10 years. Have you ever played in NFL by the way?

Ms. JAYARAMAN. Have I ever played in the NFL? No. I have not.

Mr. OWENS. Okay.

Ms. JAYARAMAN. Probably because of sexism.

Mr. OWENS. What would you say if you are given a position to make rules in the NFL that you never had to live by? Would that be—are you going to give yourself a good name, or give yourself a title, good income. Would we take you seriously if we were to talk about rules and changes in the NFL if you never had experience in that area? The answer is no.

Ms. JAYARAMAN. Sir, I have been working with restaurant workers for the last 30 years.

Mr. OWENS. Well, you are sitting next to——

Ms. JAYARAMAN. Hundreds of thousands of restaurant workers.

Mr. OWENS. You are sitting next to restaurant people right now.

Ms. JAYARAMAN. Yes. Restaurant workers, like all people, can have differences of opinions. The overwhelming majority of workers in this industry say we need a raise. We are not paid enough because as I said, I would challenge any of you to live on $2.00. I would challenge Ms. Barron to live on $2.00 right now; to leave Seattle and to go work for $2.00 right now.

Mr. OWENS. Let me—I am sorry, I would like to take back the time please. I would like to—OK. Well, you know what, the good thing about—I would like to reclaim my time, please. The great thing about this great country is choice. Instead of saying—we

have people like the young lady here, who can leave and go to another industry, you know that, right?

Ms. JAYARAMAN. Or, go to another State, yes, absolutely.

Mr. OWENS. Well, they are leaving California, so obviously it is not working there. They are leaving Seattle because it is not working there.

Ms. JAYARAMAN. Actually, California has the largest and fastest growing restaurant industry in the country.

Mr. OWENS. The sad part of this conversation is bureaucrats. Arrogant bureaucrats, who sit there and make these rules, and you are sitting next to someone who has been impacted. Ten years, 10 years in this industry, and she is telling you——

Ms. JAYARAMAN. Well, the worst rule was the Trump administration trying to make tips the property of owners, rather than workers.

Mr. OWENS. She is telling you why. She is telling you what she is trying to do, what is happening to her family, and you are sitting there with that smile on your face because it does not matter to you. You are going to make your income no matter what. The problem is we have too many—we have too many bureaucrats who sit there with expertise, and just run out—California is being destroyed by the way because of these kinds of rules.

Ms. JAYARAMAN. No. California has the largest and fastest growing restaurant industry in the United States according to the CFO of Denny's.

Mr. OWENS. That is why we are leaving California signs all over the place because of the great things they are doing there.

Ms. JAYARAMAN. All the chains have grown faster in California, than any State in the U.S., according to the CFO of Denny's.

Mr. OWENS. Do me a favor. Keep it in California then, thank you so much. I yield back my time.

Chairman KILEY. I want to thank our witnesses for their testimony, and I now recognize the Ranking Member for a closing statement.

Ms. ADAMS. Thank you, Mr. Chairman. I want to thank the witnesses as well, but you know, Congress is a good example of the fact that we make rules, and sometimes we do not know a lot about what people are going through, so you know, maybe we are in that sense, we do not know what we do not know as well.

I do appreciate what has been said here today. The current subminimum wage with tipped employees perpetuates low pay, enables, inexcusable levels of wage theft, and it leads to higher poverty rates. Despite some high earning expectations, most tipped workers face income insecurity, and limited or no access to benefits.

The Trump administration's attempt to gut protections for tipped workers have only worsened these issues by allowing employers to steal almost 6 billion dollars of worker's hard-earned tips for themselves each year. Luckily, in 2021, the Biden-Harris administration withdrew the Trump administration's extreme attack on tipped workers by ensuring workers, not their bosses, get worker's tips.

It is abundantly clear that there are two agendas present today. The republican's agenda will weaken worker protections and let low road employers off the hook for breaking the law. While the

democratic agenda is focused on uplifting workers by advancing legislation like the Raise the Wage Act, and the Let's Protect Workers Act, which will secure fair wages, close loopholes, and hold dishonest employers accountable.

Let us work together to build a system that supports all workers and addresses these pressing issues. I thank the witnesses very much for being here today, for your testimony. Mr. Chairman, I yield back.

Chairman KILEY. Thank you very much. I think this hearing has brought to light some important implications of the current policy, well, the policy that is no longer in effect because it was struck down by a court, but clearly the direction that this administration wants to take us.

That for millions of Americans, who rely on tips, who are proud of the tips they earn, who appreciate the opportunity to earn tips, and depend on them for their livelihood, you have a Department of Labor in this Biden Harris administration, under the direction of unconfirmed Acting Secretary Julie Su, that is coming after your tips, simply by issuing regulations.

I think that is a very alarming thing, and the contrast could not be clearer because we have legislation right now in Congress that would actually say you get to keep your tips entirely, no taxes on tips. The contrast could not be clearer between that and saying we do not want you to have any tips at all.

Then we also saw that for the folks who run restaurants, this could be a very challenging industry, especially in recent years. This is really a threat to the viability of a lot of restaurants, and so they are coming after your favorite restaurant as well.

Coming from California, we have seen something of a preview of this set of policies, after all, the current Acting Secretary, Ms. Su, was the Department of Labor head in California, and under her leadership in the Newsom administration, California for most of her tenure had the highest unemployment rate in the entire country.

We had the slowest level of wage growth. Absolutely last out of the 50 states. We also had the highest poverty rate in the United States. Her record there was so bad that even a majority of her own party in the Senate refused to confirm her. Now, that was no matter to the Biden administration.

They have decided to keep her there without a vote, shattering all records for an unconfirmed Acting Secretary remaining in office. The Vice President, Kamala Harris, even went so far as to say "I'm not going to call her Acting." Even though the Senate refused to confirm her, Vice President Harris, sitting Vice President of the United States, basically shoves the Constitution aside and says I am not going to call her Acting.

She has remained there and has continued to promulgate these anti-worker policies. I think that the common thread as we discussed, between this and say the Independent Contractor Rule, is these rules by force run directly against the wishes of workers.

90 percent prefer the tip model. Similar numbers of independent contractors prefer to be independent contractors, and yet they want to issue orders without so much as a vote of Congress that say we

are going to take away your tips, we are going to take away your right to earn a living on your own terms.

Fortunately, under the leadership of Dr. Foxx, this Committee, Education and the Workforce, is fighting back against these overreaching regulations. We just had a good court ruling on the Tipping Rule, the Independent Contractor Rule is being challenged in court as well, and we will continue to fight to protect workers and small businesses.

With that, and seeing without objection, there being no further business, the Subcommittee stands adjourned.

AACS 100 Years 1924-2024
ADVANCING BEAUTY, BARBER, AND WELLNESS EDUCATION

September 19, 2024

The Honorable Kevin Kiley, Chair
Subcommittee on Workforce Protections
U.S. House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman,

Although your subcommittee's hearing this week, "Examining the Biden-Harris Attacks on Tipped Workers" is focused on concerns within the food and beverage service-related industries and their use of the tip credit, there are other service-related industries that are interested in this important workforce protection topic as well.

I am confident that many institutions of higher education are paying attention to this hearing as the issue of tracking tip income as a portion of an individual's earnings after completion of their education has regulatory implications for the higher education community. Under the Biden-Harris administration's new Financial Value Transparency and Gainful Employment regulations, graduates' earnings are a critical component of calculations used to determine metrics comparing debt-to-earnings and comparisons of future earnings potential of high school graduates versus individuals completing postsecondary educational programs.

One of many key problems with the new regulations is the accurate determination of income in service-related industries, such as beauty, barber and wellness, due to underreporting of tips. As we explore ways to improve worker's earnings and provide businesses with more flexibility, we must work with our colleagues on the Higher Education and Workforce Development Subcommittee to ensure that potential benefits do not have unintended consequences related to determination of future earnings growth.

And, within the broader Beauty & Wellness industry, the community has been seeking inclusion in the tax-credit for a portion of the employer paid Social Security taxes for employee cash tips. Under current law the credit is limited to tips received from providing, serving, or delivering food and beverages. Legislation has been introduced seeking to add the employer tip credit and safe harbors to the beauty service industry and specifying reporting requirements for income received from renting space to individuals who provide beauty services. Here again, our efforts should be mindful of the efforts of the House Ways

and Means Committee and their consideration of H.R. 45 – The Small Business Tax Fairness and Compliance Simplification Act" – a bipartisan bill supported by fifty members of the House.

Thank you for taking time to consider our thoughts on this issue and we applaud the committee for their tireless work. Should you have any questions, please do not hesitate to contact me.

Regards,

Cecil Kidd

Cecil Kidd, Executive Director
American Association of Cosmetology Schools

cc. The Honorable Burgess Owens

Simone Barron
Additional Testimony
“Examining the Biden-Harris Attacks on Tipped Workers”

Thank you again for the opportunity to testify in the Committee on Education and the Workforce subcommittee hearing “Examining the Biden-Harris Attacks on Tipped Workers.” As stated, I am submitting additional testimony to bolster my original statements as they pertain to the subject matter that was touched on in the hearing.

Wage Experiment Restaurants

www.eater.com/2020/1/24/21080202/colors-nyc-restaurant-roc-united-closure

www.nypost.com/2020/01/19/non-profit-eatery-closes-doors-after-less-than-a-month-chef-laments/

Colors Restaurant in NYC Closes Amid Questions - Eater

Non-profit eatery closes doors after less than a month, chef laments (nypost.com)

Tip Pooling

www.nytimes.com/2020/12/22/business/tip-pools

New Labor Department rule would let employers distribute tips more widely. - The New York Times (nytimes.com)

Seattle's Minimum Wage and Total Compensation Clause

www.king5.com/article/news/local/seattle-councilmember-pulls-bill-delay-expiring-minimum-wage-tip-credit

www.seattletimes.com/opinion/editorials/drop-the-hot-talk-and-make-practical-changes-to-minimum-wage-law

Seattle councilmember pulls bill to delay expiring minimum wage tip credit | king5.com Drop

the hot talk and make practical changes to minimum wage law | The Seattle Times

Here are two op-eds written by Full Service Workers Alliance Co-founder Sean Beavers and me.

www.wsj.com/articles/seattles-wage-mandate-kills-restaurants

www.seattletimes.com/opinion/lets-sever-the-minimum-wage-from-inflation-in-wa/

Seattle's Wage Mandate Kills Restaurants - WSJ (archive.ph)

Let's sever the minimum wage from inflation in WA | The Seattle Times

Seattle Restaurant Closures from 2015 to 2023

2015

www.seattlemag.com/why-are-so-many-seattle-restaurants-closing-lately

www.seattle.eater.com/2015/11/30/9819620/2015-restaurant-closure-poll

Why Are So Many Seattle Restaurants Closing Lately? - Seattle magazine

Which Restaurant Closure Was the Biggest Bummer of 2015? - Eater Seattle

2016
www.seattle.eater.com/2016/6/17/11965094/restaurant-closings-seattle-2016

Seattle Restaurant Closures of 2016 - Eater Seattle

2017

www.seattlepi.com/lifestyle/food/slideshow/Restaurant-closures-of-2017-165861.php

www.seattletimes.comRestaurant closures of 2017 (seattlepi.com)

2018

www.seattlepi.com/lifestyle/food/slideshow/Restaurant-closures-of-2018-179541.php

Restaurant closures of 2018 (seattlepi.com)

2019
www.seattlemet.com/eat-and-drink/2019/12/2019-the-year-in-seattle-restaurant-closures

www.seattletimes.com/life/food-drink/22-more-shutdowns-the-end-of-2019-brings-a-rash-of-seattle-area-restaurant-closures/

2019: The Year in Seattle Restaurant Closures | Seattle Met

22 more shutdowns: The end of 2019 brings a rash of Seattle-area restaurant closures | The Seattle Times

2020

www.seattle.eater.com/2020/12/10/22166284/total-seattle-restaurant-closures-during-the-pandemic

About 20 Percent of Seattle Restaurants Closed Permanently During the Pandemic, Survey Says - Eater Seattle

2021

www.seattlemet.com/eat-and-drink/2021/12/seattle-restaurants-that-closed-permanently-in-2021

www.seattlepi.com/lifestyle/food/article/seattle-restaurants-that-closed-in-2021-16738960.php

2021: The Year in Seattle Restaurant Closures | Seattle Met

Dearly departed: The restaurants Seattle lost in 2021 (seattlepi.com)

2022

www.seattlemet.com/eat-and-drink/2022/12/seattle-restaurants-that-closed-permanently-in-2022

www.seattletimes.com/life/food-drink/goodbye-forever-to-vitos-and-20-more-seattle-area-restaurant-closures/

Remembering Seattle Restaurants That Closed in 2022 | Seattle Met

Goodbye forever to Vito's — and 21 more Seattle-area restaurant closures | The Seattle Times

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www.seattle.eater.com/2022/6/8/23159984/restaurant-and-bar-closings-closures-seattle

www.msn.com/en-us/foodanddrink/foodnews/seattle-s-bar-and-restaurant-closures-december-2023/ar-AAYeuH9

Seattle Restaurant Closings - Eater Seattle

Seattle's Bar and Restaurant Closures, December 2023 (msn.com)

2024

www.msn.com/en-us/foodanddrink/foodnews/10-significant-seattle-cafes-bars-and-restaurants-that-closed-this-month/ar-AA1rlby7?ocid=BingNewsSerp

www.seattle.eater.com/24057319/seattles-bar-and-restaurant-closures-2024

Seattle's Restaurant and Bar Closures, 2024 - Eater Seattle

10 Significant Seattle Cafes, Bars, and Restaurants That Closed This Month (msn.com)

Please feel free to contact me with any additional questions.

Sincerely,
Simone Barron

[Whereupon, at 11:18 a.m., the Subcommittee was adjourned.]

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