Congress of the United States

Washington, DC 20510

December 11, 2019

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA21, Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Secretary Scalia:

Thank you for the opportunity to submit comments in response to the Department of Labor's (DOL) October 8, 2019 Notice of Proposed Rulemaking Regarding Tip Regulations Under the Fair Labor Standards Act (FLSA).

DOL has proposed to issue regulations that would, for the first time, interpret the amendments that Congress made to the FLSA's tip provisions in the 2018 Consolidated Appropriations Act (2018 amendments) and would also change DOL's application of the FLSA in situations where employers have employees perform both tip-producing and non-tip-producing work. The Notice invites comments on this proposed rule.

As the authors of the 2018 amendments, we find the proposed rule is contrary to both the congressional intent and plain language of the 2018 amendments to the FLSA. First, it proposes to allow employers to keep employees' tips—both by keeping employees' tips to offset back-of-the-house workers' wages generally and to offset tipped workers' wages specifically when they perform non-tip-producing work. Second, it proposes to impermissibly narrow which workers are prohibited from keeping employees' tips as "managers or supervisors." Third, it restricts civil penalties to only those employers who steal tips repeatedly or willfully. For these reasons, we request DOL withdraw its proposed rulemaking and, instead, faithfully enforce the FLSA's protections regarding employees' tips.

The FLSA has Long Provided Different Pay Structures for Tipped and Non-Tipped Employees

Under the FLSA, employers must generally pay employees the federal minimum wage for all hours worked (currently $7.25).[1] In 1966 and again in 1974, Congress amended the FLSA to regulate the pay structure for "tipped employees"—that is, employees who customarily and

[1] *See* 29 U.S.C. 206.

regularly receive more than $30 per month in tips by performing tip-producing work. Under the amendments, employers are allowed to take a "tip credit" to meet their federal minimum wage obligations to their tipped employees, but only so long as certain conditions are met, including that, with tips, the employee receives hourly pay that is at or above the full minimum wage for all hours worked.[2] Today, the FLSA tip credit allows employers to pay tipped employees a direct cash wage of $2.13 per hour, so long as tips bring the tipped employees' hourly wages up to at least $7.25 per hour.[3] The FLSA also allows employers to pool employees' tips while still taking this "tip credit," but only those employees who customarily and regularly receive tips—not back-of-the-house employees—may be included in such a tip-pool.[4]

However, over the last several decades, some industry groups and employers have argued erroneously that the FLSA was silent on who tips belonged to when employers paid a cash wage of the full federal minimum wage to tipped employees. In some cases, employers would pay tipped employees a full cash wage of $7.25 per hour and then take the employees' tips for themselves, sometimes using those tips to create nontraditional tip-pools with back-of-the-house employees—like dishwashers—but other times pocketing portions of the tips.[5] Litigation regarding this issue worked its way through the courts and, in 2011, DOL issued a regulation clarifying that tips were the property of the particular employee who received them, prohibiting employers from taking employees' tips and pocketing those tips for themselves and from using them to create nontraditional tip-pools with back-of-the-house workers.[6]

Extensive litigation ensued, with two circuit courts of appeals coming to differing conclusions on the issue—the Ninth Circuit Court of Appeals upholding DOL's 2011 rule and the Tenth Circuit Court of Appeals refusing to grant deference to DOL's 2011 rule. Secretary Acosta was confronted with this split as Secretary of Labor in 2017.[7]

In 2017, DOL Proposed to Allow Employers to Keep Employee's Tips

In December of 2017, DOL issued a Notice of Proposed Rulemaking (2017 NPRM) that proposed to rescind its 2011 rule.[8] However, the 2017 NPRM went beyond proposing to repeal the 2011 rule to also endorsing the legality of employers keeping employees' tips; so long as employers paid employees a cash wage of the full minimum wage then employees would have no right to their tips and employers could keep those tips for a range of purposes. The 2017 NPRM stated that in addition to being able to create nontraditional tip-pools with back-of-the-house employees, employers could keep employees' tips and "allocate any customer tips to make capital improvements to their establishments (*e.g.*, enlarging the dining area to accommodate more customers), lower restaurant menu prices, provide new benefits to workers (*e.g.*, paid time

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[2] *See* 29 U.S.C. 203(m) and 203(t).
[3] *See* 29 U.S.C. 203(m), 203(t), and 206(a).
[4] *See* 29 U.S.C. 203(m).
[5] *See Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).
[6] Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18831 (Apr. 5, 2011).
[7] For a detailed history on the litigation, *see generally* Tip Regulations under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956 (proposed Oct. 8, 2019).
[8] Tip Regulations under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395 (proposed Dec. 5, 2017).

off), increase work hours, or hire additional workers…" and further specified that "the employer could effectively redistribute tips to other employees and thus reduce its overall wage bill."[9]

DOL provided no quantitative economic analysis in the 2017 NPRM, stating at the time that DOL "currently lacks data to quantify possible reallocation of tips[.]"[10] It was later revealed that prior to the NPRM being published DOL had in fact performed a quantitative economic analysis and had found that the NPRM would result in workers losing billions of dollars if finalized—and had chosen to conceal that analysis from the public by excluding it from the NPRM.[11]

In response, over 300,000 workers, worker advocates, unions, and Members of Congress condemned DOL's 2017 NPRM[12] as well as DOL's concealment of data that confirmed concerns that the NPRM would result in workers losing billions of dollars as employers kept their tips.[13] The 2017 NPRM was also wildly unpopular with voters as revealed in a poll released on January 29, 2018 that showed 82 percent of voters disapproved of it.[14] During testimony by then-Secretary Acosta before the House Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Representative DeLauro sharply questioned Secretary Acosta about the proposal, as did Representative Clark.[15] Secretary Acosta claimed at the time that he did not want employers to be able to keep employees' tips but that he felt restricted by the text of the FLSA and that he would support a legislative amendment making clear that employers could not keep employees' tips, stating "… if we are all concerned about this, why don't we just add a simple sentence to the law that says that *establishments, whether or not they take a tip credit, may not keep any portion of the tips*…" and later in his testimony also

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[9] *Id.* at 57408.
[10] *Id.* at 57396.
[11] Ben Penn, Labor Department Ditches Data on Worker Tips Retained by Business, Bloomberg BNA, Feb. 1, 2018, https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses.
[12] *See* Senator Patty Murray, President Trump's Promises to Workers "Ring Hollow," as Administration Rolls Back Protections for Tipped Workers, Dec. 4, 2017, https://www.help.senate.gov/ranking/newsroom/press/murray-president-trumps-promises-to-workers-ring-hollow-as-administration-rolls-back-protections-for-tipped-workers; National Employment Law Project, Trump Administration's 'Tip Stealing' Rule Overwhelmingly Unpopular With Voters, Jan. 29, 2018, https://www.nelp.org/news-releases/trump-administrations-tip-stealing-rule-overwhelmingly-unpopular-with-voters/; Congressional letter to Secretary Acosta, Comments on the Notice of Proposed Rulemaking, RIN 1235-AA21, Tip Regulations under the Fair Labor Standards Act (FLSA), Feb. 5, 2018, https://edlabor.house.gov/imo/media/doc/2018-02-05%20House%20Senate%20Comment%20Letter%20in%20Response%20to%20Tip%20Regulation.pdf.
[13] *See* Senator Patty Murray, "This Botched Cover-Up of Evidence Proving President Trump's Policies Help Businesses Steal Billions From Workers Shows Exactly What President Trump Truly Cares About," Feb. 1, 2018, https://www.help.senate.gov/ranking/newsroom/press/murray-this-botched-cover-up-of-evidence-proving-president-trumps-policies-help-businesses-steal-billions-from-workers-shows-exactly-what-president-trump-truly-cares-about; Senate letter to Secretary Acosta, Feb. 6, 2018, https://www.help.senate.gov/imo/media/doc/02062018%20-%20Acosta%20-%20Tip%20Rule%20Analysis%20Concealed%20Letter.pdf; National Employment Law Project, DOL Hid Data Showing Tip Rule Change Would Cost Workers Billions, Feb. 1, 2018, https://www.nelp.org/news-releases/dol-hid-data-showing-tip-rule-change-cost-workers-billions/.
[14] National Employment Law Project, Trump Administration's 'Tip Stealing' Rule Overwhelmingly Unpopular with Voters, Jan. 29, 2018, https://www.nelp.org/news-releases/trump-administrations-tip-stealing-rule-overwhelmingly-unpopular-with-voters/.
[15] Appropriations for the Department of Labor: Hearing before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies, 115 Cong. 19-21, 35-37, Mar. 6, 2018 (Statement of Secretary Alexander Acosta).

stated, "I fully support a provision that says *establishments should not be permitted to keep any portion of a tip.*"[16]

Congress Enacted the 2018 Amendments to the FLSA to Reverse the 2017 NPRM and Protect Tips as Belonging Solely to Employees

We drafted an amendment to the FLSA to protect employees' tips, prohibiting employers from being able to keep any portion of employees' tips for any purpose. In doing so, our intent was to reverse the 2017 NPRM and to overcome the decision of the Tenth Circuit Court of Appeals. Working with Secretary Acosta, that legislative text was passed into law as part of the Consolidated Appropriations Act of 2018.[17] As the sole two drafters of this statutory text, we carefully chose and crafted the language, explained it to our colleagues in the House and Senate, and worked with House and Senate Leadership to secure its enactment, making us deeply familiar with it and uniquely situated to speak to its underlying congressional intent.

The operative language of the 2018 amendments reads as follows: "An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit."[18] The language is direct, clearly protecting tips as being solely the property of employees and prohibiting employers from "keep[ing] any portion of employees' tips." This prohibition on employers is intended to cover the conduct that DOL attempted to bless in its 2017 NPRM and any other employer conduct that would make tips inure to the employer's benefit—while remaining silent on the issue of nontraditional tip-pools amongst employees themselves. The language leaves in place one exception to the new overarching statutory rule that employers may not keep employees' tips: the FLSA provision allowing for employers to take a tip credit for work performed by its tipped employees—using employees' tips to make up the difference between the cash wage of $2.13 per hour and the federal minimum wage of $7.25 per hour—and to pool tips amongst those tipped employees. The language also mooted the litigation that Secretary Acosta was engaged in regarding DOL's 2011 rule, stating the 2011 rule would not have any force or effect until future action taken by the Secretary.[19]

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[16] Secretary Acosta's full remarks were: "There is a real simple solution to this, which is that this committee should simply legislate our authority to prohibit this. And so if we are all concerned about this, why don't we just add a simple sentence to the law that says that *establishments, whether or not they take a tip credit, may not keep any portion of the tips.* I don't know of a single person that would oppose an—a law that says that *an establishment may not keep part of a tip.*" Later in his testimony, he also stated, "I fully support a provision that says *establishments should not be permitted to keep any portion of a tip.*" Appropriations for the Department of Labor: Hearing before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies, 115 Cong. 36, Mar. 6, 2018, (Statement of Secretary Alexander Acosta) (emphasis added); Ben Penn, Congress Willing to Aid Labor Dept., Ban Tip Skimming, Bloomberg BNA, Mar. 6, 2018, https://bnanews.bna.com/daily-labor-report/congress-willing-to-aid-labor-dept-ban-tip-skimming-1.

[17] Consolidated Appropriations Act of 2018, Title XII-Tipped Employees, Pub. L. No. 115-141, Mar. 23, 2018.

[18] *See id.*; 29 U.S.C. 203(m)(2)(B). The legislative language also amended the FLSA to create penalties for violations of this section, including back wages and civil penalties, as well as language stating that the regulations created by the 2011 NPRM had no force or effect until future action by the Secretary of Labor. *See* Consolidated Appropriations Act of 2018, Title XII-Tipped Employees, Pub. L. No. 115-141, Mar. 23, 2018.

[19] Consolidated Appropriations Act of 2018, Title XII-Tipped Employees, Pub. L. No. 115-141, Mar. 23, 2018.

DOL's current proposal correctly states that the 2018 amendments prohibit employers from keeping employees' tips, including by allowing managers or supervisors to keep any tips.[20] The proposal states that "An employer would 'keep' tips, for example, by using tips to cover its own general operating expenses, using tips to pay for capital improvements, or directing the tips to an individual who is not an employee, such as a vendor."[21] This is all accurate to the plain language of the amendment and to congressional intent.

However, counter to congressional intent and the plain language of the 2018 amendments, the NPRM goes on to propose that while employers may not pocket employees' tips directly, employers may pocket them indirectly, keeping employees' tips by using those tips to reduce their wage obligations and thereby—in the highly semantic words of the proposal—"capture" the tips.[22] It states: "because back-of-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-house workers (as long as they do not reduce these employees' wages below the applicable minimum wage)."[23] The NPRM proposes to allow the same conduct that DOL attempted to bless in its 2017 NPRM—"the employer could effectively redistribute tips to other employees and thus reduce its overall wage bill"[24]—and that Congress prohibited with the 2018 amendments. Under the 2018 amendments, tips are the property of employees, which is reflected in both the prohibition on employers keeping tips and the reference in the text of the FLSA to those tips being "*employees'* tips." Employers may not keep tips by "capturing" them in this way, nor may they "capture" employees' tips by keeping them for the purposes of engaging in any other conduct that would make those tips inure to the benefit of the employer.[25] To propose otherwise puts DOL in clear violation of the 2018 amendments.

It is disappointing that DOL would seek to repeat its error from the 2017 NPRM, recognizing that the current proposal would authorize tip-theft but not providing a quantitative analysis of it. DOL's states in the proposal:

> The Department acknowledges that *some employers could respond to the proposed rule by decreasing back-of-the-house workers' wages*, as the rule will allow employers to supplement these employees' wages with tips. *Some employers may consider exchanging back-of-the-house workers' hourly wages for tips*, but tips fluctuate at any given time. Thus, employers' ability to do so would be limited by market forces, such as, potentially, workers' aversion to risk and the endowment effect (workers potentially valuing their set wages more than tips of the same average amount). Because of a lack of data to quantify the extent to

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[20] *See generally* Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956 (proposed Oct. 8, 2019).
[21] *Id.* at 53961.
[22] *Id.* at 53957.
[23] *Id.* at 53957, 53968.
[24] Tip Regulations Under the FLSA (FLSA), 82 Fed. Reg. 57395, 57408 (proposed December 5, 2017).
[25] As stated above, some additional conduct that the 2017 NPRM attempted to bless included "allocate[ing] any customer tips to make capital improvements to their establishments (*e.g.*, enlarging the dining area to accommodate more customers), lower[ing] restaurant menu prices, provid[ing] new benefits to workers (*e.g.*, paid time off), increas[ing] work hours, or hir[ing] additional workers. . . ." *Id.*

which this will occur, the Department has not included this possibility in the present analysis.[26]

That DOL would attempt to authorize tip-theft in this rulemaking—and keep workers in the dark about how much it would cost them—is deeply troubling.

DOL, however, does estimate the "total potential transfer" from front-of-the-house employees to back-of-the-house employees to be up to $213.4 million in the first year of the rule. This, combined with DOL's proposed allowance for employers to keep tips by using tips to replace decreased back-of-the-house wages, would mean employers would potentially keep as much as $213.4 million in employee tips each year, with employees potentially losing $2.1 billion in tips over 10 years.

The Proposal Seeks to Further Enable Employers to Keep Tips by Narrowly Defining "Manager" and "Supervisor" Under the 2018 Amendments

The proposed rule further violates congressional intent and the plain language of the FLSA by narrowly defining a "manager" or "supervisor" under the 2018 amendments. This would allow employers to keep tips by allowing some workers who should otherwise be prohibited from keeping tips as managers or supervisors to keep a portion of employees' tips.

The proposal correctly states that the 2018 amendments prohibit employers from allowing managers or supervisors to keep any portion of employees' tips and that "[t]his prohibition applies to managers or supervisors obtaining employees' tips directly or indirectly, such as via a tip pool."[27] However, DOL proposes to define manager or supervisor far too narrowly to refer to an individual who (i) meets the "duties test" that DOL has established to determine whether an employee qualifies as an executive employee under the FLSA's overtime exemptions[28] or who (ii) qualifies as a "business owner" under that same test.[29] The proposal attempts to justify using this as its definition by stating that "[b]ecause an employee who satisfies the executive duties test manages and supervises other employees, the test effectively identifies those employees who Congress sought to preclude from keeping tips."[30]

While managing and supervising employees may be *one necessary component* of the test for qualifying as an "executive employee" under an entirely different provision of the FLSA, that test is not appropriate for accurately identifying all employees who are managers or supervisors. This test would impermissibly limit which workers are prohibited from keeping tips as managers or supervisors by requiring they satisfy the duties of an executive employee, which requires not only that the employee manages a piece of the employer's business, but also that they regularly direct the work of at least two full-time employees *and* have authority regarding personnel

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[26] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53970-71 (proposed Oct. 8, 2019) (emphasis added).
[27] *Id.* at 53961.
[28] *Id.* at 53960.
[29] *Id.* at 53961-62. A business owner is: "any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management." 29 C.F.R. 541.101.
[30] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53961 (proposed Oct. 8, 2019).

decisions.[31] Furthermore, DOL itself demonstrates that employees qualify as managers and supervisors *before* they also satisfy the duties test. Specifically, the proposal states that "a manager or supervisor satisfies the duties test of the executive employee exemption if..."[32], which demonstrates that the group of managers and supervisors who satisfy the duties test for executive employees is a far narrower set of employees than *all* managers and supervisors. The 2018 amendments prohibit this larger group of all managers and supervisors from keeping employees' tips.

DOL's attempt to use a test that was created to administer a separate portion of the FLSA and that contains wholly distinct wording violates basic cannons of statutory interpretation.[33] Two main components of these cannons dictate that (1) "if Congress uses one term in one place and a different term in another place...each term has a distinct meaning" and (2) "when Congress uses particular language in one place and does not use that language in another place, the omission was intentional."[34] In the situation presented here, Congress used the phrase "employee employed in a bona fide executive, administrative, or professional capacity" to refer to a group of employees exempt from the FLSA's overtime protections and used the completely different phrase "managers or supervisors" to refer to individuals who, in addition to employers, may not keep employees' tips.[35] Not only do the two sets of language appear in different sections of the FLSA and have entirely different purposes, they also are comprised of completely different words. If Congress had wished to prohibit only those employees who satisfy the duties test of the "executive employee" overtime exemption from keeping tips, then Congress could quite easily have done so. Congress chose not to and, instead, used the words "managers or supervisors," which do not appear in any other provision of the FLSA. Congress's intent to prohibit from keeping tips a different group of employees than those employees Congress exempted from overtime protection is clearly evinced by Congress's use in the FLSA of one term for overtime-exempt employees and a different term for employees who may not keep tips and, further, by Congress's omission in the 2018 amendments of any reference to the duties test for overtime-exempt executive employees.

Referencing the duties test for overtime-exempt executive employees in order to capture one subset of employees who obviously and unmistakably qualify as "managers or supervisors" might be permissible—but *limiting* the definition to only that narrow set of employees is impermissible. This is particularly true in light of the text of 2018 amendments listing "managers *or* supervisors," indicating Congress's intent for the language to be broad enough to capture all such employees rather than merely a subset of managerial employees who perform duties of executive employees.

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[31] "...[A] manager or supervisor satisfies the duties test of the executive employee exemption if (1) the employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise...; (2) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent...; and (3) the employee has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight." *Id.* at 53961; *see* 29 C.F.R. 541.100(a)(2)-(4).
[32] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53961 (proposed Oct. 8, 2019).
[33] *See* Tobias A. Dorsey, Legislative Drafter's Deskbook: A Practical Guide, 83, TheCapitol.Net (2006).
[34] *See id.* at 84-85.
[35] *See* 29 U.S.C. 213(a)(1) and 29 U.S.C. 203(m)(2)(B).

If DOL wished to seek guidance from relevant statutory text, then other far more appropriate options exist. The Labor Title of the U.S. Code contains an exact definition of "supervisor" within a sister statute of the FLSA, the National Labor Relations Act (NLRA).[36] The NLRA contains a time-tested definition of "supervisor" which is easily understandable, which would be readily recognized by the ordinary person as being a reasonable definition of "supervisor," and which has been referenced by the Supreme Court when determining who qualifies as a "supervisor" for the purposes of other statutory schemes.[37] This definition is one that has been provided by Congress in the context of workers' rights to bargain collectively in the workplace, and it would be a much more appropriate definition to look to than the duties test administratively established by DOL to exempt from overtime those "employees employed in a bona fide executive, administrative, or professional capacity."

Additionally, a related portion of the regulations that DOL references in the proposal provides a definition of "Management" that would be a useful starting point for any definition of "manager." The regulation gives a fairly detailed list of the work that qualifies as managerial for the purposes of the larger duties test for executive employees that DOL proposes to utilize.[38] If DOL were to use this definition, then at least it would be looking to what it has previously concluded qualifies as the work managers perform and, further, is both comprehensible and reasonable.

The NLRA definition of "supervisor" and DOL's existing definition of "management" are both far more encompassing than the definition proposed by DOL and they should be the low-water marks that DOL looks to in determining who is prohibited from keeping tips. At a minimum, employees performing the managerial tasks or supervisory tasks identified in these definitions should be prohibited from keeping employees' tips as "managers" or "supervisors."

The Proposal Violates the Text of the 2018 Amendments by Exempting from Civil Penalties Some Employers That Congress Sought to Penalize for Violating the Law by Keeping Tips

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[36] The NLRA states that "[t]he term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 151 *et seq.*

[37] "But sometimes the term ["supervisor"] is used to refer to lower ranking individuals. See, e.g., 29 U.S.C. § 152(11) (defining a supervisor to include 'any individual having authority ... to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment'). . . ." *See Vance v. Ball State Univ.*, 570 U.S. 421, 433–34 (2013).

[38] "Generally, 'management' includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures." 29 C.F.R. 541.102.

DOL proposes—without support from the language of the 2018 amendments—to restrict civil money penalties (or CMPs) only to employers who repeatedly or willfully keep employees' tips.[39] The 2018 amendments provide for civil penalties as follows:

> Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages…[40]

This language clearly provides for a civil penalty of not more than $1,100 against "any person" and for "each" violation of the tip-protection language. However, in direct contravention of this plain language, DOL "proposes to follow the same guidelines and procedures that it follows for assessing CMPs for violation of the minimum wage… and overtime… provisions of the FLSA, and to issue CMPs only when it determines there has been a willful or repeated violation of section 3(m)(2)(B)."[41] DOL's justification for this unlawful approach is that DOL and employers are accustomed to civil penalties being assessed for willful or repeat violations of the FLSA's minimum wage and overtime provisions.[42]

That interpretation, however, is neither what the language states nor what Congress intended. The 2018 amendments state that "[a]ny person who violates" the new tip-protection provision of the FLSA "shall be subject to a civil penalty … for each such violation." This language stands in contrast to the FLSA language on civil penalties for minimum wage or overtime violations, which states "Any person who repeatedly or willfully violates section 206 or 207 … shall be subject to a civil penalty…"[43] Congress's language is clear: civil penalties are available for repeat or willful violations in instances of violations of the minimum wage and overtime provisions of the FLSA, but civil penalties are available for *all violations* of the tip-protection provision of the FLSA.

Further evidence of Congress's intent is found in the FLSA's language regarding civil penalties for violations of its child labor provisions. That language provides that "Any person who violates [the child labor provisions of the FLSA] … shall be subject to a civil penalty not to exceed…"[44] DOL has for years interpreted this language as not limiting civil penalties solely to repeat or willful violations, but rather as providing for civil penalties for *each violation* of the child labor provision. In each case, the specific penalty amount rises or falls depending on the circumstances of the violation, including "any history of prior violations" and "any evidence of willfulness…"[45] This statutory requirement is the same as in the 2018 amendments—"Any person who violates" the provision in question "shall be subject to a civil penalty…" Therefore, Congress intends that employers who violate both the child labor and the tip-protection provisions be assessed civil penalties and the exact dollar amount is then determined by the circumstances of the violation.

Furthermore, the specific amount of the civil penalty in the 2018 amendments indicates Congress's intent to apply it to all employers who violate the tip-protection provision rather than

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[39] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53960 (proposed Oct. 8, 2019).
[40] Consolidated Appropriations Act of 2018, Title XII-Tipped Employees, Pub. L. No. 115-141, Mar. 23, 2018.
[41] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53964 (proposed Oct. 8, 2019).
[42] *Id.*
[43] 29 U.S.C. 216(e)(2).
[44] 29 U.S.C. 216(e)(1)(A).
[45] *See generally* 29 C.F.R. 579.5(c).

only those employers who repeatedly or willfully keep employees' tips. The 2018 amendments provide for a civil penalty of $1,100 per violation, while the current civil penalty for repeat or willful violations of the FLSA's minimum wage and overtime provisions is nearly twice that amount at $2,014.[46] With full knowledge of the FLSA's existing civil penalty amounts, Congress did not intend to enact a civil penalty for only repeat or willful violations of the tip-protection provision that was half as much as the civil penalties for repeat or willful violations of the minimum wage and overtime provisions. If that were the case, it would mean that an employer that willfully stole employees' minimum wages would be subject to a civil penalty of $2,014, but an employer that willfully stole employees' tips would only be subject to a civil penalty of $1,100. As the authors of the 2018 amendments, clearly that was not our intent.

While the 2018 amendments give the Secretary discretion to assess these civil penalties "as the Secretary determines appropriate," that discretion is to be used to determine the amount of the penalty up to $1,100 depending on the particular circumstances—similar to the child labor civil penalties.[47] The discretion may not be used to ignore congressional intent regarding civil penalties in the 2018 amendments and exempt from civil penalties all violations that are not repeat or willful.

The Proposed Rule Further Violates Congressional Intent by Proposing to Allow Employers to Keep Employees' Tips to Pay the Employers' Minimum Wage Obligations for the Performance of Non-Tip-Producing Work

We also object to DOL's proposal to further allow employers to keep employees' tips by having employees perform non-tip-producing work and still take a tip credit for that work, thereby "keep[ing]" employees' tips to fulfill the employers' minimum wage obligations. Specifically, DOL proposes to amend its existing regulations to reflect that "[a]n employer may take a tip credit for any amount of time that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties."[48] Under DOL's proposal, an employer could now pay a cash wage of just $2.13 to an employee for both tip-producing and non-tip-producing work under certain circumstances, thereby allowing the employer to use the employee's tips to fulfill its obligation to pay $7.25 per hour for that non-tip-producing work—"keep[ing]" the employee's tips. While it is appropriate for DOL to, in light of the 2018 amendments, revisit its existing regulations regarding employees who perform both tip-producing and non-tip-producing work, DOL's proposal contravenes congressional intent by failing to clearly reflect the new statutory prohibition on employers keeping employees' tips *for any purposes*.

This particular allowance for employers to keep their employees' tips is over and above the so-called "de minimis" rule—which are judicially-created rules designed to facilitate and ease the enforcement of laws by recognizing that some amounts of time, taxes, or otherwise are so small

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[46] 29 C.F.R. 578.3(a). While DOL increased this civil penalty in January 2019, at the time of enactment of the 2018 amendments the civil penalty was approximately the same amount at $1,964. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018, 83 Fed. Reg. 7, 13 (Final Rule published Jan. 2, 2018).

[47] Consolidated Appropriations Act of 2018, Title XII-Tipped Employees, Pub. L. No. 115-141, Mar. 23, 2018.

[48] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53975 (proposed Oct. 8, 2019).

as to be too trivial to measure and recognize in law.[49] The Wage and Hour Division has general FLSA regulations that already provide a de minimis rule across the FLSA, which recognizes that some time is too small to practically measure, stating in relevant part that

> In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.[50]

This de minimis rule is already part of DOL regulations, demonstrating that DOL's proposal is not concerned with ensuring that employers are not ensnared over unmeasurable "trifles," but rather about providing employers with greater leeway beyond this de minimis rule.

DOL's current regulations on tipped employees—which were initially written in 1967, long before the 2018 amendments—identify a difference between an employee who has "dual jobs" as both a tipped employee and nontipped employee for the same employer and an employee who is solely a tipped employee for her employer but performs both tip-producing duties and "related" non-tip-producing duties.[51] The regulatory text currently states:

> **Dual Jobs.** 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 a 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 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.*[52]

DOL further interpreted this regulation in the Wage and Hour Division's Field Operations Handbook, which for decades explained the limits to the "related" non-tip-producing duties scenario in what is commonly known as the "80/20 rule." The Handbook stated: "However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such

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[49] The full phrase of the legal doctrine is *de minimis non curat lex* ("the law does not concern itself with trifling matters"). *See de minimis,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/de%20minimis (last visited Dec. 6, 2019).

[50] 29 C.F.R. 785.47.

[51] 29 C.F.R. 531.56(e).

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

related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance."[53]

DOL now proposes to amend the regulations to reflect an Opinion Letter that it issued in 2018 and later expanded nation-wide in a Field Assistance Bulletin (FAB), which reversed its guidance on the "80/20 rule" and established as DOL policy that "No limitation shall be placed on the amount of these [related non-tip-producing duties] that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties."[54] DOL argues that the previous 80/20 rule was "difficult for employers to administer and led to confusion."[55] For support, DOL points to its own Opinion Letter and FAB and states "The Department believes this [new] policy is consistent with the plain statutory text, which permits employers to take a tip credit based on whether an employee is engaged in a tipped 'occupation,' not on whether the employee is performing certain kinds of duties within the tipped occupation."[56] However, in light of the 2018 amendments that created new rights and prohibitions within the FLSA, DOL's reliance on this supposed statutory distinction is misguided and leads DOL to a conclusion in conflict with the current text of the FLSA.

Previously, in light of the FLSA's former silence on what employers were permitted to do with regard to an employee's tips when an employer had a tipped employee performed both tip-producing and non-tip-producing work, DOL created the dual jobs regulation and the 80/20 rule. However, in 2018 Congress ended that statutory silence and statutorily precluded employers from taking a tip credit for any work other than that which produces tips. As is detailed above, the language that we wrote and passed into law changed the operation of the FLSA to fully protect employees' tips from all employer abuse. It does this by prohibiting employers from keeping any portion of employees' tips for any purposes, recognizing those tips as belonging to employees. Under the FLSA as amended in 2018, an employer may not keep employees' tips *"for any purposes"*—including by using those tips to fulfill its minimum wage obligations and thereby reduce its wage costs—with the sole exception being the FLSA's explicit allowance for employers to use tips as a tip credit to reduce its minimum wage obligation for the work that produces those tips. Under the 2018 amendments and the sole exception to them, if an employer wishes to take a tip credit and use employees' tips to satisfy part of its minimum wage obligation for work performed by tipped employees, the employer may only do so specifically and solely for the tip-producing work itself. To ensure that the employer is not keeping employees' tips to fulfill its minimum wage obligations for any non-tip-producing work that the employer has the tipped employees perform, the employer must clearly differentiate tip-producing work from non-tip-producing work and must pay a full cash wage of $7.25 for all non-tip-producing work.

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[53] Field Operations Handbook, Wage and Hour Division of the Department of Labor, 30d00(f)(3) (from Jan. 2017), https://web.archive.org/web/20170118233536/https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.
[54] Letter from Wage and Hour Division Acting Administrator, Bryan Jarrett, FLSA2018-27 Nov. 8, 2018, (attaching DOL Opinion Letter FLSA2009-23), https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_27_FLSA.pdf; FAB 2019-2, Wage and Hour Division of the Department of Labor, Feb. 15, 2019, https://www.dol.gov/whd/FieldBulletins/fab2019_2.pdf.
[55] Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53956, 53963 (proposed Oct. 8, 2019).
[56] *Id.*

The new statutory protection of tips therefore put an end to the varied attempts by DOL to decide through regulation and guidance how much of employees' tips employers could keep for the purposes of fulfilling their $7.25 minimum wage obligation for work that is non-tip-producing: none. Any other reading of the current statutory text would produce an absurd result in which employers would be in violation of the 2018 amendments if they fulfilled their minimum wage obligations to nontipped employees with employees' tips, but could circumvent the 2018 amendments by simply reassigning some or all of the nontipped employees' non-tip-producing work to tipped employees as "related duties" and use tips to fulfill their minimum wage obligations for that work. Furthermore, if the tip credit were not limited to work that is specifically tip-producing, then employers could engage in this sort of transfer on a broad scale and gradually recharacterize non-tip-producing work as being part of the "related duties" of tipped employees in a given tipped occupation. This would expand the definition of the tipped occupation to include an ever-increasing amount of non-tip-producing work, thereby subverting the 2018 amendments by allowing employers to keep a growing share of employees' tips to satisfy their minimum wage obligations.

Moreover, DOL once again fails to provide a quantitative analysis of the amount of tips employees would lose to employers under this portion of its proposal, but DOL also once again recognizes that this would in fact allow employers to keep employees' tips, stating:

> The removal of the twenty percent time limit may result in tipped workers such as wait staff and bartenders performing more of these non-tipped duties such as "cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses." Consequently, employment of workers currently performing these duties, such as dishwashers and cooks, may fall, possibly resulting in a transfer of employment-related producer surplus from those non-tipped workers to tipped workers who work longer hours. However, *tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage.*[57]

DOL goes so far as to provide the following example and concludes, in its own analysis, that employees would be losing tips to employers as employers potentially lower their prices by keeping tips to subsidize their operating expense of wages:

> For example, assume that prior to this change, a restaurant server spends 12 minutes each hour of their shift (i.e., 20 percent) performing related, non-tipped duties (e.g. clearing tables, washing dishes, etc.), and 48 minutes providing direct customer service. Assume the server earns $12 per hour in tips (i.e., $0.25 per minute of customer service work). With no 20 percent limit on the performance of related, non-tipped duties, an employee might spend more than 12 minutes per hour performing related, non-tipped duties, as long as they still receive enough tips to earn at least $7.25 per hour for the shift. Thus, if an employee now spends 20 minutes performing non-tipped work (i.e., 33 percent of their shift) and 40 minutes interacting with customers, they would be expected to lose $2 per hour in tips, a decrease accounting for eight fewer minutes per hour spent performing tip-generating work (i.e., 8 minutes x $0.25 per minute). Similarly, *employers that*

[57] *Id.* at 53972.

> *had been paying the full minimum wage to tipped employees performing related, non-tipped duties could potentially pay the lower direct cash wage for this time and could pass these reduced labor cost savings on to consumers.* As mentioned above, the Department lacks data to quantify this potential reduction in tips.[58]

It is concerning that DOL could propose a change that, even in its own analysis, violates the 2018 amendments.

The 2018 amendments do not provide for a "reasonable" amount of tip theft. Rather, the 2018 amendments prohibit employers from keeping employees' tips for any purposes. Any employer who has an employee perform non-tip-producing work and then uses tips that were received for the performance of tip-producing work to pay a portion of the $7.25 for the time spent on the non-tip-producing work would be acting in clear violation of the 2018 amendments by "keep[ing]" that portion of employees' tips. Accordingly, DOL should re-write its regulations on "dual jobs" to strike any exception for so-called "related" non-tip-producing duties and read as follows:

> **Dual Jobs.** 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 a maintenance man. **The same is true of a waiter who is employed solely as a waiter, but whose employer has her also spend part of her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses. No tip credit can be taken for any hours of employment that are spent performing these and other related tasks that are outside the tip-producing work of directly serving customers.** ~~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 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.~~

Employers have several workable options for compliance with the new text: (A) they can pay tipped employees a full cash wage of $7.25 for all hours worked and have those employees perform an unrestricted amount of non-tip-producing work alongside their tip-producing work; (B) they can pay tipped employees the cash wage of $2.13 per hour for all hours worked (with tips bringing the employees' pay up to at least $7.25) and assign all non-tip-producing work to nontipped back-of-the-house employees who are paid the full cash wage of $7.25 for all hours worked; or (C) they can pay tipped employees the cash wage of $2.13 (with tips bringing the employees' pay up to at least $7.25), assign non-tip-producing work to those tipped employees, accurately track the tipped employees' time spent on the tip-producing and non-tip-producing work, and pay the tipped employees a cash wage of the full $7.25 for all hours spent performing

[58] *Id.*

the non-tip-producing work. However, the employer may not, as DOL proposes, have tipped employees perform non-tip-producing work, pay them a cash wage of only $2.13 for that non-tip-producing work, and use the employees' tips to bring their pay up to $7.25 per hour—as DOL itself identifies, that would be "keep[ing]" employees' tips in violation of the 2018 amendments.

DOL Must Use Its Full Authority to Implement the Entirety of the 2018 Amendments in Order to Protect Employees' Tips

We are also deeply disappointed that DOL is not implementing the full breadth of the 2018 amendments. As stated above, we amended the FLSA to completely prohibit employers from keeping employees' tips, placing in the text of the FLSA a recognition that tips belong to employees as "employees' tips." In its proposal, DOL violates congressional intent in the several ways detailed herein, but DOL also fails to recognize the full consequence of the 2018 amendments and to propose regulations that fully effectuate them.

We note, first, that the text of the 2018 amendments in no way restricted DOL from issuing a regulation, similar to the 2011 rule, stating that tips are the property of the specific employee who receives them. The 2018 amendments mooted the litigation around the 2011 rule by stating that the rule would have no further force or effect until future regulation by the Secretary, but the 2018 amendments did not create any restriction on that future action. Additionally, the 2018 amendments protecting employees' tips rendered irrelevant the analysis from the Tenth Circuit Court of Appeals regarding the 2011 rule since the amendments to the FLSA changed the Act's operation with regard to employees' tips. Therefore, it would be entirely within DOL's authority to revisit the 2011 rule in light of the 2018 amendments and explore issuing a substantially similar regulation.

Short of issuing such a regulation, DOL should implement the full text of the 2018 amendments, which, for the first time in the text of the FLSA, identifies tips as presumptively belonging to employees by both prohibiting employers from keeping tips and by stating explicitly that tips are "employees' tips." To be clear, effectuating this language in regulation need not mean that employers could not pay the full minimum wage of $7.25 to tipped employees and create tip pools that included back-of-the-house employees—it would mean that all tips are, as the text of the 2018 amendments commands, the property of the employees and those employees must give their consent to the employer doing anything with those tips. Such consent could be provided through a workplace democratic process, whereby the employees who have a right to their tips vote on any employer-proposed mandatory tip-pool that includes back-of-the-house workers. Alternatively, DOL would be acting in accord with the text of the 2018 amendments if it were to require any employer that wishes to establish a nontraditional tip-pool with back-of-the-house workers to demonstrate that the employees freely elected to establish such a tip-pool, which could be presumptively demonstrated by the employees having formed or joined a union which bargained with the employer over such a tip pool. Only with the intrinsic safeguards of such a democratic process in the workplace could it be assured that employers are not keeping employees' tips.

At a minimum, DOL should clarify the ways in which the 2018 amendments affect employer obligations regarding compulsory service charges. Existing DOL regulations make clear that

compulsory service charges are *not* tips and instead are part of the employer's gross receipts.[59] In response to the 2018 amendments, DOL should amend these regulations to clarify that employers are prohibited from leading consumers into understanding that a service charge is a tip or gratuity, is "in lieu of" or "in place of" a tip or gratuity, or otherwise replaces a tip or gratuity by directly "going to" employees. The 2018 amendments' prohibition on employers keeping any portion of a tip, combined with the existing FLSA regulations stating that service charges are by their nature not tips and are *necessarily* kept by the employer as part of the employer's gross receipts, now means that employers may not convey to a customer or in any way contribute to a customer perception that such a service charge, instead, *belongs* to employees in the same way tips now *belong* to employees and *cannot* be kept by the employer.

Therefore, employers may continue to charge a compulsory service charge but that charge is "kept" by employers as part of employers' gross receipts and an employer must clearly and unambiguously state that such a charge goes to its gross receipts, that it is not similar to or in lieu of a tip, and that its use is entirely within the employers' discretion. The regulations should go on to state that if an employer refers to a service charge differently—as somehow replacing tips, making tips unnecessary, or otherwise "going to" employees—then the employer must distribute the *entire amount* of the service charge to employees as tips *in addition to* the employees' regular wages or no less than the full minimum wage of $7.25 per hour for all hours worked. Anything less than this would allow an employer to lead consumers to the mistaken conclusion that a compulsory service charge is operating like tips to increase employees' wages, with each dollar paid by a consumer as a service charge increasing employees' wages to a dollar above their regular wage. This would be in stark contrast to the reality, with the employer actually "keep[ing]" the service charge as part of the employer's gross receipts and deciding entirely at its discretion whether or not to provide any portion of the service charge to its workers. The result would be akin to employers "keeping" employees' tips because consumers would treat the service charge as being a tip or being in lieu of a tip, paying the service charge instead of paying a tip and thereby eliminating their inclination to pay an additional amount as a tip to employees, even though the service charge is in actuality kept by the employer.

The fact that DOL is not using its full authority to protect employees' tips in these ways is deeply disappointing.

Conclusion

DOL's proposed rule is contrary to the congressional intent and plain language of the 2018 amendments to the FLSA. The proposed rule would inappropriately allow employers to keep employees' tips, impermissibly narrow which workers qualify as "managers" or "supervisors" who are prohibited from keeping employees' tips, and restrict civil penalties to only those employers who steal tips repeatedly or willfully. Further, DOL should use its authority to implement the full breadth of the 2018 amendments.

We request DOL withdraw its proposed rulemaking and, instead, faithfully enforce the FLSA's protections regarding employees' tips that we wrote in the 2018 amendments.

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[59] *See* 29 C.F.R. 531.55.

Thank you for your consideration of these views. For any questions or further communication, please contact Joe Shantz with the Senate Health, Education, Labor, and Pensions Committee Minority Staff at Joseph_Shantz@help.senate.gov or Leticia Mederos, Chief of Staff for Representative DeLauro, at Leticia.Mederos@mail.house.gov.

Sincerely,

PATTY MURRAY
Ranking Member
Senate Committee on Health, Education, Labor, and Pensions

ROSA L. DELAURO
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