NFIB

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Via www.regulations.gov
and U.S. First Class Mail

July 16, 2021

Hon. Martin J. Walsh, Secretary of Labor
c/o Ms. Amy DeBisschop
Division of Regulations, Legislation,
and Interpretation
Wage and Hour Division, Room S-3502
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Mr. Secretary:

RE: Department of Labor Wage and Hour Division Notice titled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal," RIN 1235-AA21, 86 *Fed. Reg.* 32818 (June 23, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB) on the Department of Labor Wage and Hour Division notice of proposed rulemaking titled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal" and published in the *Federal Register* of June 23, 2021. NFIB recommends below (see material in bold typeface) revisions to the proposed rule to provide needed greater flexibility for small businesses with tipped employees.

NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The wage and hour provisions of the FLSA and regulations that implement them apply to most small businesses, including members of NFIB. Among other things, NFIB seeks to preserve freedom for small and independent businesses within the law to determine how best to compensate employees in the free market. NFIB also seeks to reduce the burdens, uncertainties, and costs small businesses face when federal agencies make substantial changes to employee compensation rules frequently.

Congress has established by law a clear policy that federal agencies should consider the special needs of small businesses when the agencies issue regulations. In paragraph 2(a)(4) of the Regulatory Flexibility Act (RFA),[1] Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity." Congress also noted in paragraph 2(a)(6) of the RFA that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation."

Section 3(t) of the FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."[2] Section 3(m)(2)(A) of the FLSA allows an employer, under certain circumstances, to take a credit for tips an employee makes against the statutory minimum wage the employer must pay the employee.[3] The proposed rule states:

> Any work performed by the tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation provided it is not performed for a substantial amount of time.[4]

Regarding the meaning of a "substantial amount of time," the proposed rule says:

> 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

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[1] Public Law 96-354, 5 U.S.C. 601 note.

[2] 29 U.S.C. 203(t).

[3] 29 U.S.C. 203(m)(2) ("(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to--(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and (ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 6(a)(1) of this Act. The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips. (B) 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.").

[4] Proposed 29 CFR 531.56(f)(1).

> of time if: (A) For any workweek, the directly supporting work exceeds 20 percent of the hours worked during the employee's workweek. If a tipped employee spends more than 20 percent of the workweek on directly supporting work, the employer cannot take a tip credit for any time that exceeds 20 percent of the workweek; or (B) 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 of that continuous period of time.[5]

Accordingly, under the proposed rule, an employer can take a tip credit for (1) tip-producing work, and (2) work that directly supports tip-producing work, if that tip-producing work is "not performed for a substantial amount of time," defined to mean not more than 20 percent of the tipped employee's workweek nor for more than 30 minutes at a time.

In lines of business that involve tipping (such as restaurants, bars, hair salons, and nail salons), small business owners and their employees work within tight time constraints, as success in the business generally requires them to maximize the number of customers served while providing them high quality service. Small businesses need flexibility in using their relatively small number of employees, including tipped employees, to accomplish the work that makes the business a success. Often, that may require a small business to use tipped employees for work that directly supports tip-producing work for more than the proposed rule's "substantial amount of time," a limitation that appears in the proposed rule but appears nowhere in subsections 3(m) (providing for the tip credit) or 3(t) (defining a "tipped employee") of the FLSA. Also, the government cannot reasonably expect owners or employees in a high pressure small business to monitor, record, and report in precise detail the minutes each employee spends in work that directly supports tip-producing work, as the proposed rule would require. Finally, small businesses often cannot afford the lawyers, accountants, and clerks that larger companies use to decipher wage and hour regulations, establish business systems to implement them, monitor continuously the nature of the activities of employees, maintain documentation of employee activities, and otherwise provide nearly error-free compliance with federal regulations.

To provide the flexibility that small businesses need, NFIB requests that the Department of Labor revise proposed 29 CFR 531.56:

> **-- by revising paragraph (f)(1) to read "(1) *Work that is part of the tipped occupation.* Any work performed by the tipped employee that produces tips is part of the tipped occupation. Work that directly supports tip-producing work is also work that is part of the tipped occupation.";**
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> **-- by striking from subparagraph (f)(1)(ii) "provided that it is not performed for a substantial amount of time";**

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[5] Proposed 29 CFR 531.56(f)(1)(iii).

-- by revising subparagraph (f)(1)(iii) to read: "*Tip Credit.* An employer can take a tip credit for the time a tipped employee spends performing work that is (A) tip-producing, and (B) not tip-producing, but directly supports tip-producing work."; and

-- by adding at the end thereof the following new paragraph: "(iv) *Flexibility for small businesses in implementation and enforcement.* No civil monetary or other penalty shall be imposed, on an employer that has fifty or fewer employees, for a violation of this section unless the authority imposing the penalty has determined that the violation was willful."

To the extent the Department may fear that affording the requested flexibility might adversely affect tipped employee compensation in some circumstances, the Department should recall that the market will over time ensure a pay rate that matches the supply and demand for tipped employee services and that employers who do not treat tipped employees well will lose the tipped employees they need to make a success of their businesses.

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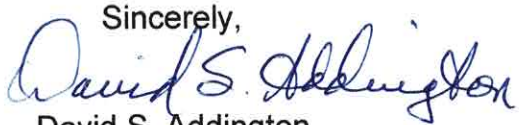
The Department of Labor exists in part to advance wage earners' opportunities for profitable employment (29 U.S.C. 551). As the Biden White House stated in a fact sheet on February 22, 2021, "[s]mall businesses account for 44 percent of U.S. GDP, create two-thirds of net new jobs, and employ nearly half of America's workers." The Department's adoption of the revisions proposed above will help small businesses continue to play their crucial role in the American economy of furnishing goods and services and creating jobs for America's wage earners.

Sincerely,



David S. Addington
Executive Vice President and General Counsel