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Restoring the Minimum Wage for America's Tipped Workers

By Rajesh D. Nayak and Paul K. Sonn | August 2009

\$2.13
FOR 18 YEARS



NELP

National Employment Law Project

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This report is available for download at <http://www.nelp.org/tippedworkers2009>.

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Executive Summary

In 2007, Congress finally raised the federal minimum wage for the first time in ten years, giving millions of low-wage workers a modest raise to \$7.25 per hour by 2009.¹ But for millions more low-income employees like the waitress at your local diner, paychecks have not budged.

Workers who rely on tips are subject to a special tipped worker minimum wage, which has remained frozen since 1991 at a meager \$2.13 per hour—just \$4,430 per year for a full-time worker. Congress has overlooked this little-understood part of our minimum wage system the last few times that it has increased the minimum wage. The result has been to drag down pay for tipped workers in many of our nation's fast-growing service industries, such as restaurants, hotels, nail salons, and car washes, where millions today spend their careers. The overwhelming majority of tipped workers are adult women—many of them supporting families. They are hurt the most by the frozen tipped worker minimum wage, which is an under-appreciated factor in the unequal pay that working women continue to receive across our economy.

Despite their stagnant wages, most tipped workers still earn a couple of dollars more than the full minimum wage once their tips are added in. In fact, if their tips are not enough to bring them up to the full minimum wage, their employers are required to make up the difference. But the tipped worker minimum wage was meant to do more. When it was created by Congress, it provided tipped workers an economic cushion and brought their pay closer to a living wage—something our economy badly needs more of today. That is what the tipped worker minimum wage used to do when it was higher—and what it still does today in the states that have not let it erode.

The low minimum wage for tipped workers, which forces these employees to subsist almost entirely on tips, is a key factor behind falling living standards and growing economic insecurity for workers in tipped industries. Since the tipped worker minimum wage was frozen at \$2.13 in 1991, its value has fallen by 36% in real terms.

Workers who are forced to rely mainly on tips see their paychecks fluctuate widely, frequently leaving them unable to pay their bills or provide for their families. This problem is now worse than ever because economically squeezed customers are leaving smaller tips. As a result, waitresses and waiters—the largest group of tipped workers—have three times the poverty rate of the workforce as a whole.

The solution is to guarantee tipped workers a strong minimum wage that is paid directly by their employers. That is what the federal Fair Labor Standards Act (FLSA) did historically and what many state minimum wage laws still do today. Thirty-two states have preserved or adopted stronger protections for tipped workers, and by 2010 over half of those will guarantee tipped workers 60% of the full minimum wage—the level of protection that the federal minimum wage provided tipped workers until 1989. These states have found that a strong tipped worker minimum wage raises living standards for this growing workforce without hurting business growth.

Congress and the rest of the states should follow their lead by restoring protections for the nation's millions of tipped workers. Specifically, they should:

1. **Substantially raise the tipped worker minimum wage.** For starters, Congress and the states that currently have weak protections should restore the tipped worker minimum wage to at least its historical level of 60% of the full minimum wage. But over the longer term, the federal and state tipped worker minimum wages should be raised to 100% of the full minimum wage as seven states have done.
2. **Make the tipped worker minimum wage increase automatically when the full minimum wage increases** by making it a fixed percentage of the full minimum wage or a fixed dollar amount less than the full minimum wage.
3. **Strengthen protections against “tip stealing”** to ensure that managers or employers do not skim off a portion of workers' tips.
4. **Fight attempts to roll back tipped worker minimum wages** in states that already provide strong protection for these workers.

1. The Low Tipped Worker Minimum Wage Leaves Millions of America's Workers Economically Insecure

"After taxes are taken out, I barely get any paycheck at all. At this job, I'm living just on tips, which is hard for me and my daughters."

—Leanne, a waitress at a southern New Jersey diner

Today tipped industries are major sources of jobs in our nation's low-wage service economy. But at a meager \$2.13 per hour under federal law, the tipped worker minimum wage is outdated and leaves millions of America's workers near poverty.

Industries Across Our Economy Rely on Tipped Workers

Tipped workers make up a significant portion of our low-wage service workforce. They work as parking attendants and car wash workers, nail salon workers and barbers, baggage porters and bellhops.² The largest numbers are employed in food service where workers such as waitresses, waiters, bussers, and food delivery workers rely on tips. According to the federal Bureau of Labor Statistics, restaurants alone employ nearly 2.9 million workers in jobs that are generally classified as tipped positions.³ Food service is projected to be twelfth fastest growing industry nationwide between 2006 and 2016.⁴ Moreover, recent trends suggest that tipped workers are increasing as a percentage of the minimum wage workforce in some states.⁵

[T]he tipped worker minimum wage is outdated and leaves millions of America's workers near poverty.

The Origins of the Federal Tipped Worker Minimum Wage

When it was first enacted in 1938, the federal minimum wage law, the Fair Labor Standards Act, did not cover most service and retail workers, including tipped workers such as waitresses and waiters.⁶ For decades after that, industry lobbyists fought proposals to extend minimum wage protections to this workforce, which represented many of the lowest paid jobs in the nation's economy. By the 1960s, the American Hotel and Motel Association estimated that the continued exemption of their employers from the minimum wage was saving the industry approximately \$1 million each day.⁷

In 1966, Congress finally overcame this opposition and extended minimum wage protections to most service and retail workers. But in doing so, it established the special tipped worker minimum wage, also known as the "tip credit."⁸ (See "How the Minimum Wage Works for Tipped Workers.")

The industry would have preferred that employers not be required to pay tipped workers any wage at all, arguing that their tips generally added up to at least the minimum wage. However, Congress recognized that tip income is erratic and can subject workers

[R]estaurants alone employ nearly 2.9 million workers in jobs that are generally classified as tipped positions.

to wide swings in pay as it fluctuates. It therefore established the tipped worker minimum wage to guarantee a stable base income that employers must pay their workers at all times, regardless of how much tip income they receive.

Congress recognized that tip income is erratic and can subject workers to wide swings in pay as it fluctuates. It therefore established the tipped worker minimum wage to guarantee a stable base income that employers must pay their workers at all times, regardless of how much tip income they receive.

As a first step, Congress established this tipped worker minimum wage as 50% of the full minimum wage.⁹ Later, Congress phased it up to 60% in 1980.¹⁰ Other states have gone further and require employers to pay tipped workers 100% of the minimum wage as a cash wage. (See “Guaranteeing Tipped Workers the Full Minimum Wage.”) Congress and most of the states also require that if workers’ tips are not enough to bring them up to the full minimum wage, their

employer must make up the difference.¹¹ However, because most tipped workers make a few dollars more than the minimum wage, as a practical matter that requirement is seldom triggered.

When it is set at a substantial level, the tipped worker minimum wage boosts pay for most tipped workers to several dollars above than the full minimum wage. Its function is to provide tipped workers an economic cushion and bring their pay closer to a living wage—something our economy needs more of today.

How the Minimum Wage Works for Tipped Workers

The minimum wage for tipped workers is straightforward in the seven states that require employers pay to tipped workers 100% of the full minimum wage: employers simply pay the minimum wage for each hour that an employee works. But its operation becomes more complicated under the federal Fair Labor Standards Act (FLSA) and in the states that allow lower wages for tipped workers.

Under these laws, an employee who “customarily and regularly” receives tips may be paid a lower minimum wage. But the employer must make up the difference if the employee does not in fact receive enough tips to bring him or her up to the full minimum wage. This lower minimum wage is sometimes called a “tip credit” because it allows a portion of tips received by the employee to be “credited” towards paying the minimum wage.

For most tipped workers, the requirement that the employer make up the difference is rarely triggered because they earn a dollar or two more than the full minimum wage once tips are added in. But because some do not, and because employers’ eligibility to pay the lower wage depends on their documenting how much employees actually receive in tips, having a lower tipped worker minimum wage necessitates a complex system of wage and tip monitoring procedures.

Tracking tips is complex because they fluctuate from hour to hour, day to day, and shift to shift; because

they are often paid in cash; and because federal and state minimum wage laws generally allow them to be “pooled” or shared among staff that have direct contact with customers, such as waitresses, table bussers and runners. Under these complex conditions, even law-abiding employers can have trouble keeping track. And less ethical employers can take advantage of this complex system to illegally take for themselves a portion of tips. As a result, some tipped workers end up actually receiving less than the full minimum wage even after their tips are included.

Making matters worse, under the federal minimum wage and the laws of some states, tipped workers are not actually guaranteed the full minimum wage for each individual hour or shift that they work. Instead, U.S. Department of Labor regulations allow employers to average out their workers’ tips over a full work week.¹² If a tipped worker earns few or no tips during a slow shift, her employer does not have to make up the difference as long as she has enough higher paying shifts later in the week.

This complicated system—and the reality of widespread abuse—make it all the more important that employers be required to pay a substantial minimum wage directly to all tipped employees, in order to provide them a dependable base income that is not subject to fluctuation or vulnerable to cheating.

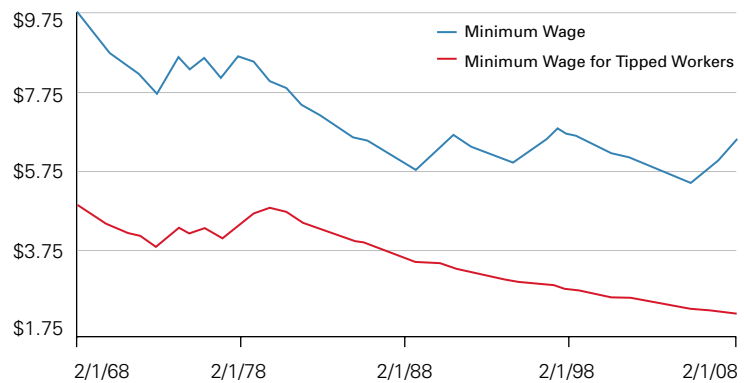
Just \$2.13: The Tipped Worker Minimum Wage's Sharp Decline

When it established the tipped worker minimum wage in 1966, Congress set it as a fixed percentage of the full minimum wage, thereby linking the two minimum wage rates. This meant that when the minimum wage increased throughout the 1960s, 70s, 80s, and early 90s, the tipped worker minimum wage did too, ensuring that tipped workers did not fall behind.

In 1996, however, restaurant industry lobbyists prevailed on Congress to freeze the tipped worker minimum wage when it raised the overall minimum wage.¹³ Breaking with its nearly thirty-year practice of raising the tipped worker minimum wage whenever the minimum wage went up, Congress instead “de-linked” the two—freezing the minimum wage for tipped workers at \$2.13.¹⁴ Over the next decade, both the minimum wage and the minimum wage for tipped workers languished as lawmakers ignored them. And when the new Congress elected in 2006 finally got President George W. Bush to sign a modest minimum wage increase in 2007, it left the minimum wage for tipped workers unchanged at \$2.13.¹⁵

As a result, both the relative value and the real value of the tipped worker minimum wage have fallen precipitously over the past two decades. In relative terms, its value has dropped from 60% of the minimum wage in 1990 to just 29% in 2009. In real terms, the tipped worker minimum wage would be \$4.89 today had it kept up with inflation over the last 40 years. Instead, it remains just \$2.13, and its real value is at an all-time low.

Chart A: Inflation-Adjusted Value of the Minimum Wage and Minimum Wage for Tipped Workers (2/1/1968–7/24/2008, in 2008 dollars)



Source: NELP analysis of historical minimum wage rates adjusted by the Consumer Price Index for All Urban Consumers (CPI-U)

States Leading—and Lagging—in Protecting Tipped Workers

During the years that Congress has allowed the tipped worker minimum wage to fall, many states have stepped in to adopt or preserve stronger tipped worker protections under their state minimum wage laws. States are able to do this because federal law allows states to establish their own minimum wages, and employers operating in the state must comply with the higher of the two.¹⁶

Thirty-two states and the District of Columbia have established tipped worker minimum wages that are higher than the \$2.13 federal rate. This includes twenty-two states that, as of 2010, will guarantee tipped workers at least 60% of the full minimum wage—the historical federal minimum wage rate for tipped workers. Seven of those states have gone further to guarantee tipped workers 100% of the minimum wage—a

During the years that Congress has allowed the tipped worker minimum wage to fall, many states have stepped in to adopt or preserve stronger tipped worker protections under their state minimum wage laws.

best practice that provides tipped workers a maximum cushion against economic insecurity and helps bring their pay closer to a living wage. (See “Guaranteeing Tipped Workers the Full Minimum Wage.”)

Table 1. States with Tipped Worker Minimum Wages Above the Federal Rate of \$2.13

(As of August 1, 2009)

| State | Minimum Wage | Minimum Wage for Tipped Workers | |
|----------------|--------------|---------------------------------|-------------------------------|
| | Amount | Amount | Percent of State Minimum Wage |
| Washington | \$8.55 | \$8.55 | 100% |
| Oregon | \$8.40 | \$8.40 | 100% |
| California | \$8.00 | \$8.00 | 100% |
| Nevada | \$7.55 | \$7.55 | 100% |
| Montana | \$7.25 | \$7.25 | 100% |
| Alaska | \$7.25 | \$7.25 | 100% |
| Minnesota | \$6.15 | \$6.15 | 100% |
| Hawaii | \$7.25 | \$7.00 | 97% |
| West Virginia | \$7.25 | \$5.80 | 80% |
| Connecticut | \$8.00 | \$5.52 | 69% |
| North Dakota | \$7.25 | \$4.86 | 67% |
| New York | \$7.25 | \$4.60-plus* | 64%-85% |
| Illinois | \$8.00 | \$4.80 | 60% |
| Iowa | \$7.25 | \$4.35 | 60% |
| Arizona | \$7.25 | \$4.25 | 59% (will reach 60% by 2010) |
| Colorado | \$7.28 | \$4.26 | 59% (will reach 60% by 2010) |
| Florida | \$7.21 | \$4.19 | 58% (will reach 60% by 2010) |
| Ohio | \$7.30 | \$3.65 | 50% |
| Maine | \$7.25 | \$3.625 | 50% |
| Missouri | \$7.05 | \$3.525 | 50% |
| Oklahoma | \$7.25 | \$3.63 | 50% |
| Maryland | \$7.25 | \$3.63 | 50% |
| Vermont | \$8.06 | \$3.91 | 49% |
| Idaho | \$7.25 | \$3.35 | 46% |
| New Hampshire | \$7.25 | \$3.26 | 45% |
| Arkansas | \$6.25 | \$2.63 | 42% |
| Pennsylvania | \$7.25 | \$2.90 | 40% |
| Rhode Island | \$7.40 | \$2.89 | 39% |
| DC | \$7.55 | \$2.77 | 37% |
| Michigan | \$7.40 | \$2.65 | 36% |
| Wisconsin | \$6.50 | \$2.33 | 36% |
| Massachusetts | \$8.00 | \$2.63 | 33% |
| Delaware | \$7.15 | \$2.23 | 31% |
| Average | | | 63% |
| Federal | \$7.25 | \$2.13 | 29% |

* Rate to be adjusted by New York State Department of Labor Restaurant and Hotel Wage Board

Source: NELP analysis of state minimum wage laws

But despite this wave of action, eighteen states still have not strengthened their tipped worker minimum wages. Ten of those states have minimum wages for tipped workers that are the same as the low federal rate.¹⁷ And the remaining eight states provide no protection at all for tipped workers. New Jersey and Virginia, for example, have no tipped worker minimum wage and so allow workers to be paid entirely in tips. Georgia exempts tipped workers from its minimum wage coverage altogether. Five other Southern states—Alabama, Louisiana, Mississippi, South Carolina, and Tennessee—have no state minimum wage laws at all. In these states, millions of workers in the nation’s high-growth tipped industries are protected only by the federal tipped worker minimum wage—which has languished at \$2.13 since 1991.

Table 2. States with Tipped Worker Minimum Wages at or Below the Federal Rate of \$2.13
(As of August 1, 2009)

| State | Minimum Wage | Minimum Wage for Tipped Workers | |
|----------------------|-----------------------|---------------------------------|-------------------------------|
| | Amount | Amount | Percent of State Minimum Wage |
| Wyoming | \$5.15 | \$2.13 | 41% |
| Kansas ¹⁸ | \$7.25 | \$2.13 | 29% |
| Indiana | \$7.25 | \$2.13 | 29% |
| Kentucky | \$7.25 | \$2.13 | 29% |
| Nebraska | \$7.25 | \$2.13 | 29% |
| North Carolina | \$7.25 | \$2.13 | 29% |
| South Dakota | \$7.25 | \$2.13 | 29% |
| Texas | \$7.25 | \$2.13 | 29% |
| Utah | \$7.25 | \$2.13 | 29% |
| New Mexico | \$7.50 | \$2.13 | 28% |
| New Jersey | \$7.15 | \$0.00 | 0% |
| Virginia | \$7.25 | \$0.00 | 0% |
| Georgia | \$5.15 | Exempt | n/a |
| Alabama | No state minimum wage | n/a | n/a |
| Louisiana | No state minimum wage | n/a | n/a |
| Mississippi | No state minimum wage | n/a | n/a |
| South Carolina | No state minimum wage | n/a | n/a |
| Tennessee | No state minimum wage | n/a | n/a |

Shading = States where the tipped worker minimum wage is below the federal rate of \$2.13

Source: NELP analysis of state minimum wage laws

Why Workers Cannot Count on Tips

Tipped workers need to be guaranteed a substantial minimum wage that is paid directly by their employers in order to cushion them and their families against wide swings in their paychecks. Tips are notoriously erratic, varying depending on broader economic trends, from season to season and from shift to shift. Workers who are forced to subsist largely on tips face sudden pay drops that prevent them from paying their bills and providing for their families. Making matters worse, the complicated tipped worker minimum wage and tip

credit system is vulnerable to abuse that results in many tipped workers not receiving all of their tips. Only by guaranteeing tipped workers a strong minimum wage paid directly by their employers can they be protected against economic hardship.

The Erratic Nature of Tips

Because tips are discretionary, tipped workers' incomes fluctuate widely based on broader economic and seasonal trends. "We really depend on those tips. I don't think people understand that," one waitress said. She explained that tips vary substantially depending on

Tips are notoriously erratic, varying depending on broader economic trends, from season to season and from shift to shift. Workers who are forced to subsist largely on tips face sudden pay drops that prevent them from paying their bills and providing for their families.

a variety of outside factors: "Tipped workers are at the whim of customers, or the weather, or the holidays. It's very external." A strong minimum wage that is paid directly by the employer is essential for cushioning the impact of these fluctuations.

Tipped workers are hit especially hard by economic downturns, and the current recession underscores why it is so important to raise the minimum wage for

tipped workers. Families have less money to spend on nonessentials like dinners out and salon visits, leaving tipped workers with fewer customers and less pay.¹⁹ Compounding the problem, tipped workers across the country report that customers who are feeling squeezed by the economy are leaving smaller tips.²⁰ As one restaurant worker describes, "To be honest, every day is bad. I walk out of my shift with \$40. A lot of people are getting second jobs."

But even when the economy is stronger, seasonal swings are still the norm. In an urban area, a parking attendant can make \$100 day in tips during the high season from fall to spring, but only \$50 a day during summer months when high spenders leave for vacation homes. Holidays and special events are a mixed bag. One restaurant worker described working on Superbowl Sunday "at a bar that wasn't known for it": "I've literally walked out with \$10 in tips, and that's after a six-hour shift."

Tips can also vary significantly from shift to shift during a normal week. One worker explained that at his restaurant, "Nobody likes to work Sunday morning or Monday—but someone has to do it. When that's my time, I know I'm not going to make any money. Working Friday night is like working five Sunday mornings."

"To be honest, every day is bad. I walk out of my shift with \$40. A lot of people are getting second jobs."

While this variation can be predictable, observers report that few employers take steps to mitigate the effect on workers—for example, by cutting back on staff during slow shifts. Because of the low minimum wage for tipped workers, employers have little

incentive not to overstaff slow shifts. By contrast, employers tend to use greater care when they schedule non-tipped workers since employers must pay them the full minimum wage for every hour, even when business is slow. As one worker put it, "In the kitchen [— where workers do not receive tips—it] is different. They just have [the staff that] they need."

Complicated Rules Facilitate Abuse

Equally important, the notoriously complex minimum wage system for tipped workers results in many employees failing to receive the tips to which they are entitled. A strong tipped worker minimum wage guarantees tipped workers a basic income that is less vulnerable to manipulation and abuse.

For starters, although the federal minimum wage and the wage laws of most states require it, few employers actually do the active monitoring necessary to make sure that workers always receive enough tips to bring them up to the level of the full minimum wage. Federal tax rules allow employers to estimate their workers' tips in order to determine how much tax to withhold.²¹ Although this estimation approach is not sufficient for federal minimum wage compliance, many employers use it nonetheless and, as a result, are not actually verifying that their workers really are receiving enough tips to bring them up to the full minimum wage.

"They just take our total sales for the day—say it's [a couple] hundred dollars—and they just [estimate] 15% of that," explained a waitress from southern New Jersey. Not only is this approach illegal under the federal minimum wage but, as the waitress explained, it tends to overstate tips since many customers tip less than 15%, and "a few times a week" a customer leaves no tip at all.²²

[T]he notoriously complex minimum wage system for tipped workers results in many employees failing to receive the tips to which they are entitled. A strong tipped worker minimum wage guarantees tipped workers a basic income that is less vulnerable to manipulation and abuse.

Second, workers' tips are especially vulnerable to being misappropriated, making them less dependable than a minimum wage that is paid directly by the employer. In many restaurants, for example, waitresses and waiters must share their tips with other service workers, including bussers (who clean tables), runners (who bring food to the tables), and bartenders. Waitresses and waiters typically do this either by "tipping out" their co-workers—a practice whereby they give a portion of their tips to the bussers, runners, and bartenders that help them serve each table—or by participating in a "tip pool," whereby all tipped workers accumulate their tips and distribute them according to a set formula. The federal minimum wage law and most states' wage laws allow this sort of tip sharing among workers who "customarily and regularly receive tips"—such as the categories listed above—though some states require employee consent.²³

While such pooling is legal, it creates opportunities for unethical employers to illegally skim off a portion of tips to keep for themselves or to use to pay other employees.²⁴ Tip violations can take a variety of forms, but ultimately they all result in tipped workers losing some of their tips to improve the employer's bottom line. Sometimes this process is quite direct, with managers or owners simply pocketing a portion of the tip pool. Other employers use less direct methods, for example, by illegally including non-tipped workers in the tip pool so that they can be paid the lower minimum wage for tipped workers.

Workers report that this sort of abuse, often called "tip stealing," is rampant. As one restaurant industry veteran described, "They do take tips, everyplace does." Sometimes restaurants take advantage of communication barriers among workers. A waitress described setting aside 15% of her tips for bussers, but stressed that the money "goes to the front—I don't even know if the busboys get it."

"They do take tips, everyplace does."

Recently, waitresses and waiters at diners around Newburgh in upstate New York exposed that managers had simply been pocketing the portion of the workers' tips that they had been deducting, supposedly to share with the bussers. Another waitress in Maryland who already shared her tips with a captain, bussers, and a host finally contacted a union for help when the restaurant's managers tried to take a take a portion of the tips for themselves as well.

[W]omen make up 62% of tipped workers and 72% of waitresses and waiters.... As a result, the tipped worker minimum wage is a substantial but underappreciated factor in the unequal wages that women workers continue to receive across our economy.

Several high-profile lawsuits have been filed in recent years in response to these practices. For example, members of the Restaurant Opportunities Center of New York (ROC-NY) recently reached a nearly \$4 million settlement with a New York City restaurant group that it alleged allowed management to take a portion of workers' tips, among other violations.²⁵

And when the New York State Department of Labor conducted a compliance audit of a random sample of car washes around the state, it found tip abuse at 21% of car washes statewide and at 39% in New York City.²⁶

The complexity of these rules and the fact that most tips are still received in cash make tip misdirection very difficult to eliminate. This reality underscores the importance of a strong tipped worker minimum wage to provide a base income for all tipped workers that is less vulnerable to abuse.²⁷

The Low Tipped Worker Minimum Wage Is Keeping Millions of America's Tipped Workers, Most of Them Adult Women, Near Poverty

The falling minimum wage for tipped workers is driving down living standards for the millions of America's workers—the vast majority of them adult women—who today spend their careers in the fast-growing tipped industries of our nation's service economy. In large part because of the low minimum wage, today tipped workers like waitresses and waiters have

More than two-thirds of tipped workers are adults twenty-one and older, as are 72% of waitresses and waiters.

nearly triple the poverty rate of the workforce as a whole. Until we restore a stronger minimum wage for tipped workers, these jobs will continue to be a major contributor to the lower pay that women workers receive across our economy.

Tipped Workers Are Overwhelmingly Adult Women

According to the U.S. Census Bureau's Current Population Survey, tipped workers are overwhelmingly women, many of whom are supporting families. Overall, women make up 62% of tipped workers and 72% of waitresses and waiters—one of the largest groups of tipped workers. As a result, the tipped worker minimum wage is a substantial but underappreciated factor in the unequal wages that women workers continue to receive across our economy.²⁸

Making matters worse, even among tipped workers, women earn less. Overall, they average \$0.40 less per hour than their male counterparts. For restaurant workers the differential is even larger: waitresses average \$0.70 per hour less than waiters.²⁹

Nor are tipped workers chiefly teenagers, as industry lobbyists often suggest. More than two-thirds of tipped workers are adults twenty-one and older, as are 72% of waitresses and waiters.

Table 3. Demographics of Tipped Workers in the United States

(2005–2007, in 2007 dollars)

| Demographic | | Percent of Workforce | Median Wage |
|------------------|--------------------|----------------------|---------------|
| <i>Overall</i> | | <i>100%</i> | <i>\$8.23</i> |
| Gender | Male | 38.1% | \$8.50 |
| | Female | 62.0% | \$8.10 |
| Race | White | 60.7% | \$8.23 |
| | Black | 10.9% | \$8.00 |
| | Hispanic | 20.8% | \$8.23 |
| | Other | 7.6% | \$8.80 |
| Age | 16-18 | 20.7% | \$7.00 |
| | 19-20 | 12.2% | \$7.97 |
| | 21-24 | 18.8% | \$8.50 |
| | 25-44 | 33.9% | \$9.26 |
| | 45-64 | 14.5% | \$9.50 |
| Education | No diploma | 32.3% | \$7.25 |
| | High school grad | 31.9% | \$8.50 |
| | Some college | 28.9% | \$9.05 |
| | Bachelor's or more | 7.0% | \$12.01 |

(Categories may not sum to 100.0% due to rounding)

Source: NELP analysis of 2005-2007 Current Population Survey³⁰

Table 4. Demographics of Waitresses and Waiters in the United States

(2005–2007, in 2007 dollars)

| Demographic | | Percent of Workforce | Median Wage |
|------------------|--------------------|----------------------|---------------|
| <i>Overall</i> | | <i>100%</i> | <i>\$9.00</i> |
| Gender | Male | 28.0% | \$9.50 |
| | Female | 72.0% | \$8.80 |
| Race | White | 70.7% | \$9.01 |
| | Black | 6.5% | \$8.50 |
| | Hispanic | 15.2% | \$8.74 |
| | Other | 7.5% | \$9.40 |
| Age | 16-18 | 14.0% | \$7.01 |
| | 19-20 | 14.6% | \$7.01 |
| | 21-24 | 25% | \$9.26 |
| | 25-44 | 35.6% | \$10.00 |
| | 45-64 | 10.9% | \$9.89 |
| Education | No diploma | 19.9% | \$7.43 |
| | High school grad | 30.9% | \$9.00 |
| | Some college | 40.2% | \$9.80 |
| | Bachelor's or more | 9.0% | \$12.75 |

(Categories may not sum to 100.0% due to rounding)

Source: NELP analysis of 2005-2007 Current Population Survey

Tipped Workers Face Low Wages and High Poverty

Industries employing tipped workers represent some of the lowest paid jobs in the U.S. economy. In fact, the U.S. Department of Labor’s Bureau of Labor Statistics cites food preparation and service as the nation’s single lowest paying industry.³¹ Other industries employing tipped workers, such as nail salons and car washes, also pay poverty-level wages.

[T]ipped workers nationwide earn a median wage of \$8.23 per hour including tips, or just \$17,118 annually.

Even after accounting for tips, the vast majority of tipped workers are still barely getting by. According to our analysis of Current Population Survey data from 2005-2007, tipped workers nationwide earn a median wage of \$8.23 per hour including tips, or just

\$17,118 annually (in 2007 dollars). Waitresses and waiters earn slightly more, but still only \$9.00 per hour including tips or \$18,720 annually—barely more than the poverty level for a family of three and less than the poverty level for a family of four.³² As a result, a sizeable percentage of

waitresses and waiters live in families below the poverty level—and the rates are even higher for black and Hispanic waitresses and waiters.

Table 5. Family Poverty By Race Among Waitresses and Waiters (2003–2007)

| Percent living in a family below the poverty level | | |
|----------------------------------------------------|----------|-------|
| Race | White | 13.8% |
| | Black | 22.3% |
| | Hispanic | 18.0% |
| | Other | 13.4% |

Source: NELP analysis of March 2003-2007 Current Population Survey

Overall, the family poverty rate for waitresses and waiters is 14.9%—almost three times the rate for the workforce as a whole. And the rates are even higher for tipped workers as a whole, since their wages are lower than those of waitresses and waiters.

Table 6. Comparative Family Poverty Rates (2003–2007)

| Percent living in a family below the poverty level | |
|----------------------------------------------------|-------|
| Waitresses/Waiters | 14.9% |
| All Workers | 5.7% |

Source: NELP analysis of March 2003-2007 Current Population Survey

Moreover, it is widely recognized that the federal poverty level is artificially low and substantially underestimates the income that an individual or a family needs to avoid economic hardship in the United States.³³ In reality, even a single adult cannot make ends meet

on the \$9.00 per hour that the average waitress earns. More realistic calculations show that breadwinners need to earn closer to \$19.00 per hour, or \$40,000 per year, to actually meet basic needs, depending on family size and the local cost of living.³⁴

It is true that there exists some economic diversity among tipped workers, who can work in a variety of different workplaces with varying levels of tips. But while some waitresses and waiters at high-end restaurants may earn high incomes, they represent a very small minority of restaurant

[T]he family poverty rate for waitresses and waiters is 14.9%—almost three times the rate for the workforce as a whole.

workers, and an even smaller portion of tipped workers overall. Across the country, CPS data suggest that only the top quarter of waitresses and waiters earned more than \$12.86 per hour in wages and tips or \$26,748 per year during 2003-2007. And the median wage

was just \$9.00. But even this number hides the fact that wages are lower for waitresses and waiters in most of the states, since it includes—and is therefore inflated by—wages in states like California, Oregon, and Washington that both have relatively high state minimum wages and require tipped workers to be paid 100% of the minimum wage.³⁵ In the eighteen states where the tipped worker minimum wage is effectively stuck at \$2.13, the median wage for waitresses and waiters was just \$8.40.³⁶

[E]ven a single adult cannot make ends meet on the \$9.00 per hour that the average waitress earns.

Moreover, tipped workers must stretch their wages further because they are less likely than other workers to receive employer-provided health insurance. Waitresses and waiters are only one-quarter as likely as the workforce as a whole to have a health insurance plan under which their employer pays some portion of the cost. As a result, these workers are twice as likely to go without health insurance.

Table 7. Health Insurance Coverage (2003-2007)

| | Employer-provided health insurance* | Uninsured |
|---------------------------|-------------------------------------|-----------|
| Waitresses/Waiters | 13.5% | 33.8% |
| All Workers | 52.4% | 16.9% |

* Employer-provided health insurance means that the employer offered health insurance and paid some portion of the cost

Source: NELP analysis of March 2003-2007 Current Population Survey

The data on waitresses and waiters—the largest group of tipped workers—are the most readily available for illustrating these problems. But other tipped workers earn even less. For example, the median hourly wage for all tipped workers for whom data were available (excluding waitresses and waiters, bartenders, and food preparation workers) was just \$8.16 per hour during 2005-2007. This group includes hotel and restaurant workers not involved in food preparation, barber shop workers, and other personal services workers to name a few.

Interviews with tipped workers illustrate how many struggle to make ends meet. One restaurant worker living in an apartment complex near Philadelphia explained that in order to afford the car that she needs to get to her job, she must share a one-bedroom apartment with two other restaurant workers. Her monthly expenses consume all of her income, leaving her unable to afford to take time off or improve her living arrangements. Another waitress living in New Jersey described how she struggles to raise her two young children on her meager earnings, and was forced to turn to a homeless shelter until she received a temporary housing voucher that enabled her to afford an apartment. “When you wait tables,” she explained, “you’re not even check to check, but day to day.”

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But waitresses and waiters still make more than other tipped restaurant workers like bussers and runners. As a waiter named Juan Carlos remembered from his time bussing tables in a New Brunswick, New Jersey chain restaurant before becoming a waiter, “The money you make per hour, it’s not worth it. I made \$40, from 5pm to 12 [midnight].... There are three guys, and you have to break the tips in three. And the morning is the worst. You start working at 10:00 and end at 3:00 and the tips are really bad, I’m talking \$20.” As a result, his living situation was fairly typical: “We were five guys sharing one room. It’s not a very good experience.”

2. Raising the Tipped Worker Minimum Wage Increases Pay Without Slowing Business Growth

The experiences of states and cities that have preserved or adopted a higher minimum wage for tipped workers show that it is an effective tool for improving workers' living standards and does so without costing jobs or slowing business growth. Raising the tipped worker minimum wage—like raising the minimum wage in general—is simply not a major factor, one way or the other, in the economic health of industries that employ tipped workers. Instead, growth in these industries is influenced far more by broader trends in the economy than by whether employers must pay somewhat more to their frontline staff.

Strengthening the Tipped Worker Minimum Wage Helps Working Families

Raising the tipped worker minimum wage can have a substantial impact on tipped workers' incomes. For example, the federal minimum wage will increase to \$7.25 in July 2009. If the tipped worker minimum wage were restored to 60% of the full minimum wage, it would be \$4.35—approximately double the current rate of \$2.13. Over the course of a year, that would mean an extra \$4,618 for a full-time worker.³⁷

Wage data from states with higher tipped worker minimum wages show how such protections boost incomes and improve economic security for tipped workers. For example, in the seven states that provide tipped workers the full minimum wage, plus Hawaii, which has just a nominal 25 cent tip credit, the median wage for waitresses and waiters is \$10.00 per hour—\$1.00 higher than the median in the other 42 states.³⁸

Interviews with tipped workers illustrate the very real difference that a strong minimum wage for tipped workers makes in their economic security. Mark, a waiter at a restaurant in Minneapolis, found the change dramatic when he moved to Minnesota, a state with a strong minimum wage for tipped workers. "I worked in Wisconsin, where [the minimum wage for tipped workers] was something like \$2 [\$2.33]," he explained, "And I really saw the difference when I moved to Minnesota. The higher wage means that in a bad week for tips I can still pay my bills."

Higher Minimum Wages for Tipped Workers Have Not Cost Jobs or Slowed Business Growth

Organized employer groups such as the National Restaurant Association typically argue that raising the minimum wage—either in general or for tipped workers—will cost jobs. They claim that businesses will be forced to lay off low-wage workers or even close their doors if the minimum wage is increased. However, studies of states and cities that have raised their tipped worker minimum wages have consistently found no evidence that doing so leads to job losses or slows business growth in industries that employ tipped workers, including restaurants. These results are consistent with the trend in research on the minimum wage in general, which has shown that recent minimum wage increases have neither led to job losses nor been a major factor in the overall economic health of industries that employ low-wage workers.³⁹

[S]tudies of states and cities that have raised their tipped worker minimum wages have consistently found no evidence that doing so leads to job losses or slows business growth in industries that employ tipped workers, including restaurants.

For example, a 2006 study by the Fiscal Policy Institute examined job growth between 1998 and 2003 in the ten states and the District of Columbia that had minimum wages higher than the federal rate at that time—Alaska, California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, Rhode Island, Vermont, and Washington.⁴⁰ The study compared job growth in those states with the forty states that did not have higher minimum wages. All ten of the high minimum wage states examined in the study also had tipped worker minimum wages higher than the federal \$2.13 rate. In fact, four of the ten guarantee tipped workers the full state minimum wage and Hawaii allows tipped workers to be paid just 25 cents less. The study found that these ten states actually had faster job growth among small businesses than the other forty states. This experience highlights how job growth is driven overwhelmingly by other factors in a state’s economy—not by how high or low the state’s minimum wage is.

Similarly, a 2006 study by economist Paul Wolfson at Dartmouth’s Tuck Business School examined the impact of higher minimum wages on the restaurant industry—one of the largest tipped industries.⁴¹

Wolfson’s study focused on the seventeen states and the District of Columbia that had raised their minimum wages above the federal level as of 2005.

Again, sixteen of those jurisdictions—California, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois,

Maine, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin—had tipped worker minimum wages that exceeded the federal \$2.13 rate. The study found that raising the minimum wage in those states raised workers’ incomes in the restaurant industry, but found no evidence that it adversely affected restaurant employment.

[T]he National Restaurant Association’s own analysis of industry trends projects that four of the five fastest growth states for restaurant jobs over the next decade will all be states that mandate high minimum wages for tipped workers: Arizona (\$4.25), Florida (\$4.19), Nevada (\$6.85), and Alaska (\$7.15).

Additional evidence is provided by the experiences of the restaurant industry in San Francisco, a city that raised its minimum wage from \$6.75 to \$8.50 in 2004 and requires employers to pay their tipped workers the full minimum wage. When that city’s minimum wage law took effect, tipped workers received a raise of \$1.75 per hour—a substantial increase. A University of California study of the city’s restaurant industry found that the increase did not

result in restaurant closures, job losses, or even substantial price increases.⁴² In fact, the study found that the increase may have helped stabilize the restaurant industry, since job tenure and employment of full-time employees actually increased at fast food restaurants, and employment of tipped workers increased at table-service restaurants.⁴³

Even the National Restaurant Association's own analysis of industry trends projects that four of the five fastest growth states for restaurant jobs over the next decade will be states that mandate high minimum wages for tipped workers: Arizona (\$4.25), Florida (\$4.19), Nevada (\$6.85), and Alaska (\$7.15).⁴⁴

All of this evidence underscores that the minimum wage in general—and the minimum wage for tipped workers in particular—is simply not a major factor in the economic health of the restaurant industry or other low-wage industries. These industries are influenced far more by broader trends in the economy that affect consumer demand—not by whether they must pay somewhat more to their lowest-wage staff.

Guaranteeing Tipped Workers the Full Minimum Wage

Experiences in the states have shown that by far the best way to improve the economic security of tipped workers is to eliminate the lower tipped worker minimum wage altogether and guarantee tipped workers 100% of the full minimum wage.

To date, seven states have adopted this model reform: Alaska, California, Minnesota, Montana, Nevada, Oregon and Washington.⁴⁵ Their experiences have shown that strong tipped worker protections have created more living wage jobs without causing layoffs or hurting business growth. Many of the states with higher tipped worker minimum wages have been among those with the strongest national job growth in recent years. And Nevada and Alaska—two of the seven states that guarantee tipped workers the full minimum wage—are projected by the National Restaurant Association to have some of the fastest growth in restaurant jobs over the

next decade.⁴⁵ As a result, lawmakers in these states have consistently rejected proposals by restaurant industry lobbyists to roll back their model protections for tipped workers.

Based in part on these experiences, this model reform is now spreading internationally. In 2009, the United Kingdom announced that it is abolishing the tip credit and requiring that tipped workers be paid the full minimum wage. The reform was championed by two leading British newspapers and won the support of major restaurant employers like Pizza Hut and TGI Friday's, as well as food guides such as *The Michelin Guide* and *Time Out Eating and Drinking*.⁴⁷ Members of the European Parliament supported the reform campaign in the UK, and have now proposed rules to do the same throughout the European Union.⁴⁸

3. Four Steps for Restoring Economic Security for Tipped Workers

Tipped workers need a strong minimum wage that is paid directly by their employers in order to have a decent standard of living and a cushion against wide fluctuations in tips. Historically, the federal tipped worker minimum wage did just that. But it has been frozen since 1991, forcing these workers to subsist largely on tips at the very time that economically struggling customers are cutting back on tipping. Congress and the remaining states should follow the lead of the states that have restored stronger minimum wage protections for tipped workers by taking four key steps:

One. Substantially raise the minimum wage for tipped workers

For starters, Congress and the states that currently have weak protections for tipped workers should restore the tipped worker minimum wage to at least 60% of the full minimum wage—its historical level until 1990. But over the longer term, the federal and state tipped worker minimum wages should be raised to 100% of the full minimum wage as Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington have already done. Their experiences show that this best practice is the most effective way to create living wage jobs and improve economic security for the nation’s millions of tipped workers. And they have found that doing so has not slowed business growth. (See “Guaranteeing Tipped Workers the Full Minimum Wage.”)

Two. Make the tipped worker minimum wage increase automatically when the full minimum wage increases

As noted, until 1990, the federal minimum wage for tipped workers was set at 60% of the full minimum wage. By directly linking the tipped worker minimum wage to the full minimum wage, Congress ensured that whenever the full minimum wage went up, the minimum wage for tipped workers was also adjusted automatically. It was only after Congress “delinked” the tipped worker minimum wage from the full minimum wage—and then failed to raise the tipped rate again when it raised the full minimum wage rate—that its value began to plummet.

Twenty states today link their tipped worker minimum wage directly to their full state minimum wage: Alaska; Arizona; California; Colorado; Connecticut; Florida; Hawaii; Illinois; Iowa; Maine; Maryland; Missouri; Minnesota; Montana; Nevada; Oregon; New Hampshire; New York;⁴⁹ Ohio; and Washington. In addition, Vermont provides automatic annual increases for both the minimum wage and the minimum wage for tipped workers, which has the same effect as linking them.⁵⁰ These states have shown that linking the two minimum wages is the most effective approach for maintaining adequate protections for tipped workers.

Congress and the remaining states should follow this best practice by setting the minimum wage for tipped workers as a fixed percentage of the full minimum wage—ultimately, 100% of the full minimum wage—so that it increases automatically when the full minimum wage does.

Three. Strengthen protections against “tip stealing”

Both the U.S. Department of Labor and federal courts have long recognized that federal law prohibits employers and managers from taking any portion of a worker’s tips.⁵¹ But in the final months of the Bush Administration, the Department of Labor proposed ambiguous new rules that erroneously suggested that there are circumstances where employers may take a portion of their workers’ tips.⁵² Fortunately, these proposed rules, which are clearly inconsistent with the federal Fair Labor Standards Act, were frozen by the incoming Obama Administration.⁵³

At least eighteen states have gone further and adopted additional protections against tip stealing through laws and rules that expressly state that tips are the sole property of the workers who receive them.⁵⁴ The remaining states and the federal government should enact the same model protections to provide greater economic security for tipped workers by clarifying that they own the tips that they receive.

Four. Fight attempts to roll back tipped worker minimum wages

At the same time that they are working to restore stronger protections for tipped workers at the federal and state levels, policymakers and grassroots groups should be ready to oppose attempts to roll back protections in states that have them. For example, in the years after voters in Colorado, Missouri, and Montana approved minimum wage increases that included stronger protections for tipped workers, restaurant industry have filed lawsuits and proposed legislation attempting to roll back these voter-backed increases.⁵⁵ Similarly, in Minnesota—one of the states that has adopted the best practice of requiring employers to pay tipped workers the full minimum wage—Governor Tim Pawlenty has attempted to roll back wages for tipped workers by pledging to veto minimum wage increases unless lawmakers agree to weaken protections for the tipped workforce.⁵⁶

However, in each of these instances, once the issue was publicized, lawmakers and public opinion came out in support of tipped workers like the hardworking waitresses at their local diners. In Missouri, for example, Governor Matt Blunt’s administration initially attempted to deny tipped workers a voter-approved minimum wage increase by taking the position that it did not apply to tipped workers.⁵⁷ Tipped workers responded with a “Save Our Tips” campaign in which thousands of waitresses, waiters, and other tipped workers raised their voices, explaining that they were struggling and badly needed a raise. As a result, the governor reversed direction and threw his support behind the increase.⁵⁸ In the years since, the restaurant industry has mounted repeated efforts to weaken Missouri’s tipped worker protections despite their broad public support. But with effective organizing to call public attention to these harmful proposals, to date they have not succeeded.⁵⁹

These experiences demonstrate how, with education and organizing, the public and policymakers will understand the importance of strong minimum wage protections for shoring up living standards for the nation’s fast-growing tipped workforce.

Conclusion

The long overlooked minimum wage for tipped workers is a key protection for the millions of America's employees who rely on tips to make ends meet. Restoring a strong minimum wage for these workers is the most important thing our nation can do to improve their economic security and create more living wage jobs—something our economy badly needs more of today.

Endnotes

Note: All URL's last visited July 17, 2009

- 1 Congress phased in the increase in three steps: \$5.85 in July 2007; \$6.55 in July 2008; and finally \$7.25 in July 2009. See Act of May 25, 2007, Pub. L. No. 110-28, 121 Stat. 188 (2007) (to be codified at 29 U.S.C. § 206(a)).
- 2 In the U.S. there are 49,770 baggage porters and bellhops, 10,330 barbers, 51,590 manicurists and pedicurists, and 136,470 parking attendants. See Bureau of Labor Statistics, List of SOC Occupations (2008), available at http://www.bls.gov/oes/current/oes_stru.htm. Although the federal Bureau of Labor Statistics (BLS) does not distinguish between tipped and non-tipped workers, these are occupations in which most employees are generally known to receive tips.
- 3 Among food service occupations for which BLS gathers data, waitresses, waiters, and bartenders are generally classified as tipped positions. In the U.S., there are more than 2.3 million waitresses and waiters and more than 500,000 bartenders. See Bureau of Labor Statistics, Occupational Employment and Wages (2008), available at <http://www.bls.gov/oes/current/oes353031.htm>, <http://www.bls.gov/oes/current/oes353011.htm>.
- 4 See Arlene Dohm & Lynn Shniper, *Occupational Employment Projections to 2016*, Monthly Labor Rev. 86, 97 t.3 (Nov. 2007), available at <http://stats.bls.gov/opub/mlr/2007/11/art5full.pdf>.
- 5 For example, the Minnesota Department of Labor and Industry found that “[T]he percentage of Minnesota’s minimum wage workers who also received overtime pay, tips or commissions rose from an estimated 24 percent in 1998 to 33 percent in the first portion of 2005.” David Berry, Minnesota Department of Labor and Industry, Minnesota Minimum Wage Report 2005, 1 (2006), available at <http://www.doli.state.mn.us/RS/PDF/05minwage.pdf>.
- 6 See United States Department of Labor, History of Changes to the Minimum Wage Law, available at <http://www.dol.gov/esa/minwage/coverage.htm>.
- 7 See William G. Whittaker, Congressional Research Service Report for Congress No. RL33348, The Tip Credit Provisions of the Fair Labor Standards Act 3 (2006), available at http://assets.opencrs.org/rpts/RL33348_20060324.pdf.
- 8 See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101(a), 52 Stat. 1061 (1966) (codified as amended at 29 U.S.C. § 203(m)). See also Whittaker, *supra* note 7, at 3.
- 9 See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101(a), 52 Stat. 1061 (1966) (codified as amended at 29 U.S.C. § 203(m)).
- 10 See Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 3, 91 Stat. 1249 (1977) (codified as amended at 29 U.S.C. § 203(m)) (raising the tipped worker minimum wage to 60% of the full minimum wage in 1980); Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 5, 103 Stat. 941 (1989) (codified as amended at 29 U.S.C. § 203(m)) (lowering the tipped worker minimum wage to 50% of the full minimum wage in 1991).
- 11 The federal Fair Labor Standards Act provides that “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 [\$2.13 and] an additional amount on account of the tips received by such employee which amount is equal to the difference between [\$2.13] and [the full federal minimum wage, which is \$7.25 as of July 2009]. The additional amount on account of tips may not exceed the value of the tips actually received by an employee.” 29 U.S.C. § 203(m). Most state minimum wage laws incorporate similar rules. Hawaii represents an interesting variation. It allows employers to pay tipped workers a slightly lower minimum wage—25 cents less than the full minimum wage—but only if the worker receives at least 50 cents more than the full minimum wage once tips are added in. Hawaii Rev. Stat. § 387-2 (2008).
- 12 See 29 C.F.R. § 531.59.
- 13 The restaurant industry has since redoubled its lobbying efforts in Washington. According to *Fortune* magazine, the National Restaurant Association is among the “Power 25” trade associations in terms of influence and clout, and food and beverage lobbyists spend millions year after year. See Jeffrey H. Birnbaum, *Washington’s Power 25—Which Pressure Groups Are Best at Manipulating the Laws We Live By?*, *Fortune Magazine*, Dec. 8, 1997, available at http://money.cnn.com/magazines/fortune/fortune_archive/1997/12/08/234927/index.htm; Restaurants & Drinking Establishments Industry Profile, *Opensecrets.org*, available at <http://www.opensecrets.org/lobby/induscode.php?lname=G2900&year=2008> (reporting that restaurants and drinking establishments spent over \$12.1 million lobbying in 2007 and 2008); Restaurants & Drinking Establishments Long-Term Contribution Trends, *Opensecrets.org*, available at <http://www.opensecrets.org/industries/indus.php?ind=G2900> (reporting that individuals and political action committees connected to restaurants and drinking establishments gave over \$11.7 million to federal candidates in the 2008 election cycle). See also Joel Brinkley, *Restaurant Association Sees Its Persistence Pay Off*, *N.Y. Times*, Aug. 1, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9900E3D71331F932A3575BC0A96F958260&sec=&spon=&pagewanted=all>.
- 14 See Fair Labor Standards Amendments of 1996, Pub. L. No. 104-188, § 2105(b), 110 Stat. 1929 (1996) (codified as amended at 29 U.S.C. § 203(m)).
- 15 See Act of May 25, 2007, Pub. L. No. 110-28, 121 Stat. 188 (2007) (to be codified at 29 U.S.C. § 206(a)).
- 16 See 29 U.S.C. § 218(a).
- 17 Kansas raised its minimum wage to \$7.25, effective on January 1, 2010. At that time, its tipped worker minimum wage will rise to \$2.13—matching the federal rate. See Kansas S.B. 160 (2009) (signed Apr. 23, 2009).
- 18 See *id.*
- 19 See, e.g., Shannon Mullen, *Relying on Customers’ Generosity Can Be Precarious*, *Asbury Park Press*, May 30, 2009; Shawn Clubb, *Less Tips Sink Shifts*, *Suburban Journals*, Mar. 11, 2009, available at <http://suburbanjournals.stltoday.com/articles/2009/03/12/south/news/0311ssi-tips0.txt>; Katy Jordan, *Recession Bites Into Servers’ Pay*, *Boston Herald*, Feb. 22, 2009, available at http://news.bostonherald.com/news/hard_times/view/2009_02_22_Recession_bites_into_servers_pay/srvc=home&position=also; Mike Sunnucks, *Tips Topple as Economy Plummets*, *Phoenix Business Journal*, Dec. 23, 2006, available at <http://phoenix.bizjournals.com/phoenix/stories/2008/12/22/daily11.html>; Michael Lamendola, *Restaurants Feeling Crunch*, *South Bergenite*, Nov. 26, 2008, available at <http://www.southbergenite.com/NC/0/1998.html>; Jason Torrealano, *Tips & the Minimum Wage*, Sep. 26, 2008, available at <http://www.kxmb.com/getArticle.asp?ArticleId=279450>; Nichole Aksamit, *Servers Say Diners Are Leaving Smaller Tips*, *Omaha World-Herald*, Sep. 1, 2008; Lesley Lane, *Area Servers Sound Off on Patron Tipping Practices*, *Greenwood (S.C.) Today*, available at <http://www.gwdtoday.com/default.asp?sourceid=&smenu=1&twindow=&mad=&sdetail=8699&wpage=1&keyword=&sidate=&ccat=&ccatm=&restate=&restatus=&reopti on=&retype=&repmin=&repmax=&rebed=&rebatch=&subname=&p form=&sc=2071&hn=gwdtoday&he=.com>; Daniel Victor, *For Restaurant Workers, Economy Eats Away at Tips*, *Harrisburg (Penn.) Patriot-News*, Aug. 3, 2008, available at <http://www.pennlive.com/news/patriotnews/index.ssf?/base/news/1217714115246030.xml&coll=1>; Erinn Connor, *Area Service Workers Notice a Dip in Their Tips*, *Green Bay (Wis.) Press Gazette*, Aug. 2, 2008; Crystal Walker, *Restaurant Workers Feel Economic Pinch*, *WACH (S.C.)*, June 28, 2008, available at http://www.wach.com/news/news_story.aspx?id=151610; Dana Knight, *Tips Shrink with Economy*, *Cincinnati Enquirer*, Mar. 24, 2008 (focusing on restaurant workers and beauty workers).

- 20 See *id.* Restaurant workers have started a website to educate customers about the need to tip. See FairTip.org, available at <http://www.fairtip.org>.
- 21 Federal tax rules allow employers to estimate tipped workers' tips based on total receipts, or even based upon the average tips left on credit cards. United States Department of Labor, Field Operations Handbook § 30d09. See also *United States v. Fior D'Italia*, 536 U.S. 238 (2002) (upholding the Internal Revenue Service practice of estimating tips on cash receipts based on credit card tip estimates).
- 22 On the other hand, employers often keep meticulous records of tips left on credit cards, since some courts have found that they can legally deduct credit card processing fees from a worker's tips. See, e.g., *Myers v. Copper Cellar*, 192 F.3d 546 (6th Cir. 1999). See also United States Department of Labor, Field Operations Handbook § 30d05(a); Opinion Letter FLSA 2006-1, available at http://www.dol.gov/esa/WHDO/opinion/FLSA/2006/2006_01_13_01_FLSA.pdf. States including California and Colorado forbid this practice, though. See Cal. Labor Code § 351, Colorado Minimum Wage Order Number 25, 2 Colo. Code of Regs. 1103-1.
- 23 See, e.g., 29 U.S.C. § 203(m). Some state laws allow tip pooling only if it is voluntary. See, e.g., Del. Code 19 § 902(d); Ky. Rev. Stat. § 337.065(3); Minn. Stat. § 177.24(c)(3); N.H. Rev. Stat. § 276:26-b(1). *But* see Colo. Rev. Stat. § 8-4-103(6) (omitting any guarantee that tip pooling be voluntary, thereby allowing employers to require it).
- 24 Both the U.S. Department of Labor and courts have long held that the federal Fair Labor Standards Act prohibits employers from taking any portion of a worker's tips. See 29 U.S.C. § 203(m); Wage and Hour Opinion Letter (June 21, 1974); Wage and Hour Opinion Letter, WH-321 (Apr. 30, 1975) (citing 29 C.F.R. § 531, S. Rept. 93-690, at 42); Wage and Hour Opinion Letter, WH-310 (Feb. 18, 1975). See also *Winanas v. W.A.S. Inc.*, 772 P.2d 1001, 1008 (Wash. 1989) (holding that the 1974 FLSA amendments forbid employers from retaining any portion of tipped workers' tips). In addition, at least fourteen states have statutes that expressly provide that tips are the property of tipped workers. See Cal. Labor Code § 351; Colo. Rev. Stat. § 8-4-103(6); Del. Code § 19-902(d); Ky. Rev. Stat. § 337.065; Maine Rev. Stat. 26 § 664(2); Mass. Gen. Laws § 152a; Mich. Comp. Laws § 750.351; Minn. Stat. § 177.24(c)(3); Mont. Code § 39-3-201(6)(B); Nev. Rev. Stat. § 608.160(1); N.H. Rev. Stat. § 279:26-B(1); N.M. Rev. Stat. § 50-4-22(c); N.Y. Labor Law § 196-d; Utah Code § 34-40-104(4)(c). Another four states have regulations that protect workers' tips. See 8 Alaska Admin Code § 15.907; Mont. Admin. R. 24.16.1508; 13 N.C. Admin. Code 12.0303(c); N.D. Admin. Code § 46-02-07-03(2).
- 25 See Steven Greenhouse, *Judge Approves Deal to Settle Suit Over Wage Violations*, N.Y. Times, June 19, 2008, available at http://www.nytimes.com/2008/06/19/nyregion/19wage.html?_r=1&ref=nyregion&oref=slogin.
- 26 See New York State Department of Labor, Labor Department Investigation of New York's Car Wash Industry Uncovers Nearly \$6.6 Million in Unpaid Wages, Aug. 15, 2008, available at http://labor.state.ny.us/pressreleases/2008/August15_2008.htm; Steven Greenhouse, *Carwashes Violating Wage Laws, State Finds*, N.Y. Times, Aug. 15, 2008, available at <http://www.nytimes.com/2008/08/16/nyregion/16carwash.html>.
- 27 For a general discussion of employment law violations in the restaurant industry—including both underpayments and tip stealing—see Restaurant Opportunities Center of New York (ROC-NY), *Behind the Kitchen Door* (2005), available at <http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf>. For example, the study found that 19% of restaurant workers who were surveyed reported having their tips stolen by managers or owners. *Id.* at 14. For a thorough discussion of the federal minimum wage laws and rules related to tips, see also David Borgen & James Kan, *Dipping into the Tip Pool: Restaurant Workers and the FLSA* (2007), available at http://www.gdblegal.com/documents/ArticlesAmicus_Briefs/borgen_david_dipping_into_the_tip_pool.pdf. See also Annette Bernhardt, et al, *Unregulated Work in the Global City* (2007), available at <http://www.nelp.org/globalcity/> (documenting a wide range of pervasive employment law violations in New York City's restaurant industry among other low-wage industries).
- 28 Figures are based on a NELP analysis of 2005-2007 Current Population Survey data.
- 29 *Id.*
- 30 The CPS does not expressly identify tipped workers, but it does ask workers to report their aggregate income from "tips, overtime, and commissions." In order to identify likely tipped workers, we selected and cross-referenced occupations and specific service industries in which workers often earn tips, examined the "tips, overtime, and commissions" earned by the resulting sample, and then excluded any occupation/industry combinations that reported little or no relevant earnings.
- 31 Bureau of Labor Statistics, May 2008 National Occupational Employment and Wage Estimates (2008), available at http://www.bls.gov/oes/current/oes_nat.htm.
- 32 See United States Department of Health and Human Services, 2007 HHS Poverty Guidelines (2007), available at <http://aspe.hhs.gov/POVERTY/07poverty.shtml>. The federal poverty threshold in 2007 was \$13,690 for a family of two, \$17,170 for a family of three, and \$20,650 for a family of four.
- 33 See generally Jared Bernstein, *Let the War on the Poverty Line Commence* (2001), available at http://eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/19/28/36.pdf.
- 34 See Sylvia Allegretto, Economic Policy Institute, *Basic Family Budgets*, Economic Policy Institute, available at <http://www.epi.org/publications/entry/bp165/>. EPI calculates basic family budgets for two-parent, two-child families in metropolitan areas around the country. These basic family budgets range from \$31,080 in rural Nebraska to \$64,656 in Boston, Massachusetts, measured in 2004 dollars. The median family budget nationwide is \$39,984.
- 35 For example, from 2003 to 2007, California's median hourly wage for waitresses and waiters was \$10.46, and the top 25% of its restaurant workers earned more than \$15.25 per hour.
- 36 NELP Analysis of 2003-07 Current Population Survey and state minimum wage laws.
- 37 Unlike high income workers, tipped workers who receive a raise are likely to spend it on necessities. This helps stimulate the economy by boosting consumer demand in their communities. See Kai Filion, *Increases in Minimum Wage Boost Consumer Spending* (May 27, 2009), available at http://www.epi.org/economic_snapshots/entry/snapshot_20090527/. See also Mark Lieberman, *Let the Minimum Wage Increase Stand*, Fox Business, June 17, 2009, available at <http://www.foxbusiness.com/story/markets/economy/english-let-minimum-wage-increase-stand/>; Eileen Appelbaum & Tsedey Gebreselassie, *Minimum Wage Boost Produces Bang for the Buck*, N.J. STAR-LEDGER, Jan. 16, 2009, available at http://www.nelp.org/page/-/EJJP_Bang_for_the_Buck.pdf; Jon Shure, *Economic Stimulus 101*, N.J. Voices, Sep. 23, 2008, available at http://blog.nj.com/njv_jon_shure/2008/09/economic_stimulus_101.html. State and local governments also benefit from increased sales tax revenues generated.
- 38 NELP Analysis of 2003-2007 Current Population Survey and state minimum wage laws.
- 39 For a survey of recent minimum wage research, see Liana Fox, *Minimum Wage Trends: Understanding Past and Contemporary Research* (2006), available at <http://www.epi.org/publications/entry/bp178/>. As a result of research over the past fifteen years, the last time Congress considered a minimum wage increase, it was supported by more than 650 economists including five Nobel Laureates and six past presidents of the American Economics Association. See Economic Policy Institute, *Hundreds of Economists Say: Raise the Minimum Wage* (2006), available at http://www.epi.org/page/-/pdf/epi_minimum_wage_2006.pdf.
- 40 Fiscal Policy Institute, *States with Minimum Wages above the Federal Level have had Faster Small Business and Retail Job Growth* (March 30, 2006), available at <http://fiscalpolicy.org/FPIsmallBusinessMinWage.pdf>.
- 41 See Paul Wolfson, *State Minimum Wage: A Policy That Works* (2006), available at <http://www.epi.org/publications/entry/bp176/> (documenting the benefits for workers when states raised their minimum wages).
- 42 See Arindrajit Dube, et al, *The Economic Impact of a Citywide Minimum Wage* (3d Rev. 2007), available at <http://repositories.cdlib.org/iir/iirwps/iirwps-111-05/> (analyzing the effects of San Francisco's citywide minimum wage with a particular focus on the restaurant industry).

- 43 *Id.*
- 44 See National Restaurant Association, "Restaurant Industry in All 50 States to Grow Sales, Add Jobs in 2008 and Beyond," Dec. 12, 2007, available at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1536>. See also Press Release, *Darden Sees Little Impact from Minimum Wage Hike*, Dec. 20, 2006 (on file with authors).
- 45 See Alaska Stat. § 23.10.065(a); Cal. Labor Code § 351; Minn. Stat. § 177.24(2); Mont. Code Ann. § 39-3-409; Nev. Rev. Stat. § 608.160; Ore. Rev. Stat. § 653.035; and Rev. Code Washington § 49.46.010.
- 46 See *supra* note 44.
- 47 While the UK had sector-wide wage controls prior to Prime Minister Margaret Thatcher's union reforms in the early 1980s, the country's first general National Minimum Wage Act was not enacted until 1999. See *National Minimum Wage*, Politics.Co.Uk, available at [http://www.politics.co.uk/reference/issue-briefs/economy/employment/national-minimum-wage/national-minimum-wage-\\$366581.htm](http://www.politics.co.uk/reference/issue-briefs/economy/employment/national-minimum-wage/national-minimum-wage-$366581.htm). But as part of a compromise, employers were allowed to credit toward their minimum wage obligations any tips that customers paid through their payroll systems—for example, tips placed on credit cards. See Martin Hickman, *Ex-Minister 'Regrets' Tips Loophole in Minimum Wage Deal*, *The Independent*, July 17, 2008. As a result, tipped workers could be paid entirely in tips.
- Last year, *The Independent* and *The Daily Mirror* newspapers and the labor union Unite took up the cause of closing this loophole and eliminating the tip credit. See Andrew Grice & James Macintyre [sic], *Victory for Fair Tips Campaign as Ministers Act*, July 28, 2008, available at <http://www.independent.co.uk/news/uk/home-news/victory-for-fair-tips-campaign-as-ministers-act-878687.html>; Nick Sommerlad, *Victory for Mirror and Unite's Fair Tips Campaign*, July 16, 2008, available at <http://blogs.mirror.co.uk/investigations/2008/07/victory-for-mirror-and-unites.html>. They argued that customers who leave tips intend to reward tipped workers for their service, not to subsidize employers' legal obligations. *Id.* The campaign succeeded in building broad-based support, including endorsements from leading restaurant employers and food guides. *Id.*
- Finally, on the tenth anniversary of the National Minimum Wage Act, the government announced plans to abolish the tip credit and require all tipped employers to pay the full minimum wage. See Grice & Macintyre. The new regulations will take effect in October 2009. See *'Tips as Wages' Loophole to Close*, BBC News, May 6, 2009, available at <http://news.bbc.co.uk/2/hi/business/8035631.stm>.
- 48 See Andrew Grice, *European MPs Join Campaign for Fair Tipping Policy*, *The Independent*, July 19, 2008, available at <http://www.independent.co.uk/news/uk/this-britain/european-mps-join-campaign-for-fair-tipping-policy-871804.html>.
- 49 In New York, the minimum wage for tipped workers is determined through a combination of statutes and wage orders. N.Y. Labor Law § 652(4); N.Y. Restaurant Industry Wage Order (2005), available at <http://www.labor.state.ny.us/formsdocs/wp/PART137s.pdf>; N.Y. Hotel Industry Wage Order (2005), available at <http://www.labor.state.ny.us/formsdocs/wp/PART138s.pdf>. A new 2009 Wage Board has been convened to update the restaurant and hotel industry wage orders. See N.Y. State Dep't. of Labor, 2009 Wage Board, available at <http://www.labor.state.ny.us/workerprotection/laborstandards/minwageboard2009.shtm>; Testimony of National Employment Law Project, et al., to N.Y. Hotel and Restaurant Industry Wage Board (June 3, 2009), available at <http://www.nelp.org/page/-/Justice/NYWageBoardTestimonyJune2009.pdf>.
- 50 See 21 Vt. Stat. § 384.
- 51 See 29 U.S.C. § 203(m); Wage and Hour Opinion Letter (June 21, 1974); Wage and Hour Opinion Letter, WH-321 (Apr. 30, 1975) (citing 29 C.F.R. § 531, S. Rept. 93-690, at 42); Wage and Hour Opinion Letter, WH-310 See also *Winans v. W.A.S. Inc.*, 772 P.2d 1001, 1008 (Wash. 1989) (holding that the 1974 FLSA amendments forbid employers from retaining any portion of tipped workers' tips).
- 52 See 73 Fed. Reg. 43,656-59. For a complete discussion of these proposed rules, see National Employment Law Project, Comments on Notice of Proposed Rulemaking 7 (Sep. 25, 2008), at http://www.nelp.org/page/-/Justice/NELP_Comments_to_USDOL_Reqs_FINAL.pdf.
- 53 These proposed rules were indefinitely frozen by a White House memorandum issued on the first day of the Obama Administration directing all federal agencies to suspend the publication of final rules until they can be reviewed by incoming officials. Rahm Emanuel, Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2009), available at http://abcnews.go.com/images/Politics/White_House_Memorandum.pdf.
- 54 See *supra* note 24.
- 55 See National Employment Law Project (Brennan Center for Justice), Missouri Court Rejects Attempt to Block Minimum Wage for Tipped Workers (May 25, 2007), available at <http://www.nelp.org/page/-/EJP/MissouriCourtRejectsAttemptToBlockMW.pdf>; National Employment Law Project, Montana Senate Rejects Minimum Wage Freeze for Waiters and Waitresses (Feb. 5, 2009), available at http://www.nelp.org/page/-/EJP/Montana_Senate_Rejects_Wage_Attacks.pdf; *Table Services, Ltd. et al v. Ritter*, No. 2008CV7435, Denver County (filed Aug. 21, 2008) (challenging the constitutionality of the Colorado minimum wage).
- 56 See Kevin Duchscher, *Pawlenty Rejects Minimum Wage Hike*, *Minneapolis Star-Tribune*, May 15, 2008, available at <http://www.startribune.com/politics/18991554.html>.
- 57 See National Employment Law Project (Brennan Center for Justice), Brennan Center Analysis Leads Missouri Governor to Order Minimum Wage Increase (2007), available at <http://www.nelp.org/page/-/EJP/MissouriGovernorOrdersWageIncrease.pdf>; Jobs with Justice, Huge Win for Missouri's Tipped Employees (2007), available at <http://www.jwj.org/news/updates/2007/03.html#mo1>.
- 58 See NELP, *supra* note 53.
- 59 For example, in 2009 St. Louis Area Jobs with Justice and partners revived the "Save Our Tips" campaign to oppose a bill that would freeze the minimum wage for the state's tipped workers. See Mo. H.B. 258 (2008), available at <http://www.house.mo.gov/content.aspx?info=bills091/bills/hb258.htm>; Roseann Moring, *Missouri House Passes Two Minimum Wage Bills*, *St. Louis Post-Dispatch*, Apr. 16, 2009. The proposal died when the state senate adjourned without taking action on the measure. See Associated Press, *Missouri General Assembly: What passed, what failed*, *Columbia Daily Tribune*, May 16, 2009, available at <http://www.columbiatribune.com/news/2009/may/16/missouri-general-assembly-what-passed-what-failed/>.

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