

## **Testimony of Rebecca Dixon**

National Employment Law Project

# **From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act**

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**Hearing before the U.S. House of  
Representatives Education and Labor  
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Subcommittee**

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## I. Introduction

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Good afternoon Chair Adams, Ranking Member Keller, and members of the Committee. I am deeply appreciative of the opportunity to testify today. I am Rebecca Dixon, Executive Director of the National Employment Law Project (NELP).

NELP is a nonprofit research, policy, and capacity building organization that for more than 50 years has sought to strengthen protections and build power for workers in the U.S., including people who are unemployed. For decades, NELP has researched and advocated for policies that create good jobs, expand access to work, and strengthen protections and support for underpaid and jobless workers, both in the workplace and when they are displaced from work. Our primary goals are to build worker power, dismantle structural and institutional racism, and to ensure economic security for all.

As President Joe Biden and Vice President Kamala Harris have repeatedly acknowledged, the United States has a long history of systemic racism which is a stain on our nation's soul.<sup>1</sup> The president and vice president have called on all of us to do the hard work of undoing the racism baked into our country's laws and policies. That work demands, as Majority Whip Jim Clyburn has stressed, scrutinizing the legacy of New Deal policies that unfairly excluded Black people from their benefits and protections.<sup>2</sup>

I am here today to talk to you about how systemic racism stained the original passage of the Fair Labor Standards Act, how it lives on in exclusions still in place today, and how Congress can act to address this historic wrong and make a material difference in the lives of millions of working people and their families.

When we speak about undoing the stain of systemic racism in this country, we are speaking not just about dismantling something, but about building a better future, one that appeals to our highest principles and aspirations: Where we all have what we need, where we are all truly treated equally under the law, and where our fundamental human rights, like that of a fair wage for our work, are sacred and honored. This Congress has the tremendous opportunity to center these shared values as it responds both to this current moment of an

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<sup>1</sup> See, e.g. "Remarks by President Biden on the Verdict in the Derek Chauvin Trial for the Death of George Floyd", April 29, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/20/remarks-by-president-biden-on-the-verdict-in-the-derek-chauvin-trial-for-the-death-of-george-floyd/>

<sup>2</sup> Laura Barron-Lopez, Alex Thomson, and Theodoric Meyer, "Clyburn doesn't want Biden to be like FDR," Politico, April 13, 2021, <https://www.politico.com/newsletters/transition-playbook/2021/04/13/clyburn-doesnt-want-biden-to-be-like-fdr-492463>

unprecedented health and economic crisis and our ongoing and intertwined national reckoning with structural racism.

To ensure that our economy and larger society is truly fair and just, we must center racial equity in policy choices and directly confront how racism shaped the economy we have now. The fact that a disproportionate share of those in underpaid, insecure, and unsafe jobs are Black people and other people of color is neither inevitable, nor accidental. Occupational segregation—the preservation of glass and concrete ceilings and the way racist and sexist policy choices pushed people of color and women into underpaid occupations—accounts for a large portion of the racial and gender wage gap.<sup>3</sup> In fact, the Blacker an occupation is, the less employers tend to pay workers, and the more female-dominated an occupation is, the more underpaid that work is, especially care work. This is our country's default policy, a continuing legacy of chattel slavery and Jim Crow—but it does not have to be this way.

The history of the New Deal, including the passage of the Fair Labor Standards Act (FLSA) and its exclusions of domestic, agricultural, and tipped workers, is a foundational part of this legacy. These exclusions did not accidentally deny Black people and other workers of color the rights and protections given to white workers. Congress intentionally excluded whole categories of workers from vital protections in order to deny Black people the opportunity for economic and social freedom and to preserve a system where employers could profit off of racist exploitation. Nearly half of all Black men, Mexican-American men, and Native American men and women, plus significant numbers of Asian American workers were excluded from Social Security, unemployment insurance, and the right to organize in the NLRA. The effects of this exclusion fell most heavily on Black women because of their concentration as agricultural and domestic workers.

This history has continued and impacts economic realities for millions of people every day. Not only are vital resources such as housing, schools, and neighborhoods largely separate and unequal, but the labor market remains highly segregated. This stratification perpetuates two-tiered workplaces and a Jim Crow economy—contributing to generational wage and wealth gaps and the exclusion of millions of people from the benefits, rights, and protections we all deserve.

In practice, the FLSA exclusions might look like a Black restaurant worker in Louisville who experiences significantly more precarity, stress, and fluctuation in her earnings than her white coworkers—because racism affects how customers tip and she can't rely on a decent set wage with tips on top. It may look like a Latino farmworker in Arizona who is forced to work inhumane hours because he does not have overtime protections to prevent his employer from exploiting his labor. It could look like an Asian American domestic worker in Pittsburgh who is struggling to pay her bills because she could not access overtime for her live-in hours.

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<sup>3</sup> See Olga Alonso-Villar and Coral del Río, "The Occupational Segregation of African American Women: Its Evolution from 1940 to 2010," *Feminist Economics* 2 (1) (2017): 108–134; Coral del Río and Olga Alonso-Villar, "The Evolution of Occupational Segregation in the United States, 1940–2010: Gains and Losses of Gender–Race/Ethnicity Groups," *Demography* 52 (3) (2015): 967–988; *see also* Will McGrew, How workplace segregation fosters wage discrimination for African American women, Washington Center for Equitable Growth, Aug. 28, 2018, <https://equitablegrowth.org/how-workplace-segregation-fosters-wage-discrimination-for-african-american-women/>.

The COVID-19 pandemic, as both a health and an economic crisis, has further exposed these deep societal fissures. The problem of labor market inequities is deeply embedded, multi-faceted, compounding, and interlocking, so our country's solutions must in turn be systemic and focused on root causes. That is why we must understand and reckon with the historical reasons behind the FLSA's racist exclusions.

We should all be equally protected by human rights like a fair wage for our work, regardless of our skin color, gender, who signs our paycheck, or any other factor. This Congress has the power and the incredible opportunity to begin to rectify this particular legacy of slavery and Jim Crow and to honor our higher values not just in principle, but in practice. Addressing the racist exclusions in the FLSA is a clear structural step that Congress can take right now to move toward racial equity, to build a better future for our nation, and to make a difference in the lives of millions of workers and community members immediately.

In this testimony, I will first discuss the historical conditions that led to the exclusions in the FLSA; then I will discuss how those exclusions compounded racial wealth gaps, exploitation, and other inequities in the years since their passage; and then finally, I will discuss how the FLSA exclusions continue to perpetuate wealth gaps, poverty, and other forms of racial and gender inequality for workers and communities today, and how this Congress can begin to correct this historical wrong.

## **II. A Legacy of Slavery and Jim Crow: The Racist Politics and History of FLSA's Passage**

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The Fair Labor Standards Act, passed in 1938, established a minimum wage, outlawed the use of child labor, and established a regular work week by mandating the payment of overtime wage rates.<sup>4</sup> The preamble of the FLSA stated that its purpose was to eliminate the conditions that substantially curtailed workers' employment and earning power, seeking to protect workers.<sup>5</sup> However, instead of lifting up all workers, the FLSA adopted racist exclusions of farmworkers and domestic workers as a proxy to deny broad swaths of workers of color its core protections. Although the legislative history is sparse, it is widely understood that these exclusions were a facially race-neutral way to deny Black workers coverage under the FLSA.

### **A. The National Industrial Recovery Act as a Precursor to the FLSA**

The use of occupational designations as a proxy for the racist and intentional exclusion of Black workers from wage protections was not new to the FLSA. Five years earlier, Congress passed the National Industrial Recovery Act (NIRA), which called for industries to establish codes of fair competition to regulate the wages and hours of workers in those industries.<sup>6</sup> The National Recovery Administration (NRA) was tasked with gathering evidence to determine the codes for each industry.<sup>7</sup> Employers who testified at these hearings called for explicit wage differentials based on race. One employer stated that "a negro makes a much

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<sup>4</sup> Act of June 25, 1938 (Fair Labor Standards Act), Pub. L. 75-718, 52 Stat 1060, June 25, 1938, p. 1060

<sup>5</sup> Act of June 25, 1938 (Fair Labor Standards Act), Pub. L. 75-718, 52 Stat 1060, June 25, 1938, p. 1060

<sup>6</sup> Juan F. Pera, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion From the National Labor Relations Act*, 72 OHIO ST. L. J 95, 104-05 (2011).

<sup>7</sup> *Id.* at 104.

better workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage.”<sup>8</sup> An employer of a manufacturing company in Selma, Alabama testified:

“If all the past years have failed to make any real impression in the status of their intelligence, can any legislative act take them and immediately advance their capabilities to be equal to those of the white man with whom they must compete in the race for employment? We think not and because of this inherent irradicable element of incapability, any idea is futile that fails to recognize a difference does exist and will always exist and that a proper difference in wage rates must be applied to meet the inequality.”<sup>9</sup>

President Roosevelt also commented, with regard to the National Industrial Recovery Act, that “[i]t is not the purpose of this Administration to impair Southern industry by refusing to recognize traditional differentials”<sup>10</sup> (referring to the differentials in the wages and wealth between Black Southerners and white Southerners). Although the explicit race differentials were not adopted, the National Recovery Administration conducted hearings to gather evidence to formulate maximum hours and minimum wages for each industry.<sup>11</sup> In debates for these codes, various industries argued that the NRA should adopt explicit racial differentials.<sup>12</sup> Although the NRA did not use explicit racial distinctions, it did use occupational and geographic classifications in the industry codes that achieved nearly the same purpose.<sup>13</sup> For example, when domestic workers petitioned the NRA for a board to regulate domestic service, the NRA responded that household employment or domestic service would not ordinarily be a trade or industry subject to its jurisdiction, meaning that domestic workers were excluded altogether.<sup>14</sup> Thus, “[t]he compromise position was race-neutral language that both accommodated the southern desire to exclude blacks but did not alienate northern liberals nor [B]lacks in the way that an explicit racial exclusion would.”<sup>15</sup>

## **B. Appeasing Southern Democrats and Codifying the Labor Exploitation of Black Workers**

The construction of the FLSA was part of a concerted effort to exclude Black workers from the fruits of their labor and resist any threats to the economic and social status quo of the Jim Crow South. In particular, the Southern political economy, dominated by agriculture, depended on the exploitation and subordination of Black labor<sup>16</sup>, and an equalized wage floor was a threat to that racially segregated system. Southern Democrats in Congress held the balance of power during the New Deal era. The Southern states controlled 35 percent of

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<sup>8</sup> Id. at 105.

<sup>9</sup> Id.

<sup>10</sup> Id. at 103.

<sup>11</sup> Id. at 104.

<sup>12</sup> Id. at 104.

<sup>13</sup> Id. at 106.

<sup>14</sup> Peggie R. Smith, *Regulating Paid Household Work*, 48 AM. U. L. REV. 851, 885 (1999).

<sup>15</sup> See *supra* note 6 at 106.

<sup>16</sup> See *supra* note 6 at 101.

the seats in the Senate and a large number of seats in the House.<sup>17</sup> They also held a number of the committee chairperson seats.<sup>18</sup> They were unified in their opposition to any initiatives that would endanger the ability to exploit and subjugate Black people or that would improve their welfare relative to whites.<sup>19</sup> Meanwhile, President Roosevelt refused to push for measures that could imperil the coalition he needed to pass the FLSA and other New Deal measures. As he stated: “First things come first and I can’t alienate certain votes I need for measures that are more important at the moment by pushing any measures that would entail a fight.”<sup>20</sup> Similarly, during the Joint Committee hearings on the FLSA, Gardner Jackson, the chairman of the National Committee on Rural and Social Planning, said the New Deal legislation excluded all agricultural laborers because “it has been deemed politically certain that their inclusion would have spelled the death of the legislation in Congress.”<sup>21</sup>

### **C. How the Plantation System Extended the Legacy of Slavery for Black Workers in the South**

Domestic and agricultural labor were the cornerstone of the plantation system and continued to be integral post-Emancipation to the functioning of Southern society. Post-Emancipation, many Black workers were forced to continue providing this labor by working as domestic workers in the community, and also by working as tenant farmers and sharecroppers. According to some estimates, at Emancipation, 3 million enslaved people over 10 years of age were emancipated, and nearly 2 million of those worked on farms and many of the others labored as domestic servants.<sup>22</sup> Black farmworkers in the South accounted for 87.4 percent of all Black farmworkers nationwide.

Sharecroppers and tenant farmers were often subject to terrible conditions, conditions that Black lawyers and workers with the NAACP at the time described as “peonage” or a form of involuntary servitude.<sup>23</sup> William Henry Huff, a Black lawyer, asked President Roosevelt to abolish “that new form of slavery known as peonage, which entered the back door as the Proclamation of immortal Lincoln drove chattel slavery out of the front door.”<sup>24</sup>

As one scholar has explained:

“The North’s victory in the Civil War formally ended the institution of slavery. It did not end the southern plantation owners’ need for a cheap supply of labor or the regime of white supremacy in the South...the expectation in the South was that the newly freed [B]lacks would

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<sup>17</sup> Sean Farhang and Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, Studies in Amer. Political Dev. 19 at 1 (Spring 2005).

<sup>18</sup> *Id.* at 1, 15.

<sup>19</sup> *See supra* note 6 at 102.

<sup>20</sup> *See supra* note 6 at 103.

<sup>21</sup> Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLIN L. REV. 649, 655 (1988-1989), *citing* “Bills to Provide for the Establishment of Fair Labor Standards in Employments In and Affecting Interstate Commerce and Other Purposes”, Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. at 1196 (1937).

<sup>22</sup> R. R. Wright, “The Negro in Unskilled Labor,” *The Annals of the American Academy of Political and Social Science*, vol. 49 at 19 (1913).

<sup>23</sup> Risa Goluboff, *The Lost Promise of Civil Rights*, at p. 56. (Cambridge: Harvard University Press 2007)

<sup>24</sup> *Id.*

continue to supply the needed cheap labor. In fact, most of the southern [B]lack population remained as farm laborers, either wage laborers, sharecroppers or tenant farmers. Blacks were slaves no longer, but neither were they the equals of whites.”<sup>25</sup>

#### **D. Southern Lawmakers’ Commitment to Preserving the Plantation System**

The legislative history is clear that Southern lawmakers were adamant that setting a floor on wages, as the FLSA proposed, would attack this lingering plantation system.

From 1930-1940, 57 percent of the U.S. farm labor lived in the South and 51 percent of those workers were Black.<sup>26</sup> By cutting across wage disparities between Black and white workers in underpaid sectors, Georgia Democratic Representative Edward Cox argued that the FLSA would allow for the “elimination and disappearance of racial and social distinctions, and... throw into question the determination of the standards and customs which shall determine the relationship of our various groups of people in the South.”<sup>27</sup> As Florida Representative James Mark Wilcox explained:

[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, the delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between races. We may rest assured, therefore, that when we turn over to a federal bureau or board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.”<sup>28</sup>

FLSA’s wage floor was condemned by Southern legislators as an attack on the South that was specifically designed to win Black votes.<sup>29</sup> Lawmakers compared the FLSA to anti-lynching legislation they said was designed to increase Black political power. According to Representative Cox, “[this bill, like the antilynching bill, is another political gold brick for the

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<sup>25</sup> Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEXAS L. REV. 1335, 1348 (1986-1987).

<sup>26</sup> See *supra* note 17 at 14-15 (for this analysis, the South included 17 states: the 11 ex Confederate states, plus Delaware, Kentucky, Maryland, Missouri, Oklahoma and West Virginia).

<sup>27</sup> See *supra* note 17 at 14. 2

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Negro, but this time the white laborer is also included in the scheme.”<sup>30</sup> South Carolina Senator “Cotton Ed” Smith complained that:

“Every Senator present knows that the anti-lynching bill is introduced for no reason in the world than a desire to get the votes of a certain race in this country . . . “Anti-lynching, two-thirds rule, and last of all, this unconscionable -- I shall not attempt to use the proper adjective to designate, in my opinion, this bill [the FLSA]! Any man on this floor who has sense enough to read the English language knows that the main object of this bill is, by human legislation, to overcome the splendid gifts of God to the South.”<sup>31</sup>

### **E. How FLSA Exclusions Were Made Possible Through Racist Violence and the Disenfranchisement of Black People in the South**

The successful adoption and maintenance of FLSA’s racist exclusions cannot be divorced from Black political disenfranchisement, often achieved through violence. The Southern states that controlled Congress at the time of the FLSA’s passage had legally mandated racial segregation in their states and excluded the majority of their Black populations from voting by law and by force. Black residents did not have access to the full rights of citizenship. Because of this broad disenfranchisement, even though the Southern states controlled 35 percent of the seats in the Senate and a large number of seats in the House, they were unaccountable to the vast majority of the Black residents in those states.<sup>32</sup> Lynchings were used not only to instill terror, but as studies show, were more likely to take place prior to elections in order to suppress the Black vote.<sup>33</sup>

Black organizations, such as the NAACP-LDF and the Urban League, aware of the exclusions that were being used as a proxy for excluding Black workers in the Social Security Act, NLRA, and the NIRA, testified during the FLSA hearings about the disparate impact on Black workers, who would be excluded from the minimum wage. The NAACP-LDF argued that the combination of employment discrimination and the lack of a minimum wage would serve as a “double penalty” for Black workers<sup>34</sup>

Thus, it was against this backdrop of political disenfranchisement; the segregation of Black workers in the South into specific occupations based on the legacy of slavery; and the extraordinarily powerful Southern Democrats’ commitment to preserving the exploitation of Black workers in the South that the FLSA was constructed and passed.

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<sup>30</sup> See *supra* note 6 at 115.

<sup>31</sup> *Id.*

<sup>32</sup> See *supra* note 17.

<sup>33</sup> Mara Suttman-Lea, “The history of lynching and African American Voting Rights, A House Divided,” October, 28, 2019, <https://ahousedividedapd.com/2019/10/28/the-history-of-lynching-and-african-american-voting-rights/>; Brad Epperly, Christopher Witko, Ryan Strickler and Paul White, *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South* (March 1, 2016).

<sup>34</sup> See *supra* note 6 at 112-113.



### III. How We Ended Up Here: The Direct Historical Line From the FLSA Exclusions to Modern Racial Wealth Gaps

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#### A. Racist Policies Are Self-Reinforcing: How the Exclusions Reverberated Through Generations

As Richard Rothstein has written, “we cannot understand the income and wealth gap that persists between African Americans and whites without examining governmental policies that purposely kept [B]lack incomes low throughout most of the twentieth century.”<sup>35</sup> Rothstein argues that “federal and state labor market policies, with undisguised racial intent, depressed African American wages.”<sup>36</sup> That is because once these policies are implemented, their effects are self-reinforcing, given how limited income mobility is for subsequent generations, regardless of race. As Rothstein observes, while “standard of living may grow from generation to generation,” “an individual’s relative income—how it compares to the incomes of others in the present generation—is remarkably similar to how his or her parents’ incomes compared to others in their generation.”<sup>37</sup>

By excluding so many Black workers and other workers of color from its coverage, the FLSA was one of the federal labor market policies that effectively depressed Black workers’ wages from its passage through 1966. The effects of this wage depression were further compounded, as Rothstein argues, by the ways in which “neighborhood segregation imposed higher expenses on African American than on white families, even if their wages and tax rates had been identical.”<sup>38</sup> The result, Rothstein says, was that Black families had “smaller disposable incomes and fewer savings,” and were denied the opportunity to accumulate wealth.<sup>39</sup>

The 1940s, 1950s, and 1960s were thus critical decades in which white workers, heavily concentrated in sectors covered by the FLSA and other federal labor standards and protections,<sup>40</sup> were able to build family wealth, both through jobs as well as through other federal programs, like the Federal Housing Administration, whose benefits were only available to white workers.<sup>41</sup> Thus Black workers and other workers of color were unable to build wealth during these decades.<sup>42</sup> The effects of these decades on wealth inequality have persisted to the present day.

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<sup>35</sup> Richard Rothstein, *The Color of Law* 153 (2017).

<sup>36</sup> *Id.* at 154.

<sup>37</sup> *Id.* at 153.

<sup>38</sup> *Id.* at 154.

<sup>39</sup> *Id.* at 154.

<sup>40</sup> *E.g.*, the National Labor Relations Act.

<sup>41</sup> *See supra* note 35 at 63-75.

<sup>42</sup> *See* Janelle Jones, “The racial wealth gap: How African-Americans have been shortchanged out of the materials to build wealth”, Economic Policy Institute Blog (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/>

## B. Eliminating FLSA Exclusions as a Major Demand of the Civil Rights Movement

As discussed above, while Civil Rights movement activists fought in the 1930s to prevent the exclusion of Black workers in the domestic and agricultural sectors from the FLSA,<sup>43</sup> they were vastly overmatched by the Southern Democrats who controlled Congress and were fiercely committed to white supremacy and to ensuring the FLSA reinforced the racial hierarchy in the South.

In the years that followed, civil rights activists continued to press for expansion of the FLSA. In 1955, the NAACP's national convention adopted a resolution calling for the expansion of minimum wage coverage to agricultural workers.<sup>44</sup>

At a 1957 Congressional hearing on proposals to expand FLSA coverage, representatives from a broad array of civil rights organizations testified, including the NAACP, the National Council of Negro Women, and the National Sharecroppers Fund. Patricia Roberts Harris from the National Council of Negro Women called for the "widest possible coverage" of the FLSA, and particularly emphasized that the large numbers of Black workers concentrated in these industries was "due largely to the fact that their weak bargaining position forces them to accept lower wages than their more fortunate white neighbors."<sup>45</sup> Clarence Mitchell from the NAACP emphasized that the exclusions were part of a larger system designed to keep Black workers as a vast supply of cheap labor for the excluded industries.<sup>46</sup> The National Sharecroppers Fund called out the FLSA's exclusion of farmworkers as government-backed discrimination.<sup>47</sup>

The leaders of the 1963 March on Washington highlighted, as one of their ten core demands, "A broadened *Fair Labor Standards Act* to include all areas of employment which are presently excluded." This can be seen in the program from the march:<sup>48</sup>

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<sup>43</sup> See *infra* at Part I.

<sup>44</sup> Phyllis Palmer, *Outside the Law: Agricultural & Domestic Workers Under the Fair Labor Standards Act*, 7 J. Pol. Hist. 416, 423 & n.34 (1995).

<sup>45</sup> Statement of Patricia Roberts Harris, National Council of Negro Women, U.S. Senate, *Proposals to Extend Coverage of Minimum Wage Protection: Hearings Before a Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 85th Cong., 1st sess., March 1957, at 860-61.

<sup>46</sup> Remarks of Clarence Mitchell, NAACP, *id.* at 856.

<sup>47</sup> Statement of Mrs. Paul Blanshard, National Sharecroppers Fund, *id.* at 858-60.

<sup>48</sup> March on Washington for Jobs and Freedom August 28, 1963 Lincoln Memorial Program, <https://www.crmvet.org/docs/mowprog.pdf>

## WHAT WE DEMAND\*

1. Comprehensive and effective *civil rights* legislation from the present Congress—without compromise or filibuster—to guarantee all Americans

access to all public accommodations  
decent housing  
adequate and integrated education  
the right to vote

2. Withholding of Federal funds from all programs in which discrimination exists.

3. *Desegregation of all school districts in 1963.*

4. Enforcement of the *Fourteenth Amendment*—reducing Congressional representation of states where citizens are disfranchised.

5. A new *Executive Order* banning discrimination in all housing supported by federal funds.

6. Authority for the Attorney General to institute *injunctive suits* when any constitutional right is violated.

7. A massive federal program to train and place all unemployed workers—Negro and white—on meaningful and dignified jobs at decent wages.

8. A national *minimum wage* act that will give all Americans a decent standard of living. (Government surveys show that anything less than \$2.00 an hour fails to do this.)

9. A broadened *Fair Labor Standards Act* to include all areas of employment which are presently excluded.

10. A federal *Fair Employment Practices Act* barring discrimination by federal, state, and municipal governments, and by employers, contractors, employment agencies, and trade unions.

\*Support of the March does not necessarily indicate endorsement of every demand listed. Some organizations have not had an opportunity to take an official position on all of the demands advocated here.

In early 1965, Black farm laborers in the Mississippi Delta formed the Mississippi Freedom Labor Union (MFLU) to advocate for higher wages from the planters who owned the farms.<sup>49</sup> The workers' organizing efforts were aided by organizers from the Student Nonviolent Coordinating Committee (SNCC). In the spring of 1965, about 350 MFLU members went on strike, seeking minimum wages of \$1.25 for cotton farming. The planters were intransigent, and many of the workers who were sharecroppers were evicted in retaliation for striking. But their labor struggle attracted national attention to the plight of Black farmworkers in Mississippi and across the United States.

Later that year, MFLU leaders testified before Congress on the need to ensure the FLSA covered as many farmworkers as possible, including Black sharecroppers.<sup>50</sup> Their testimony exposed the stark conditions that Black sharecroppers faced, working for as little as 30 cents an hour and subject to abusive debt laws that kept them trapped in a cycle of debt and

<sup>49</sup> See generally Michael Siström, *The Freedom Labor Union: Economic Justice and the Civil Rights Movement in Mississippi*, in Matthew Hild & Keri Leigh Merritt, eds., *Reconsidering Southern Labor History: Race, Class, and Power* (2018).

<sup>50</sup> *Minimum-Wage Hour Amendments, H.R. 8259*, Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives, 89th Cong., 1st Sess. - Part 4, at 1898-1926 (1965).

deprivation. As MFLU leader Aaron German stressed, “All of the plantation owners don’t want to pay \$1.25 an hour... So there needs to be some law that will force them to pay a decent wage.”<sup>51</sup> After MFLU leaders Andrew Hawkins and Aaron German finished their testimony, Committee Chair Dominick V. Daniels declared the conditions the farmworkers faced were “nothing short of slavery,” and that “we haven’t progressed very far from slave days.”<sup>52</sup>

Civil rights advocates continued to advocate for expansion of FLSA protections to domestic workers in subsequent legislative sessions. In 1971 and 1973 Congressional hearings, Clarence Mitchell testified on behalf of the Leadership Conference on Civil Rights as well as the NAACP in support of the expansion of the FLSA to non-covered domestic workers, emphasizing that 340,000 women employed as private household workers earned \$1,296 a year, well below what welfare recipients received annually at the time.<sup>53</sup>

And within the halls of Congress, it was New York Congressional Representative and civil rights leader Shirley Chisolm who led the charge to pass amendments to the FLSA that expanded coverage to include domestic workers.<sup>54</sup> The daughter of a domestic worker, Congresswoman Chisolm emphasized the importance of the amendments for lifting Black families out of poverty, stressing the reality that 50 percent of poor Black families were headed by women, and that over half of these women worked as maids in 1970 but were living in poverty.<sup>55</sup>

### **C. Reform Efforts: Subsequent Reforms Failed to Dismantle the Structural Racism in the FLSA and in Some Ways Reinforced It**

#### **1. The 1966 Amendments Continued to Exclude Farmworkers From Critical Overtime Protections**

After years of pressure from civil rights and farmworker advocates, Congress finally took steps to rectify some of the FLSA’s racist exclusions in 1966. Many of the sectors that were covered by at least some of the Act’s protections for the first time—including agriculture, hotels, restaurants, schools, hospitals, nursing homes, and entertainment—were ones in which Black workers were disproportionately represented.<sup>56</sup> Moreover, the 1966 amendments extended FLSA protections to nearly a third of all Black workers in the United States.<sup>57</sup>

The impact of the 1966 amendments was significant for the workers newly covered. Economists have concluded that more than 20 percent of the reduction of the racial earnings and income gaps between 1965 and 1980 is due to the 1966 FLSA amendments extending basic (though still incomplete) FLSA protections to agriculture, restaurants, nursing homes,

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<sup>51</sup> Id. at 1906.

<sup>52</sup> Id. at 1907.

<sup>53</sup> *Fair Labor Standards Amendments of 1971, S. 1861 and S. 2259*, Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 1st Sess., Part 1, at 223-28 (1971).

<sup>54</sup> See Martin Tolchin, “Mrs. Chisolm Led Fight for Domestic’s Base Pay”, N.Y. Times (June 21, 1973), <https://www.nytimes.com/1973/06/21/archives/mrs-chisolm-led-fight-for-domestics-base-pay-grasp-of-problem.html>.

<sup>55</sup> See *supra* note 44 at 430.

<sup>56</sup> See discussion of tipped workers in Part V below.

<sup>57</sup> Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, Q. J. OF ECON. 169, 171 (2021), [http://www.clairemontialoux.com/files/DM\\_QJE\\_2021.pdf](http://www.clairemontialoux.com/files/DM_QJE_2021.pdf).

and more.<sup>58</sup> Extending these protections was particularly important in reducing the Black-white wage gap in the newly covered industries, accounting for more than 80 percent of the impact the FLSA had in reducing the economy-wide racial earnings gap.<sup>59</sup> And the 1966 amendments are also correlated with a significant reduction in the poverty rate for Black children in families—that rate fell from 65.6 percent in 1965 (pre-amendments) to 39.6 percent in 1969 (post-amendments).<sup>60</sup>

But the 1966 amendments still preserved the systemic racism of the original Act, including by continuing to exclude most agricultural workers from overtime protections. While the 1966 amendments extended minimum wage protections to most farmworkers,<sup>61</sup> they did not extend overtime/maximum hours protections to them—which has serious implications from a racial equity perspective.

First, farmworkers were, as a class, denied the monetary benefits that come with overtime pay—time and a half. The availability of overtime pay has a significant impact on workers’ annual earnings.<sup>62</sup> Second, farmworkers were denied the quality-of-life benefits that can come with maximum hours protection. Historically, the overtime premium pay requirement was intended to be a disincentive in many sectors for employers to require workers to labor for more than 40 hours per week, allowing workers the opportunity to have basic work-life balance, to pursue other activities, and to invest in their children’s care and education outside work hours.<sup>63</sup>

Overtime also can prevent workers from being subjected to unsafe conditions for overly long periods of time. Farmworkers in particular labor in dangerous conditions that expose them to extreme temperatures, require them to work with heavy machinery and carry burdensome loads, and expose them to dangerous chemicals and pesticides.<sup>64</sup> But the FLSA’s continued exclusion of farmworkers from overtime pay enables and incentivizes farms to require farmworkers to labor from sunrise to sunset, regardless of the hours required or the toll that places on farmworkers’ bodies and family lives.<sup>65</sup>

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<sup>58</sup> Id.

<sup>59</sup> Id. at 174.

<sup>60</sup> Statement of William E. Spriggs, “The Recurring Struggle of the Minimum Wage, House Education and Labor Committee Hearing, *Gradually Raising the Minimum Wage to \$15: Good for Workers, Good for Businesses, and Good for the Economy*, at 16 (2019), [https://edlabor.house.gov/imo/media/doc/Testimony\\_Spriggs020719.pdf](https://edlabor.house.gov/imo/media/doc/Testimony_Spriggs020719.pdf).

<sup>61</sup> See 29 U.S.C. § 213(a)(6). The bulk of farmworkers were protected, but several exclusions from coverage remain. In particular, employees who work on farms using less than 500 man-days of agricultural labor, immediate family members of the farm employer, and employees employed as hand harvest laborers paid on a piece rate basis who commute from their permanent residence to the farm and were employed in agriculture less than 13 weeks during the previous calendar year, remain excluded from coverage.

<sup>62</sup> For example, the Economic Policy Institute in 2017 estimated that a Congressional proposal to expand eligibility for overtime protection would have boosted affected workers’ paychecks by \$1.2 billion annually. Heidi Shierholz, “Federal overtime pay bill would boost paychecks by \$1.2 billion annually”, Economic Policy Institute (Dec. 1, 2017), <https://www.epi.org/publication/federal-overtime-pay-bill-would-boost-paychecks-by-1-2-billion-dollars-annually/>.

<sup>63</sup> See generally Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 53-59 (2005) (discussing how the movement for an 8 hour day resulted, in part, in the FLSA’s maximum hours protections).

<sup>64</sup> See Eric Hansen & Martin Donohoe, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. Health Care for the Poor & Underserved 153, 155-60 (2003), <http://phsj.org/files/Migrant%20and%20Seasonal%20Farm%20Worker%20Health/Migrant%20and%20Seasonal%20Farm%20Workers%20-%20JHCPU.pdf>.

<sup>65</sup> The health and safety implications of denying farmworkers maximum hours protection were recently recognized by the Washington Supreme Court, which held that Washington State’s exclusion of farmworkers from overtime denied the workers the fundamental right to workplace health and safety protection, as guaranteed by the Washington State constitution. See *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d 506, ¶¶ 22, 27-35 (2020). Studies have shown that being required to work overtime hours is associated with significantly higher injury hazard rates. See A.E. Dembe et al., *The impact of overtime and long work hours on occupational injuries and illness: new*

Finally, by denying farmworkers maximum hours protection, farm employers were incentivized to maintain smaller workforces and work them for longer hours, rather than being encouraged to hire more workers—meaning fewer opportunities for other farmworkers to earn a living. In sum, the earnings benefits, the quality-of-life benefits, and the job-creation benefits afforded by overtime/maximum hours protection have been denied to millions of farmworkers of color for the past 55 years.

## **2. The 1974 Amendments Contained Huge Exceptions That Allowed Continued Mistreatment of Black Domestic Workers and Other Domestic Workers of Color**

A powerful alliance of women’s rights, civil rights, and labor finally convinced Congress to extend FLSA coverage to domestic workers in private household service in 1974. This was a significant victory, extending FLSA protections to approximately 1.5 million domestic service employees.<sup>66</sup>

But the 1974 amendments still preserved the systemic racism of the original Act, including by continuing to exclude significant categories of domestic workers from minimum wage and overtime protections.

Two categories of workers were completely excluded from both the Act’s minimum wage and overtime protections: (1) “Casual” care workers providing babysitting services; and (2) Workers providing “companionship services for individuals who (because of age or infirmity) are unable to care for themselves.”<sup>67</sup> Congress empowered the Department of Labor to define these terms. Over time, corporations exploited the “companionship” exemption to deny millions of domestic workers fair wages, particularly as the use of in-home elderly care services exploded in recent decades.<sup>68</sup> While the Department of Labor narrowed the scope of this exemption through regulations that took effect in 2015, so that third-party employers such as home care and staffing agencies can no longer take advantage of it, it is still available to individual household employers.<sup>69</sup>

In addition, live-in domestic workers were completely excluded from the Act’s overtime/maximum protections.<sup>70</sup> This had serious racial equity implications, as hundreds of thousands of live-in domestic workers have been denied the earnings benefits, the quality-of-life benefits, and the job-creation benefits afforded by overtime/maximum hours protection, as discussed above with respect to farmworkers. But denying these protections to live-in domestic workers has especially pernicious implications because there is simply no boundary between home and work for these workers.

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*evidence from the United States*, 62 J. Occupational & Environmental Medicine 588 (2005), <https://oem.bmj.com/content/oemed/62/9/588.full.pdf>

<sup>66</sup> Congressional Research Service Memo, *Exemptions in the Fair Labor Standards Act: Agricultural, Domestic Service, and Tipped Workers* (Apr. 7, 2021), at 7 & n.13 (citing 1974 Bureau of Labor Statistics analysis).

<sup>67</sup> 29 U.S.C. § 213(a)(15).

<sup>68</sup> See National Employment Law Project, “Federal minimum wage & overtime protections for home care workers”, at 1, <https://s27147.pcdn.co/wp-content/uploads/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf> (updated Sept. 2015).

<sup>69</sup> *Id.* at 1,3.

<sup>70</sup> 29 U.S.C. § 213(b)(21).



Even more troublingly, the FLSA has allowed employers to deduct the cost of food and housing from live-in domestic workers' wages.<sup>71</sup> In sum, the employer's ability to compel round-the-clock labor, without any economic deterrent or the earning benefits of overtime protections, and to deduct food and housing expenses from workers' wages, makes live-in domestic workers particularly vulnerable to continued employer abuses.

#### **IV. The Effects of Racist FLSA Exclusions on Workers and Our Communities Today: Workers of Color Are Still Disproportionately Represented in Agricultural and Domestic Service, and Employers Continue to Pay Very Low Wages In These Sectors**

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The proof of how the FLSA has reinforced structural racism in our economy is in the numbers. Black and Latinx workers and other workers of color continue to be very disproportionately represented in these sectors, and employers still pay very low wages for these jobs.

There are currently an estimated 2.5 to 3 million agricultural workers in the United States.<sup>72</sup> Recent demographic data from the National Agricultural Workers Survey (prepared for the U.S. Department of Labor) shows that only 24-25 percent of farmworkers interviewed were born in the United States, while the rest were foreign born.<sup>73</sup> 83% of all farmworkers were identified as Hispanic, and 6% were identified as Indigenous.<sup>74</sup> The vast majority (69%) were born in Mexico, and just over half (51%) had work authorization.<sup>75</sup> Incomes among farmworkers remain extremely low, with mean and median personal incomes ranging from \$17,400-\$19,999.<sup>76</sup> Mean and median total family incomes ranged from \$20,000 to \$24,999, and 33% of farmworkers had family incomes below the poverty level.<sup>77</sup>

There are currently an estimated 2.2 million domestic workers in the United States working in private homes, including as house cleaners, nannies, child care workers, and home health aides.<sup>78</sup> The majority, 57.1%, are workers of color, with 21.7% Black workers, 29.1% Hispanic workers, and 6.3% Asian American/Pacific Islander workers.<sup>79</sup> Over one-third of domestic workers are foreign-born, and 20.3% are noncitizens.<sup>80</sup> And domestic work is still disproportionately done by women of color; 52.4% of domestic workers are Black, Hispanic, or AAPI women.<sup>81</sup> Moreover, domestic worker pay has been stagnant for decades and has

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<sup>71</sup> 29 U.S.C. § 203(m)(1); *see also* U.S. Dep't of Labor, Wage & Hour Division, *Credit towards Wages under Section 3(m) Questions and Answers*, <https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq>

<sup>72</sup> National Center for Farmworker Health, *Facts About Agricultural Workers* (2018), [http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts\\_about\\_ag\\_workers\\_2018.pdf](http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts_about_ag_workers_2018.pdf)

<sup>73</sup> Trish Hernandez & Susan Gabbard, JBS International, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers*, at i (Jan. 2018) [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP\\_2019-01\\_NAWS\\_Research\\_Report\\_13.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2019-01_NAWS_Research_Report_13.pdf)

<sup>74</sup> *Id.* at i.

<sup>75</sup> *Id.* at i.

<sup>76</sup> *Id.* at iii.

<sup>77</sup> *Id.* at iii.

<sup>78</sup> Julia Wolfe et al., Economic Policy Institute, "Domestic workers chartbook: A comprehensive look at the demographics, wages, benefits, and poverty rates of the professionals who care for our family members and clean our homes", at 4, Chart 1, <https://files.epi.org/pdf/194214.pdf>.

<sup>79</sup> *Id.* at 7-8 & Chart 3.

<sup>80</sup> *Id.* at 11-12 & Chart 5.

<sup>81</sup> *Id.* at 9-10 & Chart 4 Table 3 (Black, non-Hispanic women are 19.7%; Hispanic women are 27.2%, and Asian women are 5.5%).

lagged far behind the pay of all other workers; the median real hourly wage for domestic workers is currently \$12.01, compared with \$19.97 for all other workers.<sup>82</sup> The median annual earnings of domestic workers is \$15,980 per year.<sup>83</sup> 16.8 percent of domestic workers had family incomes below the poverty level, and 44.3% had incomes below the twice-poverty level.<sup>84</sup>

## V. The Effects of Racist FLSA Exclusions on Workers and Our Communities Today: Precarity and Pay Discrimination for Tipped Workers

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### A. Tipping as a Legacy of Slavery

The tipped minimum wage is a legacy of slavery—a practice that proliferated in the U.S. after Emancipation as a way to exploit recently freed Black people.

Tipping originated in Europe as early as the Tudor era. By the 17<sup>th</sup> century, the custom of tipping had spread throughout Europe.<sup>85</sup> It was imported to the U.S. in the 1880's by Americans who had traveled to Europe and were eager to show off their familiarity with European customs.<sup>86</sup> The practice of tipping proliferated among the restaurant and hospitality industries, which “hired” newly freed Black people and used tipping as a way to subsidize the costs of employer payrolls.<sup>87</sup>

Initially, it was met with opposition from those who saw it as a relic of an Old World, feudal master-servant relationship. In a 1916 polemic against tipping, William R. Scott described tipping as the price “one American is willing to pay to induce another American to acknowledge inferiority”.<sup>88</sup> This sense that those who took tips were inferior was compounded by racism in the way Black tipped workers were seen: As one Southern journalist reflected on his travels North in 1902: “I had never known any but Negro servants. Negroes take tips, of course; one expects that of them—it is a token of their inferiority. But to give money to a white man was embarrassing to me.”<sup>89</sup>

This idea that Blackness was linked with inferiority and servitude, particularly in tipped work, was especially clear with the Pullman Company, which employed 6,500 porters—all Black—in 1915, making it the largest private sector employer of Black workers.<sup>90</sup> Founder

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<sup>82</sup> Id. at 17 & Chart 8.

<sup>83</sup> Id. at 25-26 & Chart 13.

<sup>84</sup> Id. at 29-30 & Chart 15. As EPI explains, the twice-poverty level is considered by poverty researchers to be a better measure of poverty given that poverty thresholds set in the 1960s have not evolved to reflect changing spares of spending on various necessities. Id.

<sup>85</sup> Kerry Segrave, *Tipping: An American Social History of Gratuities* (McFarland & Company 1998).

<sup>86</sup> Ofer H. Azar, *The history of tipping—from sixteenth-century England to United States in the 1910s*, *The Journal of Socio-Economics*. Vol. 33, Issue 6. Pgs. 745-764 (December 2004)

<sup>87</sup> “Pullman Porters Fight on Tipping,” *New York Times* (July 23, 1928) p. 8. *See also supra* note 22 at 24 (noting that “[i]n the hotel business, the Negro is in demand in large cities as waiter, bellman, etc.”)

<sup>88</sup> William R. Scott. *The Itching Palm: A Study of the Habit of Tipping in America* 38 (1916) (“Every tip given in the United States is a blow at our experiment in democracy.”)

<sup>89</sup> Nina Martyris, “When Tipping Was Considered Deeply Un-American,” *National Public Radio* (November 30, 2015), <https://www.npr.org/sections/thesalt/2015/11/30/457125740/when-tipping-was-considered-deeply-un-american>

<sup>90</sup> *See supra* note 85 at pp.17-18.



George Pullman believed Black people were servants “by nature”.<sup>91</sup> “[Pullman] recruited porters who would be courteous to his passengers while tending to their every need and desire... [a]ll were ordered to answer to the name ‘George,’ a custom from slavery days when slaves were called by their master’s name.”<sup>92</sup> This form of servitude, in the recollections of many porters, “resembled slavery.”<sup>93</sup> Porters were dependent on their white patrons’ tips for the majority of their income, meaning that they had to cater to every whim and demand for their survival:

“The Pullman rule book allowed porters only three hours of sleep the first night out and none for the remaining days. Stationed in the men’s smoker where they could be reached by sounding a buzzer, porters were expected to be at the beck and call of their wards at all hours of the night, standing by for any emergency and ensuring that their charges got off at the proper destination. Trying to sleep on the leather seats of the smoker, they were often awakened when passengers went to the bathroom or when those who had trouble sleeping merely wanted to talk. Their dependence on tips guaranteed continued obsequiousness.”<sup>94</sup>

Thus, tipping kept Black people in an economically and socially subordinate position. And not surprisingly, the Pullman Company was one of the main lobbyists for using tips, recognizing the significant payroll cost savings it enjoyed from customers subsidizing workers’ wages. One 1915 estimate found that if not for tips, Pullman would have had to pay workers \$60 per month instead of \$27.50, which would have cost the company an additional \$2.5 million annually.<sup>95</sup>

In 1900, a third of all Black workers were in domestic or personal service, including nearly half a million “servants and waiters”—the second largest category after laborers, and a much greater percentage than Black workers’ percentage of the population.<sup>96</sup> As I have demonstrated, this labor stratification was a direct legacy of slavery that functioned to continue the exploitation of Black workers after Emancipation—with effects compounding into the present.

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<sup>91</sup> See Bruce Nelson, *Review of Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*, *Journal of Interdisciplinary History*, vol. 34 no. 1 (2003), p. 110-112, at p.111, *citing* Beth Tompkins Bates, *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945* (Chapel Hill, University of North Carolina Press, 2001).

<sup>92</sup> Arthur C. McWatt “‘A Greater Victory’: The Brotherhood of Sleeping Car Porters in St. Paul.,” *Minnesota History*, vol. 55, no. 5, 1997, pp. 202–216, [www.jstor.org/stable/20188023](http://www.jstor.org/stable/20188023).

<sup>93</sup> See *supra* note 91.

<sup>94</sup> See *supra* note 92.

<sup>95</sup> See *supra* note 85 at 17.

<sup>96</sup> See *supra* note 22 at 20-21. Specifically, in the 1900 census, “[t]here were 11,356 janitors and sextons; 545,980 laborers, 220,105 launders and laundresses; 465,787 waiters and servers; 9,681 soldiers, sailors and marines; 2,994 watchmen, policemen and firemen; and 6,070 in other branches of domestic and personal service.” *Id.*

## B. How the FLSA Excluded Tipped Workers

When FLSA was first adopted, workers in most tipped occupations were excluded entirely from its protections, as the statute's initial scope of coverage excluded industries with significant numbers of tipped workers.<sup>97</sup>

The FLSA also did not include provisions for the treatment of tips where workers would be covered under its minimum wage provisions. Shortly after Congress adopted the FLSA, the Supreme Court decided *Williams v. Jacksonville Terminal Co.*<sup>98</sup> At issue was whether a railroad employer had to pay "red cap" employees a fixed minimum hourly wage irrespective of tips received. The Court held that while employees must "receive a compensation at least as great as that fixed by the Act," it "left [the employer] free, in so far as the Act [is] concerned, to work out the compensation problem his own way."<sup>99</sup> Under this reasoning then, an employee could receive 100% of the required minimum wage from tips alone, without an employer obligation to directly pay any wage.

The 1966 FLSA amendment expanded minimum wage protections to many previously excluded sectors of the economy, including hotels and restaurants,<sup>100</sup> where the majority of tipped workers are employed. Congress also created the FLSA's tip credit in 1966 by amending the definition of "wage" in section 3(m) of the FLSA to provide employers with a tip credit (initially set at 50 percent of the full minimum wage).<sup>101</sup> The "tip credit" is the amount from employee tips that an employer may count against his requirement to pay the full minimum wage. While an improvement to the original 1938 statute, the 1966 expansion nonetheless fell short of equal treatment for tipped workers, as the cash wage was set at just 50 percent of the full minimum wage, with tips still expected to make up the difference between the cash wage and the full minimum wage.

Thirty years later, under another round of amendments, the tipped wage was frozen at \$2.13 an hour, where it remains today. These 1996 amendments set the cash wage at \$2.13 an hour (rather than defining the tip credit as a percentage of the full minimum wage).<sup>102</sup> This move delinked the tipped wage from the full minimum wage, leaving tipped workers behind as the full minimum wage has been incrementally increased over the years. Today, the tipped cash wage is the equivalent of less than 30 percent of the full federal minimum wage of \$7.25.

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<sup>97</sup> See *supra* note 57 at 13. (explaining the expansion of coverage under the 1966 amendments to the FLSA: "[t]he 1938 Fair Labor Standards Act introduced the federal minimum wage in manufacturing, transportation, communication, wholesale trade, finance, insurance and real estate, mining, forestry, and fishing. In 1950, the federal minimum wage was expanded to the air transport industry. In 1961, the minimum wage coverage was extended to all employees of retail trade enterprises with sales over \$1 million and to construction enterprises with sales over \$350,000. In 1967, the minimum wage was extended to agriculture, restaurants, hotels, schools, hospitals, nursing homes, and other services.")

<sup>98</sup> *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942).

<sup>99</sup> *Id.* at 408.

<sup>100</sup> See *supra* note 57 at 13.

<sup>101</sup> Public Law 89-601, §101(a), 80 Stat. 830 (1966).

<sup>102</sup> Public Law 104-188, § 1112, 110 Stat. 1759 (1996). \$2.13 is the equivalent of 50 percent of the full \$4.25 minimum wage from 1991, which was the effective rate prior to increases in the full minimum wage in 1996 and 1997, to \$4.75 and \$5.15, respectively.

### C. Tipped Workers Today

Under the FLSA, a tipped worker is one who “customarily and regularly” receives more than \$30 per month in tips (an amount that has been unchanged since 1977).<sup>103</sup> Although the law does not classify any specific occupation as a tipped occupation, certain jobs rely heavily on tips and are therefore considered “customarily” or “predominantly” tipped occupations. Table 1 below lists these occupations, along with their median wages inclusive of cash wage and tips. Tipped occupations are most heavily concentrated in the food services and drinking places subsector, where most restaurant servers and bartenders are employed.

**TABLE 1: Customarily or Predominantly Tipped Occupations in the U.S.**

Occupation	Employment	10th Percentile Wage	Median Wage
Baggage porters, bellhops, and concierges	28,440	\$9.15	\$13.00
Barbers	14,880	\$10.48	\$15.61
Bartenders	486,720	\$8.63	\$12.00
Cleaners of vehicles and equipment	341,660	\$9.52	\$13.29
Dining room and cafeteria attendants and bartender helpers	374,940	\$8.78	\$12.03
Food servers, non-restaurant	254,650	\$9.30	\$12.46
Hairdressers, stylists, and cosmetologists	302,410	\$9.06	\$13.16
Hosts and hostesses, restaurant, lounge, and coffee shop	316,700	\$8.55	\$11.48
Manicurists and pedicurists	73,010	\$9.79	\$13.40
Massage therapists	85,040	\$10.86	\$20.97
Parking attendants	123,790	\$9.48	\$13.02
Shampooers	8,310	\$8.92	\$11.63
Skin care specialists	46,640	\$10.99	\$17.55
Passenger vehicle drivers, except bus drivers, transit and intercity	599,980	\$9.53	\$15.54
Waiters and waitresses	1,944,240	\$8.42	\$11.42

**Source:** List of occupations from Table A2, Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>; and endnote 1, Restaurant Opportunities Center United, *Better Wages, Better Tips: Restaurants Flourish with One Fair Wage*, [https://chapters.rocunited.org/wp-content/uploads/2018/02/OneFairWage\\_W.pdf](https://chapters.rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf). Employment and wage data from U.S. Bureau of Labor Statistics, *May 2020 National Occupational Employment and Wage Estimates*, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm)

According to recent analysis by the Economic Policy Institute (EPI), there are 3.1 million tipped workers throughout the country who earn a cash wage below the full minimum wage.

<sup>103</sup> 29 U.S.C §203(t). In 1977, the FLSA was amended to increase the monthly tip amount from \$20 to \$30. See Pub. Law 95-151 §3a.

Of these, 1.3 million earn a cash wage of \$2.13 per hour, and the rest earn a cash wage higher than \$2.13 but lower than the full state minimum wage.<sup>104</sup>

Women make up 68 percent of tipped workers<sup>105</sup> in key tipped industries—far above their share of the overall workforce. The average age of tipped workers is 35, and many of them (1 in 3) are parents to one or more dependent children.<sup>106</sup>

#### **D. The Tipped Wage Puts Workers at Greater Risk for Poverty and Exploitation**

Tipped work is precarious work. Tipped workers' take-home pay fluctuates widely depending on the seasons, the weather, the shift they are given, and the generosity of customers.<sup>107</sup> Tipped work is also underpaid work. As Table 1 shows, the median wage for most tipped occupations falls below \$15 per hour, with some workers on the lower end of the wage distribution earning as little as \$8.42. In fact, prior to the pandemic, eight out of the 15 lowest paid occupations were restaurant jobs. Of these, seven were tipped.<sup>108</sup>

Low pay puts workers and their families at risk of poverty.<sup>109</sup> It should come as no surprise, then, that tipped workers are more likely to live in poverty than non-tipped workers, since in all but seven states in the country, employers are allowed to pay tipped workers a cash wage below the full state minimum wage, with the expectation that customer tips will bring these workers up to or above the full minimum wage. As Table 1 shows, most tipped workers are typically paid a total hourly wage (cash wage plus tips) of less than \$15.

According to a 2014 analysis by the University of California and the Economic Policy Institute (EPI), nationwide tipped workers have a poverty rate that is nearly twice that of non-tipped workers. While the poverty rate for non-tipped workers was 6.5% during the period analyzed (2010–2012), the poverty rate of tipped workers was 12.8%—6.3 percentage points higher. Restaurant servers and bartenders, who comprise the largest share of all tipped workers, had an even higher poverty rate of 14.9 percent.<sup>110</sup> But there is a significant difference in tipped worker poverty rates in states with a lower tipped wage and “one fair wage” states where tipped workers are guaranteed the full minimum wage as their cash wage. According to a 2021 analysis by EPI, between 2017 and 2019, servers and bartenders had a poverty rate of 13.3 percent in states with a \$2.13 tipped

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<sup>104</sup> Economic Policy Institute and National Employment Law Project, “Why the U.S. Needs a \$15 Minimum Wage”, January 26, 2021, <https://www.epi.org/publication/why-america-needs-a-15-minimum-wage/>.

<sup>105</sup> Justin Schweitzer, “Ending the Tipped Minimum Wage Will Reduce Poverty and Inequality”, Center for American Progress, March 30, 2021, <https://cdn.americanprogress.org/content/uploads/2021/03/29133657/Ending-Tipped-Minimum-Wage1.pdf>.

<sup>106</sup> Id.

<sup>107</sup> Restaurant Opportunities Center United, *Behind the Kitchen Door: Promise and Denial in Boston's Growing Restaurant Industry*, October 2016, [https://chapters.rocunited.org/wp-content/uploads/2016/11/BKD\\_Boston\\_Report\\_W.pdf](https://chapters.rocunited.org/wp-content/uploads/2016/11/BKD_Boston_Report_W.pdf).

<sup>108</sup> One Fair Wage and the UC Berkeley Food Labor Research Center, *Locked Out by Low Wages: Service Workers' Challenges with Accessing Unemployment Insurance During COVID-19*, May 2020, [https://onefairwage.site/wp-content/uploads/2020/11/OFW\\_LockedOut\\_UI\\_COVID-19\\_FINALUPDATE.pdf](https://onefairwage.site/wp-content/uploads/2020/11/OFW_LockedOut_UI_COVID-19_FINALUPDATE.pdf).

<sup>109</sup> Ken Jacobs et al., *The High Public Cost of Low Wages*, UC Berkeley Center for Labor Research and Education, April 2015, <https://laborcenter.berkeley.edu/the-high-public-cost-of-low-wages/>.

<sup>110</sup> Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>.

wage. But in one fair wage states, their poverty rate was substantially lower: 7.7 percent,<sup>111</sup> or 42 percent lower.<sup>112</sup>

The tipped wage also contributes to the gender and racial wage gaps. Researchers attribute at least some of the pay gaps to occupational segregation, such as the overrepresentation of women and workers of color in underpaid occupations, including tipped jobs.<sup>113</sup> Women in the overall workforce earn just 82 cents for every dollar men make, a gap that reduces women's annual median earnings by over \$10,000.<sup>114</sup> This gap and its impact on women's incomes is much greater for women of color: Black, Native Hawaiian, and Pacific Islander women earn 63 cents for every dollar that white non-Hispanic men earn; Native American women earn 60 cents; and Latinas just 55 cents.<sup>115</sup>

However, the gender wage gap is significantly smaller in one fair wage states, where tipped workers are guaranteed the full minimum wage as their cash wage. Per analysis by the National Women's Law Center, in these states, the wage gap shrinks by one-third: Women's earnings increase from 82 cents for every dollar a man makes to 85 cents. Conversely, the wage gap widens significantly in states with a \$2.13 tipped wage, where women earn on average just 78 cents for every dollar their male counterparts earn.<sup>116</sup> These figures illustrate the impact of the tipped wage on the gender wage gap.

Tipped work also reproduces the structural racism of our society and reinforces racist practices. Recent analysis by the Center for American progress finds that workers of color make up 48 percent of workers in key tipped industries, far above their share of the overall workforce.<sup>117</sup> A 2020 report by the University of California finds that restaurant workers of color in tipped occupations are concentrated in casual full-service restaurants, such as Denny's, Olive Garden, and Applebee's, and significantly underrepresented in fine dining restaurants where tips and earnings are significantly higher.<sup>118</sup> Within fine dining establishments, workers of color, especially women, are further segregated into positions that underpay them and come with lower tips, such as host and hostesses, baristas, barbacks, runners, and bussers.<sup>119</sup>

The University of California report also finds that the barriers that workers of color face to entry into fine dining restaurants start early in the process: White applicants are more likely to receive favorable treatment during the interview process and are 27 percent more likely

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<sup>111</sup> See *supra* note 104.

<sup>112</sup> These findings are in line with the earlier 2014 University of California and EPI analysis, which had found that in states with a \$2.13 tipped wage, the poverty rate for non-tipped workers was 7.0 percent between 2010 and 2012, while for tipped workers the poverty rate jumped to more than twice that rate: 14.5 percent. See *supra* note 110.

<sup>113</sup> See AAUW, *The Simple Truth About the Gender Wage Gap: 2020 Update*, [https://www.aauw.org/app/uploads/2020/12/SimpleTruth\\_2.1.pdf](https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf); National Women's Law Center, "One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers", February 2021, <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v2.pdf>; Lily Roberts and Galen Hendricks, "Short-Changed: How Tipped Work Exacerbates the Pay Gap for Latinas", Center for American Progress, November 20, 2019, <https://www.americanprogress.org/issues/economy/news/2019/11/20/477637/short-changed-tipped-work-exacerbates-pay-gap-latinas/>.

<sup>114</sup> National Women's Law Center, "The Wage Gap: The Who, How, Why, and What to Do", October 2020, <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *supra* note 105.

<sup>118</sup> One Fair Wage and the UC Berkeley Food Labor Research Center, *A Persistent Legacy of Slavery*, August 2020, [https://onefairwage.site/wp-content/uploads/2020/11/OFW\\_LegacyOfSlavery\\_USA-1.pdf](https://onefairwage.site/wp-content/uploads/2020/11/OFW_LegacyOfSlavery_USA-1.pdf).

<sup>119</sup> *Id.*

to be offered a job.<sup>120</sup> Further, the report finds that white customers are significantly more likely to show an unconscious preference for white people.<sup>121</sup>

These findings are consistent with other analyses on the pervasiveness of racial discrimination in tipped occupations: Research from Cornell University shows that Black restaurant waitstaff receive less in tips than white staff, and that the *perception* of the quality of service also negatively affects Black tipped workers.<sup>122</sup> Separate research published in the Yale Law Journal made similar observations of tipping discrimination affecting Black taxi drivers.<sup>123</sup>

### **E. The Tipped Wage is Difficult to Monitor and Enforce, and Often Leads to FLSA Violations**

Where a lower tipped cash wage exists, as is the case at the federal level and in 43 states in the country, minimum wage laws require that employers make up the difference between the cash wage and the full minimum wage by (“topping up”) if tipped workers’ total hourly earnings (cash wage plus tips) do not bring them to the full minimum wage. However, for various reasons, ranging from the complexity of the law, to the manner of tipping (cash vs. credit card), compliance is difficult to monitor and enforce, oftentimes resulting in FLSA violations.

Tipped workers are at significant risk for wage theft. Unscrupulous employers have an opportunity to misappropriate a portion of their workers’ income—and in fact, many do. A 2009 detailed report by the National Employment Law Project and researchers at academic institutions found that a significant share of tipped workers (12 percent) had experienced wage theft related to stolen tips.<sup>124</sup> A 2017 study by the Economic Policy Institute found that wage theft is more likely to occur in bars and restaurants,<sup>125</sup> where the majority of tipped workers are employed.

The complexity of the tipped wage also poses significant problems for enforcement. While employers are required to top up tipped workers whose tips are not enough to bring them up to the full minimum wage, many employers do not maintain accurate and complete records of tips earned by their tipped employees, as required by law.<sup>126</sup> A 2014 report by the Department of Labor found that the lower tipped wage also facilitates other related violations, such as “failing to pay the full minimum wage when tipped employees are asked

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<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, Cornell University and Mississippi College, 2008, [https://ecommons.cornell.edu/bitstream/handle/1813/71558/Lynn18\\_Consumer\\_Racial\\_Discrimination\\_in\\_Tipping.pdf](https://ecommons.cornell.edu/bitstream/handle/1813/71558/Lynn18_Consumer_Racial_Discrimination_in_Tipping.pdf).

<sup>123</sup> Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 Yale L. J. 1613 (2003).

<sup>124</sup> Annette Bernhardt et al., *Broken Laws, Unprotected Workers*, Center for Urban Economic Development, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009, <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

<sup>125</sup> David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, May 10, 2017, <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>. See also David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, Boston University, May 2010, <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

<sup>126</sup> U.S. White House, *The Impact of Raising the Minimum Wage on Women and the Importance of Ensuring a Robust Tipped Minimum Wage*, March 2014, <https://obamawhitehouse.archives.gov/sites/default/files/docs/20140325minimumwageandwomenreportfinal.pdf>.



to perform non-tipped work such as cooking, cleaning, and stocking in excess of 20 percent of their time.”<sup>127</sup>

Many instances of tipped wage violations have been documented over the years.<sup>128</sup> From 2010-2012, the Department of Labor conducted a compliance sweep of 9,000 restaurants and found that an overwhelming number of them (84 percent) had committed some type of violation, including 1,170 tipped wage violations.<sup>129</sup> An egregious case from 2014 illustrates how the difficulty in enforcing tipped wage rules—especially those related to record keeping—can allow employers to knowingly violate the law with little fear of punishment. In Pennsylvania, a chain restaurant was found in violation of the law when it failed to pay over 1,000 of its workers even the low tipped wage of \$2.13 per hour,<sup>130</sup> among other violations.

That employer was ultimately required to pay over \$6.8 million in back wages and damages. But for every employer who is found in violation of the tipped wage law and forced to make amends, there are many more who continue to take advantage of the complexity of the tipped wage to steal desperately needed earnings from workers who too often live in economic insecurity.

#### **F. The COVID-19 Pandemic Has Exacerbated the Economic Insecurity of Tipped Workers, Especially Tipped Workers of Color. However, as the Economic Outlook Improves, Some Employers are Adopting Fair Pay Models**

For decades prior to the pandemic, job growth had been skewed towards low-paying occupations, including those in the food service industry where tipped workers are concentrated.<sup>131</sup> With the COVID-19 pandemic and recession, the harm of low pay was compounded, as job losses<sup>132</sup>—and even rates of infection<sup>133</sup>—have disproportionately impacted workers in low-paying occupations. Women and workers of color, who make up significant shares of workers in frontline occupations and most affected industries, have especially been harmed.<sup>134</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> Brady Meixell and Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, September 11, 2014, <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

<sup>129</sup> See *supra* note 110.

<sup>130</sup> Press Release, U.S. Dep’t of Labor, “More Than \$6.8 Million in Back Wages, Liquidated Damages to be Paid to Current & Former Chickie’s & Pete’s Employees for Serious Wage Violations” (Feb. 20, 2014), <https://www.dol.gov/newsroom/releases/whd/whd20140044>.

<sup>131</sup> Bureau of Labor Statistics, “Employment Projections, 2010-20” [Press Release], February 1, 2012, [https://www.bls.gov/news.release/archives/ecopro\\_02012012.pdf](https://www.bls.gov/news.release/archives/ecopro_02012012.pdf)

<sup>132</sup> Elise Gould and Jori Kandra, *Wages Grew in 2020 Because the Bottom Fell Out of the Low-wage Labor Market: The State of Working America 2020 Wages Report*, Economic Policy Institute, February 24, 2021, <https://www.epi.org/publication/state-of-working-america-wages-in-2020/>.

<sup>133</sup> Centers for Disease Control and Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups*, April 19, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

<sup>134</sup> See Tori Bedford, “Women, People of Color Disproportionately Affected by Economic Impacts of Pandemic,” WGBH News, November 10, 2020, <https://www.wgbh.org/news/national-news/2020/11/10/women-people-of-color-disproportionately-affected-by-economic-impacts-of-pandemic>; and Eric S. Rosengren, Perspectives on the Eventual Economic Recovery, Federal Reserve Bank of Boston, February 19, 2021, <https://www.bostonfed.org/news-and-events/speeches/2021/perspectives-on-the-eventual-economic-recovery.aspx>.

There are signs that the economy is improving. From a record high of 14.7 percent in April 2020,<sup>135</sup> the unemployment rate was 6.0 percent in March of 2021<sup>136</sup>—the latest available data. But the data also shows an uneven and racialized recovery. Currently, the unemployment rate of white workers is 5.4 percent,<sup>137</sup> a rate below the average for all workers. For workers of color, however, the unemployment rate remains significantly above that average: 9.6% for Black workers<sup>138</sup> and 7.9% for Latinx workers.<sup>139</sup> This points to structural forces at play that existed prior to the pandemic, which harm all workers in underpaid occupations, including tipped occupations, and especially hurt workers of color.

In the hospitality sector, recent data also suggest improving conditions. According to March estimates by the U.S. Commerce Department, sales in retail and food service industries increased by 9.8 percent from the previous month, and by 27.7 percent from a year ago.<sup>140</sup> Sales in food services and drinking places, specifically, increased by 13.4 percent in February compared to a month prior, and 36 percent higher than March 2020.<sup>141</sup> Estimates by the National Restaurant Association similarly point to an improving jobs outlook in the restaurant industry, with employment rising each month in 2021.<sup>142</sup>

But as employment figures and sales rebound in the hospitality sector, a worker shortage has emerged as a new challenge.<sup>143</sup> News reports suggest that this shortage is in part driven by the easing of COVID-19 restrictions, leading to an increase in customers and the need for more workers to staff restaurants and other eating and drinking establishments.<sup>144</sup> Importantly, the shortage may also be influenced by workers leaving the hospitality sector for jobs in industries with better pay and better working conditions.<sup>145</sup>

The worker shortage has led some employers to reconsider their pay models and to adopt business practices that incorporate significantly higher wages and better working conditions, including a rethinking of the lower tipped wage.<sup>146</sup>

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<sup>135</sup> U.S. Bureau of Labor Statistics, “Unemployment Rate Rises to Record High 14.7 Percent in April 2020,” *TED: The Economics Daily*, May 13, 2020, <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm>.

<sup>136</sup> U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-1. Employment Status of the Civilian Population by Sex and Age, <https://www.bls.gov/news.release/empsit.t01.htm>. Accessed April 28, 2021.

<sup>137</sup> U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age, <https://www.bls.gov/news.release/empsit.t02.htm>. Accessed April 28, 2021.

<sup>138</sup> *Id.*

<sup>139</sup> U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-3. Employment Status of the Hispanic or Latino Population by Sex and Age, <https://www.bls.gov/news.release/empsit.t03.htm>. Accessed April 28, 2021.

<sup>140</sup> U.S. Census Bureau, U.S. Department of Commerce, “Advance Monthly Sales for Retail and Food Services, March 2021” [Press Release], April 15, 2021, [https://www.census.gov/retail/marts/www/marts\\_current.pdf](https://www.census.gov/retail/marts/www/marts_current.pdf).

<sup>141</sup> *Id.* at Table 2.

<sup>142</sup> National Restaurant Association, *Restaurant Employment Rose for the Third Consecutive Month*, April 2, 2021, <https://restaurant.org/articles/news/restaurant-employment-rose-in-march>.

<sup>143</sup> Brett Anderson, “As Diners Return, Restaurants Face a New Hurdle: Finding Workers,” *New York Times*, April 8, 2021, <https://www.nytimes.com/2021/04/08/dining/restaurant-worker-shortage.html>.

<sup>144</sup> Heather Haddon, “Restaurants Serve Up Signing Bonuses, Higher Pay to Win Back Workers,” *Wall Street Journal*, April 25, 2021, <https://www.wsj.com/articles/restaurants-serve-up-signing-bonuses-higher-pay-to-win-back-workers-11619359201>.

<sup>145</sup> *See supra* note 143.

<sup>146</sup> *Id.*; *see also* Tejal Rao, “What Is Hospitality? The Current Answer Doesn’t Work,” *New York Times*, April 13, 2021, <https://www.nytimes.com/2021/04/13/dining/restaurant-hospitality.html>; *supra* note 144.



## G. Tipped Workers and Businesses Do Better in One Fair Wage States.

In seven states (Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington), employers are required to pay tipped workers the full state minimum wage as their cash wage and cannot claim any portion of tips as a credit towards their obligation to pay all workers the full minimum wage.<sup>147</sup>

The experience of the seven “one fair wage” states makes it clear that businesses can survive and thrive without a lower tipped wage. There is no indication that tipped industries have suffered from the absence of a lower tipped wage. In fact, the opposite is true. Analysis by the Economic Policy Institute finds that from 2011 to 2019, the restaurant industry was stronger in one fair wage states than in states with a lower tipped wage: Among full-service restaurants, the number of establishments grew by 17.5% in one fair wage states, compared with 11.1% in states with a lower tipped wage. Similarly, the growth in employment in full-service restaurants was 23.8% in one fair wage states, compared with 18.7% in states with a lower tipped wage.<sup>148</sup> These findings are in line with two separate earlier analyses: A 2014 University of California and EPI study, which found that from 1995 to 2014, leisure and hospitality industries grew significantly faster (43.2%) in one fair wage states than in states with a lower tipped wage (39.2%);<sup>149</sup> and a 2018 analysis published by the Federal Reserve of Atlanta, which found that restaurant industries in one fair wage states experienced similar or higher sales and employment growth as states with a lower tipped wage, and that wages also grew at a faster rate.<sup>150</sup>

Research shows that tipped workers also benefit from earning the full minimum wage as their cash wage. The 2014 analysis by the University of California and EPI found that “tipped workers in equal treatment states earn 14.2 percent more than tipped workers in low tipped minimum states;” and that earnings for servers and bartenders were 20.6 percent higher in one fair wage states compared with states with a \$2.13 tipped wage.<sup>151</sup> A more recent analysis by EPI confirms this fact: In one fair wage states, restaurant servers and bartenders earn 21 percent more on average, than their counterparts in states with a \$2.13 tipped wage.<sup>152</sup> In fact, Alaska—one of the seven states where tipped workers are paid the full state minimum wage as their cash wage—has the highest average tip rate among all fifty states, according to a 2014 analysis of debit and credit card transactions.<sup>153</sup>

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<sup>147</sup> U.S. Department of Labor, *Minimum Wages for Tipped Employees*, <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>. Accessed April 28, 2021.

<sup>148</sup> See *supra* note 104.

<sup>149</sup> See *supra* note 110.

<sup>150</sup> Teofilo Reyes, “One Fair Wage: Supporting Restaurant Workers and Industry Growth.” In T. Andreason, S., Greene & C. E. Prince, H., and Van Horn (Eds), *Investing in Work* (Volume 2, pp 27–41). Atlanta, GA: Federal Reserve Bank of Atlanta, <https://www.investinwork.org/-/media/Files/volume-two/One%20Fair%20Wage%20Supporting%20Restaurant%20Workers%20and%20Industry%20Growth.pdf>.

<sup>151</sup> See *supra* note 110.

<sup>152</sup> See *supra* note 104.

<sup>153</sup> See Roberto A. Ferdman, “Which US States Tip the Most (and Least), as Shown by Millions of Square Transactions,” Quartz, March 21, 2014, <http://qz.com/189458/the-unitedstates-of-tipping/>. (compares One Fair Wage states to other states in table assessing “Which US states are nicest to their servers?”)

## H. Extending Full FLSA Protections to Tipped Workers Would Have a Minimal Impact on Prices and Would Eliminate an Unfair Subsidy to Employers in Tipped Industries

Research of the effect of minimum wage increases on restaurant menus suggest that raising the tipped wage—or eliminating it altogether—would have minimal impact on menu prices. In a 2018 peer-reviewed study, University of California economists analyzed changes in menu prices for restaurants in the San Jose California area, after the city implemented a 25 percent increase in its minimum wage in 2013. (In San Jose, as throughout California, employers of tipped workers are required to pay their employees the full state minimum wage as a cash wage). The researchers found that the minimum wage increase raised menu prices in full-service restaurants (restaurants with table service and tipped wait staff) by \$0.44 for every 10 percent increase in the minimum wage.<sup>154</sup> That is, the *full 25 percent minimum wage increase* raised menu prices at full-service restaurants by only \$1.10 on average.<sup>155</sup> A separate analysis, projecting the impact of eliminating the tipped wage in New York, suggested that a tipped wage elimination and an increase in the minimum wage to \$15 in the state would increase operating costs for full-service restaurants by 1.2 percent—meaning that a \$10 menu item would increase by \$0.83 cents if restaurants passed the full operating cost increase onto customers.<sup>156</sup>

Polling shows that the public supports fair treatment for tipped workers. A 2018 public opinion poll commissioned by the National Restaurant Association found overwhelming support (71 percent) for raising the federal minimum wage to at least \$10 per hour, even if doing so increased the cost of food and service at restaurants.<sup>157</sup> And a 2019 poll commissioned by the National Women’s Law Center found that 81 percent of voters support extending full minimum wage protections to tipped workers.<sup>158</sup>

Extending full FLSA protections to tipped workers would not only lead to greater fairness for tipped workers, but for employers in non-tipped industries as well. The lower tipped wage serves as an unfair subsidy to employers in restaurants and other hospitality sector industries where the lower tipped wage is most widely used. The tipped wage essentially transfers responsibility for paying a significant portion of tipped workers’ wages from employers onto the customers. No other industries are subsidized this way.

## VI. Conclusion

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Congress has the obligation and opportunity to right the wrongs we are discussing today, to advance equity, and increase the economic security and wellbeing of millions of workers.

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<sup>154</sup> Sylvia Allegretto and Michael Reich, “Are Local Minimum Wages Absorbed by Price Increases? Estimates from Internet-Based Restaurant Menus,” *ILR Review*, 71(1), January 2018, pp. 35–63, <https://irle.berkeley.edu/files/2018/01/are-local-minimum-wages-absorbed.pdf>.

<sup>155</sup> The \$1.10 average increase in menu prices is a NELP calculation based on the findings in the study:  $\$0.44 \times 2.5 = \$1.10$ .

<sup>156</sup> Sylvia Allegretto, *Should New York State Eliminate its Subminimum Wage?*, Center on Wage and Employment Dynamics, University of California at Berkeley, April 20, 2018, <https://irle.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf>.

<sup>157</sup> Lisa Graves and Zaid Jilani, “The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them,” *The Intercept*, April 17, 2018, <https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>.

<sup>158</sup> National Women’s Law Center, “NWLC Survey Finds Overwhelming Support for Gender Justice Policies”, May 3, 2019, <https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies/>.

Across the country, workers are organizing and demanding better wages and the end to laws that have exclusion and inequity at their core. It is time for representatives in Congress to join together with them and fight for justice and equality in our jobs and beyond.

The seven states that already ensure tipped workers have the protection of the full minimum wage—along with the states and cities that are providing agricultural workers and domestic workers with the full protections of their laws—offer a glimpse into both the possibilities of rectifying the racist exclusions in the FLSA and the wide-ranging positive effects doing so will have on communities across the country.

That progress, of course, was only possible because of workers' and community movements, and policymakers should look to the work of groups like the National Domestic Workers Alliance, the Fight for \$15, and the United Farmworkers that are already charting a path forward towards equity and prosperity for all. It is my hope that this Congress will listen to their demands and begin taking steps right away to rectify the lingering racist exclusions of domestic workers, farmworkers, and tipped workers from the bedrock labor protections all workers need.

When harms are rooted in racism and other forms of oppression built into the very core of our laws, it is crucial that the federal government address the problem at that root and explore structural, rather than cosmetic, solutions. The policy proposals presented by workers' groups like the ones present in this hearing today are clear examples of structural action that this Congress can take immediately. Congress should consider and pass the Raise the Wage Act of 2021, the Domestic Workers Bill of Rights, and the Fairness to Farmworkers Act. Each of these will put us on the path toward more equitable and just treatment of the millions of workers who have been excluded from the protections of the FLSA for far too long.

If this pandemic has shown us anything, it is that we are all interconnected. When structural oppression harms some of us, it harms all of us, and likewise, we can only thrive when all of us have what we need and when everyone's human rights are protected.

I hope that this Congress will recognize the profound opportunity it has to start undoing the stain of systemic racism and building a better, healthier, and more equal nation by addressing exclusions in the Fair Labor Standards Act right away—and that those changes will act as a beacon of more and lasting structural change to follow.

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