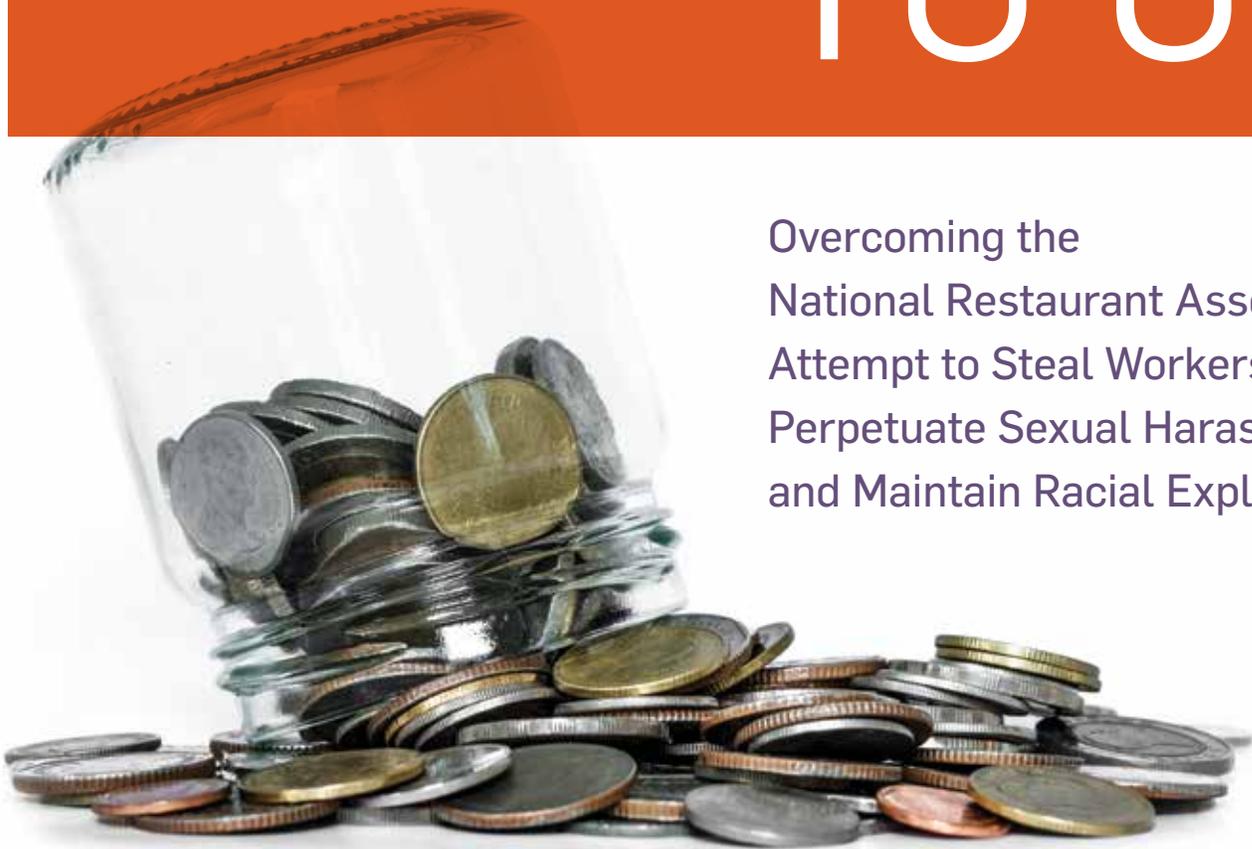


# OUR TIPS BELONG TO US

Overcoming the  
National Restaurant Association's  
Attempt to Steal Workers' Tips,  
Perpetuate Sexual Harassment,  
and Maintain Racial Exploitation



OCTOBER 2017



BY RESTAURANT OPPORTUNITIES CENTERS UNITED



## OUR TIPS BELONG TO US

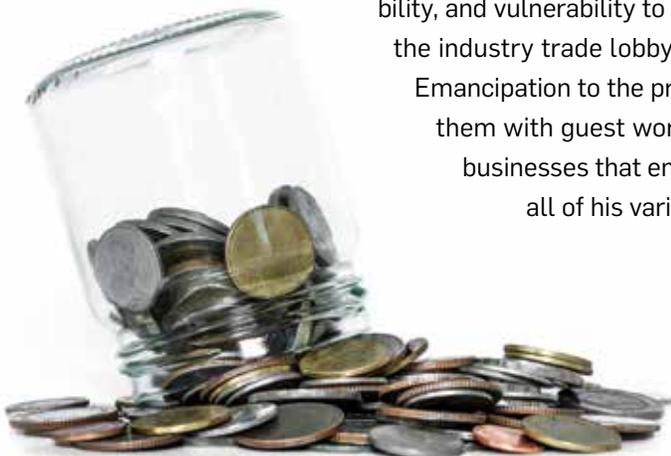


**The National Restaurant Association is one of the most powerful trade lobbies in the United States**

The acronym 'NRA' is commonly associated with a visible gun lobby, and often finds itself in the news due to horrible tragedies such as the recent mass shooting in Las Vegas. While that NRA does wield outside political influence and has polarized the country, there is another national trade lobby that shares the same acronym — the National Restaurant Association (NRA) — and wields a similar amount of political influence at both the national and local level, yet manages to fly below the radar. The National Restaurant Association is one of the most powerful trade lobbies in the United States, and drives corporate priorities by spending millions to influence policymakers and fight progressive legislation. While the Other NRA claims that it represents 500,000 restaurant businesses, its priorities echo those of the world's largest food and beverage corporations, and its key leadership includes major full-service chains such as Olive Garden (Darden Brands), IHOP and Applebee's, (DineEquity), Denny's, Cracker Barrel, Chili's (Brinker International), and Outback Steakhouse (Bloomin' Brands). Other major chains and retailers such as McDonald's and Disney also play a leading roll.<sup>1,2</sup>

The Other NRA's influence can best be seen in the subminimum wage for tipped workers, which has been frozen at \$2.13 an hour for the last twenty six years. The Other NRA has also played an instrumental role in fighting efforts to win paid sick days, such as in Albuquerque and Pittsburgh, and other public health measures such as menu labeling requirements and soft-drink size limits.<sup>3,4</sup> The Other NRA is now working with the Trump Administration's Department of Labor in an effort to overturn decades of federal and state law and precedent in order to gain control and ownership over workers' tips.

This move would force a majority-female workforce, already forced to tolerate extreme sexual harassment in order to receive tips to feed their families, into further poverty, economic instability, and vulnerability to sexual harassment and assault.<sup>5</sup> This move would also perpetuate the industry trade lobby's history of racial exploitation of tipped workers that spans from Emancipation to the present day abuse of undocumented workers and efforts to displace them with guest workers. Finally, it would allow Donald Trump, the owner of multiple businesses that employ tipped workers, to keep and profit from his employees' tips in all of his various businesses.



# THE SUBMINIMUM WAGE

When a national minimum wage was established under the Fair Labor Standards Act (FLSA) in 1938, restaurant workers were excluded. Many of these workers depended solely on tips for their wage. In 1966 the FLSA was amended to establish a subminimum wage for workers that “customarily and regularly receive tips,” generally defined as any worker who earns at least \$30 per month in tips.<sup>12</sup> The subminimum wage for tipped workers was set at 50% of the full minimum wage, with the remainder to be paid through tips. The FLSA was further amended in 1974 to clarify that tips are to be retained by the employee except when a valid tip pooling arrangement is in place.<sup>13</sup> In 1991, the minimum wage was set at \$4.25, with the subminimum wage at \$2.13. In 1996, as efforts to raise the minimum wage grew, the Other NRA under the leadership of Herman Cain negotiated with Congress and the Clinton Administration to freeze the subminimum wage at \$2.13 where it has stayed ever since. The subminimum wage of \$2.13 is generally not enough to cover an employee’s tax liability, requiring workers to depend on tips for the entirety of their take home wage. In states with a tipped subminimum wage workers receive their wage directly from the customer.

## THE OTHER NRA’S EFFORTS TO STEAL TIPS

Through a series of court decisions, and the cooperation of the Department of Labor and Secretary of Labor Alexander Acosta, the National Restaurant Association is poised to take ownership of workers’ tips away from the workers who earned them.

In 2011 the Department of Labor (DOL) adopted regulation 29 C.F.R. § 531.52, to clarify that tips are always the property of the employee, and prohibit sharing of tips with any workers who are not in direct line of service, regardless of whether the employer pays the subminimum wage for tipped employees. This regulation, adopted in 2011, reiterated over 40 years of custom and practice by the DOL and state agencies affirming “Wage and Hour’s longstanding position that the 1974 amendments to the FLSA established that tips are the property of the employee.”<sup>6,7,8,9</sup> In July of this year, in response to court challenges from the restaurant industry, the DOL gave notice that it intended to rescind this important regulation.<sup>10,11</sup>

The Ninth Circuit Court of Appeals upheld the 2011 regulation in February of 2016 (Oregon Restaurant and Lodging, et al v. Thomas Perez, et al,) affirming the right of the DOL to regulate tip pools where no tip credit was claimed under the principle of Chevron deference.<sup>14</sup> However, the Tenth Circuit Court of Appeals rejected this principle in June of 2017, ruling that tips belong to the employer and that the DOL had overstepped its bounds. The Oregon Restaurant & Lodging Association (ORLA), which had originally brought the case in the Ninth Circuit noted that under the Tenth Circuit ruling, “tips belong to the employer, who can presumably either keep them or distribute them in whole or part to employees as it sees fit.” The ORLA further noted that according to the Tenth Circuit ruling, “restaurants didn’t owe workers tips that never belonged to them.”<sup>15</sup>

Unlike the Ninth Circuit Court of Appeals, which covers the majority of states that require One Fair Wage — the same minimum wage for tipped and non tipped workers — the states in the Tenth Circuit operate under the federal subminimum wage of \$2.13 per hour with the exception of Colorado, which has a subminimum wage for tipped workers of \$6.28 per hour. The Colorado Restaurant Association has informed its members that in the states covered by the Tenth Circuit, employers can take ownership of tips as long as the minimum wage is assured, and in the case of Colorado, restaurants post information of how tips are used.<sup>16</sup> The Tenth Circuit’s decision clarifies that this issue is of concern to all tipped workers across the country, not only the ones in states with a One Fair Wage system. If the DOL rescinds the regulation, all employers will be able to gain ownership of tips as long as they pay the minimum wage.

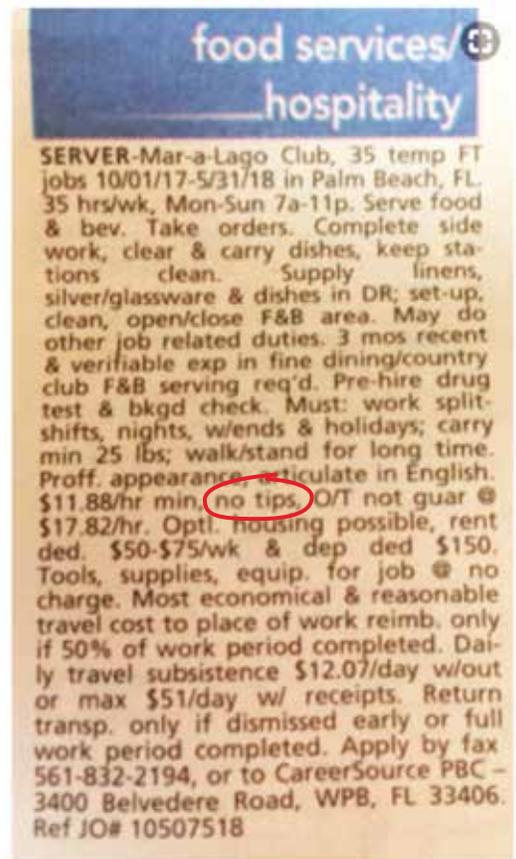
The DOL’s proposed action would go beyond previous court decisions, such as a 2010 Ninth Circuit Court decision, *Cumbe v. Woody Woo, Inc.* that al-



**Alexander Acosta** became Secretary of Labor after the failed nomination of Andrew Puzder, an active member of the Other NRA, and a highly polarizing CEO famous for using ads of women in bikinis to sell Carl's Jr. and Hardee's hamburgers.<sup>17</sup> Secretary Acosta is the son of Cuban immigrants, the only Latino member of Trump's cabinet, and previously served in four U.S. Senate confirmed positions during the Bush Administration as Principal Deputy Assistant General in the Civil Rights Division, as a member of the National Labor Relations Board, as Assistant Attorney General of the Civil Rights Division, and as United States Attorney for the Southern District of Florida.<sup>18</sup> Along with accomplishments such as prosecuting Jack Abramoff and members of the drug cartels, Acosta has some significant blemishes on his record, including weakening anti-discrimination law and defending voter suppression efforts in Ohio while at the Civil Rights Division, and negotiating a sweetheart settlement with billionaire investor Jeffrey Epstein who was accused of statutorily raping 40 underage girls but was allowed to plead guilty to a state charge involving soliciting a minor for prostitution.<sup>19</sup> However, Acosta's career path shows he is on a trajectory to be nominated for a judicial appointment if no additional controversial decisions block him.

lowed employers that always paid the full minimum wage to share tips with kitchen staff that are not considered directly in line of service to the customer. The DOL's 2011 regulation was written in response to that court decision. However, the DOL's proposed rescindment would make moot any questions surrounding tip pooling and tip sharing that the industry claims is at the heart of its appeals. The guidance provided by the Oregon and Colorado Restaurant Association demonstrate that their genuine interest is one of tip ownership that would have ramifications beyond tip pools and tip sharing mechanisms. The DOL could instead address concerns around tip pools by establishing democratic mechanisms for workers to share tips among both dining and kitchen staff, thereby allowing kitchen staff to enter into tip ownership, without upending the over forty years of precedent it established in 1974 when it asserted that tips are the property of the employee. Regardless, the Other NRA is using the conflicting court rulings between the Ninth and Tenth Circuit Courts of Appeals to refile its appeal of the Ninth Circuit Court's decision to the Supreme Court, and ask the Court to prevent the United States Department of Labor (U.S. DOL) from issuing any similar regulations.<sup>20</sup>

Secretary of Labor Alexander Acosta currently leads the U.S. Department of Labor. The DOL, under Acosta, appears to be following the Other NRA's guidance as it crafts new federal regulation that would formalize the Tenth Circuit's ruling granting tip ownership to employers.<sup>21</sup> The Other NRA praised the DOL's announcement, but reaffirmed that it would continue its appeal of the Ninth Circuit decision to the Supreme Court with the stated aim of affirming the Tenth Circuit Court's decision.<sup>22</sup> Although the Other NRA supports the DOL's proposed rule change, it wants the Supreme Court to prevent any future DOL rules by declaring that the DOL does not have the authority to issue such regulations.<sup>23</sup>



MAR-A-LAGO CLUB CLASSIFIED AD, PALM BEACH POST, JULY 27, 2017

# A LEGACY OF SEXUAL HARASSMENT



The practice of tipping takes a hard toll on women, who often face sexual harassment in the workplace. Since tipped workers who earn a low subminimum wage rely on tips for their income, they are forced to tolerate inappropriate behavior at work from the customers that leave those tips. This is magnified by sexual harassment from co-workers and employers.

**Nearly 90 percent of tipped women restaurant workers have experienced some form of sexual harassment or assault in the workplace.**

Women who rely on customers' tips for the bulk of their income are twice as likely to be harassed as women who work in states in which the tipped subminimum wage has been abolished. A survey of 688 restaurant workers conducted by ROC United and Forward Together found that women restaurant workers who earn \$2.13 per hour are twice as likely to experience sexual harassment as women in states that do not have a tipped subminimum wage.<sup>24</sup>

Compounding this problem, women are more likely to be required to wear revealing uniforms when their employers depend on the customers to pay their employees' wages. In states that allow subminimum wages for tipped workers, women feel they must tolerate inappropriate comments and sexual behaviors at work to ensure a good tip and to keep their job. Depending on tips for their income ultimately pressures tipped workers to endure inappropriate behavior.<sup>25</sup>

Moreover, sexual harassment fueled by the subminimum tipped wage affects workers of all genders. Forty-six percent of men report that sexual harassment is an uncomfortable aspect of work life, and 60 percent of transgender workers report experiencing "scary" or "unwanted" sexual behavior. Transgender workers are two-and-a-half times more likely to report harassing comments about their sexual orientation or gender identity from customers than other coworkers.<sup>26</sup>

The study also surveyed a subset of 233 women who had previously worked in the restaurant industry, and it found that over one third of those who had been tipped workers quit their jobs as a result of unwanted sexual advances. Overall, women who have previously worked in the restaurant industry are 1.6 times more likely to tolerate harassing behaviors in the workplace than women currently employed as tipped workers, indicating that women who encounter sexual harassment in the restaurant industry are more likely to tolerate sexual harassment in other environments. The subminimum wage appears to normalize inappropriate conduct, shaping perceptions of sexual harassment as acceptable workplace behavior that tipped workers can carry to future workplaces.<sup>27</sup>

The DOL's proposed rule changes would also put the Trump Administration's policy in line with that of Donald Trump's business practices. Trump's Mar-a-Lago resort famously posted in its recruitment ads that servers were to expect \$11.88 per hour with "no tips" while working at that golf resort.<sup>28</sup> Catering staff at the Trump SoHo Hotel in New York also sued Donald Trump and several family members for allegedly stealing their tips by paying a flat wage and keeping a 22% service fee added to customers' bills.<sup>29</sup> Trump's DOL is thus proposing regulation that would confirm that Donald Trump has the right to keep his employees' tips in all of his various businesses.

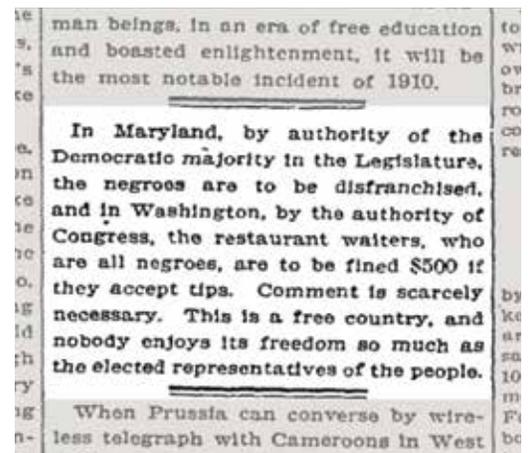
## THE OTHER NRA'S TROUBLED HISTORY WITH TIPS: A LEGACY OF RACIAL EXPLOITATION AND SEXUAL HARASSMENT

Tipping has a long and tortured history in this country. Although tipping was largely non-existent prior to the Civil War, tipping spread rapidly after Emancipation as employers in the hospitality sector hired newly freed slaves across the country.<sup>30</sup> This history is best exemplified by the Pullman Company, which hired former slaves as porters and dining car waiters with an expectation of servility to white patrons who would tip them in lieu of wages.<sup>31</sup> Freed slaves that moved North were refused employment in the skilled trades they had learned as slaves, and were forced to become cooks and waiters entirely dependent on tips.<sup>32,33</sup> By 1880, 43% of all workers employed in hotels and restaurants were African Americans.<sup>34</sup> In 1900, 37 years after emancipation, a quarter of all African Americans engaged in non-agricultural labor were employed as servants and waiters. Nearly three quarters of these workers were women.<sup>35</sup>

Efforts to ban tipping spread in the early 1900s and several states enacted such bans, many of these efforts tied to race. In 1910 in Washington, D.C., Congress adopted a fine of \$500 for any restaurant waiter who accepted tips. At the time, all restaurant waiters in the city were African American.<sup>36</sup> By 1926, the restaurant industry lobby, with the assistance of the courts, was able to roll back all of the tipping bans that had been enacted and was able to once again have employees depend completely on tips and not provide any wages.<sup>37</sup> During that same period, and with the advent of World War I, women entered the workforce in large numbers and quickly grew to become a majority of all servers. By 1940, nearly 70% of servers were women, dependent on tips for their income.<sup>38</sup>

Starting in the 1980s, the restaurant industry again experienced rapid demographic change, with immigrant workers transforming the industry. Foreign-born workers comprised 10% of the restaurant workforce in 1980, growing to 25% in 2010. Tipped restaurant workers who were foreign born grew from 9% to 19% in that same period.<sup>39</sup> The industry is also one of the largest employers of undocumented workers, but due to factors such as slowing immigration and very low wages the industry finds itself with a significant labor shortage, and is seeking ways to increase the workforce without raising wages.<sup>40,41</sup>

The industry now aggressively supports a National E-verify system with no liability for employers, increased border security, and, most importantly, an expansive effort to import a large group of guest workers for its labor needs.<sup>42</sup> The restaurant industry is already the fourth



THE NEW YORK TIMES  
MONDAY, APRIL 4, 1910

**Marisa Licandro** is a server who works at Romans, a neighborhood restaurant in Brooklyn, NY. Romans is a gratuity free restaurant, meaning that all the employees earn a living wage and don't have to scramble for tips to complete their paycheck. Marisa has worked in the restaurant industry since she was 17, causing her to experience or witness many of the injustices in this industry.

She graduated from a prestigious culinary school where she held a job at the on campus restaurant in order to get by and keep herself in school. A coworker and past friend attempted to sexually assault her at work, so Marisa asked her employer not to be scheduled with this person anymore. One day she arrived at work and this perpetrator was surprisingly also scheduled to work. Marisa was distraught and asked that this person be sent home and not scheduled with her again in the future. "Sorry, we need to keep him here today since it's a Saturday, but you can go home if you want," was their response. She no longer felt safe at work and was forced to cut down her hours to accommodate her perpetrator's schedule. After the second time they were scheduled together Marisa felt forced to quit. "He should have been asked to leave, not me," Marisa thought. She filed a complaint with the school's Title IX administrator, but he only seemed to be concerned with maintaining the reputation of the institution, not the safety of its students.

The contrast with her current employer couldn't be greater. "Here, we don't have to compete for tips so everyone has your back," Marisa said. "One customer kept calling me babe, and other demeaning names, and when I told my manager she told him to respect us". That same customer was yelling profanities and bothering other customers. Her manager and owner backed her up, telling her it didn't matter if they lost a customer; they shouldn't have to put up with that kind of harassing behavior. Customers shouldn't feel entitled to harass and demean workers.

Marisa's situation would have been much worse if she had to worry about competing with sexually abusive co-workers for those busy Friday and Saturday night shifts, and then worry whether her employer would let her keep her tips or not. Marisa is an active member of ROC New York, who is trying to help win One Fair Wage for all workers so they don't have to depend on tips and put up with abusive customers, co-workers, or managers.

**Toni Malacki**, Pittsburgh born and raised, is a sixty-year old grandmother who has worked in the restaurant industry for close to twenty years. She entered the industry as a divorced mom who needed a job that didn't entail a college degree. She has worked as a hostess at an upscale steakhouse chain in Pittsburgh for six years. "I really enjoy meeting different people," she says. Unfortunately, one of those encounters was not very pleasant.

One day she was helping one of the guests who is a regular, "I was helping him put on his coat — as hostess we take their coats — when he reached his hand under my dress and grabbed my vagina." She took her complaint to management, "I told the floor manager, then the managing partner the next day," but months and months went by and nothing happened.

Toni states, "I went through a lot of feelings. Oh my gosh, even now it is making me choke up. I probably cried on and off for two months, but the manager told me, 'He's not going to be barred from this restaurant.'"

Toni finally decided to go to HR, but this only resulted in the managing partner "throwing a fit. He said I was disrespecting him." He claimed he didn't remember the episode, even though two witnesses sent corroborating statements to HR.

Finally, she was told that, "it would be in my best interest to go in the coat closet when he came in. So he doesn't feel uncomfortable, because supposedly they had a talk with him." Toni was told to hide in order to make the guest who assaulted her feel more comfortable.

That same guest had showed another female server pictures of penises, but other servers treated him royally, presumably because he is a big tipper. One of these servers once exclaimed that the guest was in a great mood, adding "maybe he grabbed someone's vagina before he got here."

Toni notes that she fears retaliation for speaking up about this. Another female server who is frequently requested by customers was suspended after complaining that she was harassed in the kitchen. "A kitchen guy was saying stuff about her boobs and her butt. She complained and then they started writing her up." Still, she notes she wishes she had spoken up sooner. "I should have called the police," she notes, "because him coming to me unwantedly is actually a crime. By keeping quiet, you just let it continue and continue."

Unfortunately, Toni notes, "Powerful people hold your lives in their hand if you go against them."

largest recipient of H-2B, or non-agricultural guest worker certifications. In 2016, 11,308 restaurant workers were certified as H-2B workers, or 9.5% of all H-2B workers. Waiters and waitresses were the seventh largest (3,426), and restaurant cooks the eight largest (2,161) H-2B certified occupational categories.<sup>43</sup>

The most striking plank of the NRA's platform is the call for an expanded guest-worker program. As the Southern Poverty Law Center has documented, the nation's guest worker program acts as a modern day indentured servant program. This program is ripe for abuse, since it ties workers to a particular employer who decides the conditions under which that worker can remain in the country. Any worker who complains can quickly be removed and blacklisted from the program.<sup>44</sup> President Trump is a well-known user of guest workers under the H-2B program. In 2016, Trump received permission from the US Department of Labor to hire 64 foreign H-2B workers as servers, cooks, and housekeepers in 2016. At Mar-a-Lago he hired thirty H-2B servers earning \$11.13 per hour, 15 housekeepers earning \$10.17 per hour, and 19 cooks earning \$12.74 per hour. As suggested in Mar-a-Lago's recruitment ads, these workers receive no tips to supplement those wages.<sup>45</sup>

The Other NRA's effort to gain control of tips coincides with the industry lobby's effort to be allowed to hire guest workers paid at a low prevailing wage. In most industries, the prevailing wage protects wages of U.S.-born workers by requiring a higher wage for guest workers.<sup>46</sup> However, due to its successful efforts to keep the minimum wage low and the subminimum wage frozen at \$2.13 per hour, it has managed to set a very low prevailing wage for restaurant workers. Although the prevailing wage varies by region, nationally it is \$10.73 per hour for servers including tips.<sup>47</sup> If it succeeds in obtaining a dramatic increase in the number of guest workers, the restaurant industry will be able to maintain the current low prevailing wage, pay workers the subminimum wage for tipped workers supplemented by a portion of tips, and pocket the difference.



## OUR TIPS BELONG TO US

The Trump Administration's Department of Labor is proposing a dangerous new regulatory change that would allow restaurant owners — including Donald Trump himself — to keep their employees' hard-earned tips. This regulation would perpetuate the industry's history of racial exploitation and sexual harassment. The DOL's new proposal to take tip ownership away from these workers would force the most vulnerable population into greater poverty, economic instability, and vulnerability to harassment and assault.

The U.S. Department of Labor must confirm decades of law, custom, and principle that asserts that workers own their tips. Guests who leave tips are not expecting to pay the employer twice — once with the bill, and a second time through tips. Restaurant employers must be required to pay One Fair Wage — one minimum wage for tipped and non-tipped workers that continues to rise at both the federal and the state level.

**Restaurant workers deserve One Fair Wage  
and the right to retain the tips they have earned.**

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# OUR TIPS BELONG TO US

Overcoming the  
National Restaurant Association's  
Attempt to Steal Workers' Tips,  
Perpetuate Sexual Harassment,  
and Maintain Racial Exploitation



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