

Testimony of Leo Gertner

National Employment Law Project

On B22-0913, “Tipped Wage Workers Fairness Amendment Act of 2018,” Which Repeals Initiative 77 and Preserves the Two-Tiered Wage System for Tipped Workers

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Thank you, Chairman Mendelson and members of the Committee of the Whole for the opportunity to submit written testimony on B22-0913, “Tipped Wage Workers Fairness Amendment Act of 2018,” which would repeal Initiative 77, a ballot initiative that voters approved in June that gradually raises the tipped minimum wage until it reaches \$15.00 in 2025 and fully eliminates the tip credit by 2026, guaranteeing one fair wage for all workers regardless of occupation.

My name is Leo Gertner and I am a staff attorney at the National Employment Law Project (NELP). NELP is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We are based in New York with offices across the country. Our staff are recognized as policy experts on a wide range of workforce issues, such as unemployment insurance, wage and hour enforcement, and—as is relevant for today’s hearing—the minimum wage. We have worked with dozens of city councils, state legislatures and the U.S. Congress on measures to boost pay for low-wage workers and improve labor standards. We track both the economic experience of state and local jurisdictions that have increased their wage floor, and the academic research on the minimum wage. As a result, we have developed a strong expertise on the analysis of minimum wage policy.

NELP testifies today against the repeal of Initiative 77 and in support of eliminating the subminimum cash tipped minimum wage so that tipped workers receive the full minimum wage directly from their employer. As evidenced by Initiative 77’s approval, there is growing national momentum for raising pay for the nation’s millions of tipped workers such as restaurant servers, food delivery workers, and many others at the heart of some of our fastest growing industries. As a result of the current two-tiered wage system, tipped workers earn low median wages, suffer from higher rates of poverty, and face unpredictability in their take home pay. Moreover, while employers are supposed to make up the difference when tips are not enough to bring a worker up to the full minimum wage, in practice, such tracking is difficult and compliance is spotty. D.C. should follow the lead of the seven states that have done away with the subminimum wage for tipped workers and who also enjoy thriving service industries.

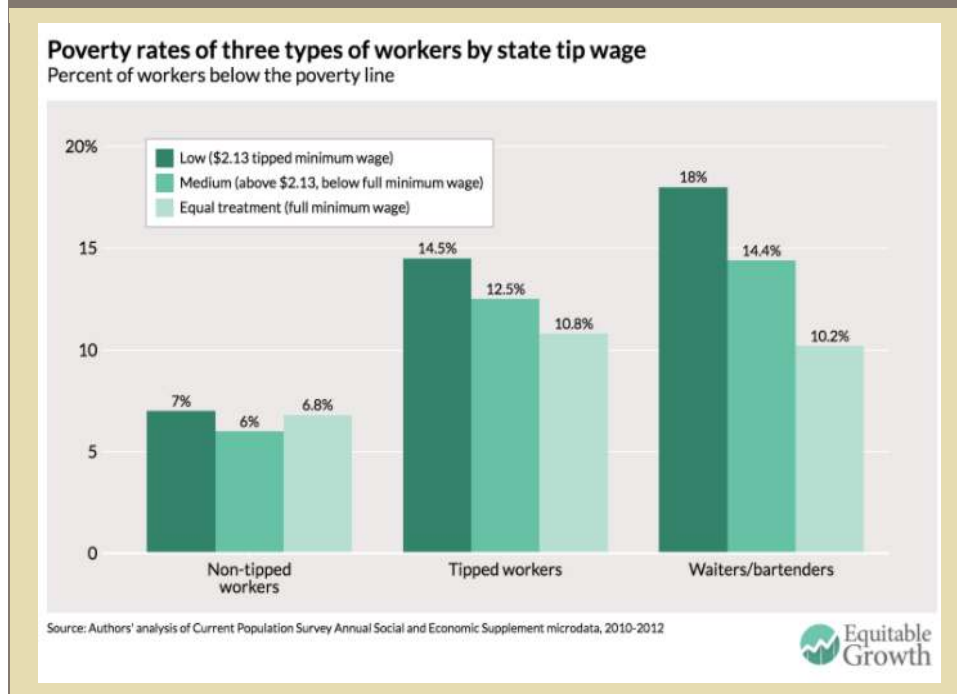
Contrary to Restaurant Industry Claims, D.C.’s Tipped Workers Earn Low Wages and Suffer High Rates of Poverty Due to the Precariousness of Tipped Work

- According to the Economic Policy Institute’s latest analysis of American Community Survey data, **the median hourly wage in the District for tipped workers is \$14.41, including tips.**¹ Servers and bartenders made slightly less at \$14.24.² This is compared to median hourly earnings of \$32.45 for non-tipped workers in the District.³ This means that many tipped workers are typically earning just enough in tips to bring them a little bit above the minimum wage—far below the types of high tips some in the restaurant industry claim to be the norm.
- Tipped work is inherently uneven and often unpredictable. While most of us expect to be paid the same for every day or hour we work, for tipped workers this is often not the case. For example, restaurant servers can earn substantially more on Friday or Saturday nights, but much less on other days of the week. Bad weather, a sluggish economy, the changing of the seasons, a less generous customer, and a host of other factors can also cause sudden drops in their tipped income and lead to economic insecurity.
- As a result of tipped wages and the precariousness of the tipped occupations, tipped workers in D.C. experience poverty at three times the rate of non-tipped workers.⁴ The overall poverty rate among non-tipped workers in D.C. is 4.5 percent.⁵ For tipped workers overall, it is 13.7 percent, while for servers and bartenders it is a bit higher at 13.9 percent.⁶ Disparities by gender and race show the treatment even among tipped workers is extremely

unequal. Women workers experience poverty at a rate of 15.7 percent compared to 11.8 percent for men, while Black tipped workers have a poverty rate of 18.5 percent compared to 12.1 percent for white workers.⁷

- In states with a tip credit system, poverty among tipped workers is more prevalent. According to data from 2010–2012, while the poverty rate for *non-tipped* workers ranged from 6.0 to 7.0 percent in states with a tipped subminimum wage, for *tipped* workers, the poverty rate jumped to more than twice that rate—between 12.5 and 14.5 percent. See Figure 1. Poverty among *servers and bartenders* in those states was even more alarming: 18.0 percent in states that follow the federal tipped rate of \$2.13, and 14.4 percent in states with tipped subminimum wages between the federal tipped floor and the full minimum wage. See Figure 1. *This means that in states with a tip credit, tipped workers are more than twice as likely to live in poverty as non-tipped workers.* In comparison, the poverty rates for tipped and non-tipped workers in One Fair Wage (equal treatment) states, while still in need of improvement, did not diverge as greatly from one another (Figure 1).

Figure 1. Because of low pay and unreliable schedules, tipped workers (especially those in states with a tip credit) have twice the poverty rate of non-tipped workers⁸ (Graphic published by the Washington Center for Equitable Growth)



- Tipped workers are forced to live on unpredictable incomes and schedules. Their take-home pay fluctuates widely depending on the seasons, the shift they are given, and the generosity of patrons. The lack of stable incomes for tipped workers makes it difficult to plan a family budget.
- Due to the dual pressure of low or precarious pay and high costs of living, nearly half of all tipped workers in the U.S. are forced to rely on public benefits. According to research by the University of Berkeley and the Economic Policy Institute, nationwide, around 46 percent of *tipped workers* and their families rely on public programs—a significantly higher share than the 35.5 percent of *non-tipped* workers and their families who also rely on these programs.⁹

A Third of All Tipped Employees in D.C. Work Outside of the Restaurant Industry

- Approximately a third of tipped workers in D.C. do not work in the restaurant industry. These workers include hair stylists, manicurists, cosmetologists, bellhops, hotel concierges, taxi drivers, delivery drivers, parking lot and garage attendants, and car wash workers.¹⁰ As the public debate around Initiative 77 clearly showed, these workers are less visible in D.C.'s economy. They make the same \$3.89 per hour waiters and bartenders earn, but they work in industries where sometimes tipping is not widely adopted or consumers do not even realize that they are subject to a lower tipped wage rate.
- These tipped workers play an important role in making D.C. a vibrant city and tourist destination, providing crucial personal care, accommodation, and transportation services. And yet, like restaurant workers, they struggle to pay the rent and feed their families with unstable and meager incomes. For example, according to 2017 statistics, median wages for parking lot attendants in D.C. are \$12.09 an hour and for baggage porters, \$12.58. To put these wages into perspective, D.C.'s workforce as a whole earns a median wage of \$32.45 an hour.¹¹ The minimum wage in 2017 was \$11.50 until July 1 and \$12.50 after that.¹² That means that even the median worker is barely making the minimum wage, if they're earning the minimum wage at all. Without increases, tipped workers will be left behind. These workers deserve a share of the prosperity they help create for D.C.'s thriving economy.

The Complex Subminimum Wage System for Tipped Workers Is Difficult to Enforce and Results in Widespread Noncompliance

- The subminimum tipped wage system is complex, difficult to implement, and plagued by noncompliance. For example, both employers and employees find it difficult to track tip earnings, a task that is often complicated by tip sharing arrangements amongst workers. In addition, when tipped workers' earnings fall short of the full minimum wage, many will forego asking their employers to make up the difference—as employers are legally required to do—for fear that the employer may retaliate by giving more favorable shifts to workers who do not make such demands.¹³
- Given the implementation challenges inherent in the subminimum wage system, it is not surprising that a 2014 report by the Obama Administration's National Economic Council and the U.S. Department of Labor found that one of the most prevalent violations amongst employers is failing to properly track employees' tips and make up the difference between an employee's base pay and the full minimum wage when tips fail to fill that gap.¹⁴ A survey found that more than 1 in 10 workers employed in predominantly tipped occupations earned hourly wages below the full federal minimum wage, including tips.¹⁵
- Not surprisingly, the U.S. Department of Labor found an 84 percent noncompliance rate among the nearly 9,000 full-service restaurants it investigated from 2010–2012. Violations included tip credit infractions and other forms of wage theft, resulting in \$56.8 million in back pay for affected workers.¹⁶

The Lower Subminimum Wage for Tipped Workers is a Unique, Unfair, and Unnecessary Subsidy for Employers in the Restaurant Industry

- The intended purpose of tips is to reward good service rather than to serve as a substitute for the wages directly paid by employers. In states where a tip credit is allowed, however, tips have become a means for employers to transfer responsibility for paying employees' wages onto the customer. This mainly benefits employers in the restaurant industry and other service industries where the majority of tipped workers are employed. No other industries are subsidized this way.
- Employers in the restaurant industry are among the most avid users not only of the tipped subminimum wage, but also of the standard minimum wage, and they are among the least likely to offer workplace benefits—such as health insurance, paid sick leave, and paid holidays—making the industry one of the least generous.¹⁷
- The restaurant industry is one of the most profitable sectors of the economy. According to the National Restaurant Association, nationwide industry sales were expected to reach \$799 billion in 2017—equivalent to 4 percent of the U.S. gross domestic product.¹⁸ The industry employed 14.7 million workers last year, or roughly 10 percent of the nation's workforce, a number that is expected to increase by nearly 11 percent by 2027.¹⁹ These figures suggest a healthy and profitable industry that could withstand the gradual elimination of the tipped subminimum wage at the national level.

States Without a Subminimum Wage for Tipped Workers Have Fast-Growing Restaurant and Hospitality Sectors

- Seven states do not have a tipped subminimum wage. The seven One Fair Wage states are California, Nevada, Washington, Minnesota, Alaska, Oregon, and Montana. And, as noted above, many local jurisdictions—including Minneapolis, Seattle, and various cities and counties in California—that have adopted a \$15 minimum wage have done so without adopting a lower minimum wage for tipped workers.²⁰
- While restaurant industry lobbyists often argue that eliminating the tipped subminimum wage would hurt restaurants and their workers, the facts belie those claims. In particular, the restaurant industry in One Fair Wage states is strong and projected to grow faster than in many of the states that have retained a subminimum tipped wage system. According to projections by the National Restaurant Association (NRA), nationwide restaurant sales were expected to reach \$799 billion in 2017, a 4.3 percent increase over 2016. And according to their own projections, restaurant employment in the seven states without a tipped minimum wage will grow in the next decade at an average rate of 10.7 percent.
- Many of the states with the strongest restaurant job growth do not allow a tipped minimum wage for tipped workers, and require employers to pay tipped workers some of the country's highest base wages. For example, restaurant employment in California—which has no subminimum wage for tipped workers and is phasing in a \$15 minimum wage—is projected to grow by 10 percent during the 2018–2028 period.²¹ In California, the minimum wage is now \$10.50 per hour for small employers (25 or fewer employees) and \$11.00 for large employers (26 or more employees), and the minimum wage will reach \$15 for all employers by 2023.²² In Oregon, where the minimum wage will increase to between \$12.50 and \$14.75 by 2022,²³ and which has no tipped subminimum wage,

restaurant employment is projected to grow by 12.9 percent during that same period.²⁴ And in Washington State, where the minimum wage will increase to \$13.50 by 2020,²⁵ restaurant employment growth during the same period is expected to grow by 11.4 percent.²⁶ And in San Francisco in 2015, a year after the city began transitioning to a \$15 minimum wage, the Golden Gate Restaurant Association reported that the restaurant industry was thriving,²⁷ with sales and employment growing faster than in 2014—the year San Francisco adopted a \$15 minimum wage. Today, San Francisco’s economy continues its positive trajectory, with the city’s unemployment rate dropping to 2.6 percent in November 2017²⁸ (nearly 50 percent lower than its jobless rate three years earlier in 2014),²⁹ and restaurant employers voluntarily raising wages and benefits above the legal minimum in order to attract and retain talent.³⁰

- Moreover, a 2015 Cornell Hospitality Report looked at the impact of minimum wage increases on restaurant employment and business growth levels over twenty years across the United States. It found that raising the minimum wage (including the tipped wage) will raise restaurant industry wages but will not lead to “large or reliable effects on full-service and limited-service restaurant employment.”³¹

A One Fair Wage System in D.C. is a Matter of Basic Fairness

- A subminimum wage for tipped workers has not always existed. Until 1966, there was no federal subminimum wage for tipped workers.³² But with the 1966 expansion of the Fair Labor Standards Act (FLSA) to cover hotel, motel, restaurant, and other leisure and hospitality employees who had previously been excluded by the FLSA, the law was amended to allow employers to pay tipped workers a subminimum wage of 50 percent of the full minimum wage.³³ In 1996, tipped workers’ pay decreased further when a Republican-controlled Congress raised the federal minimum wage from \$4.25 to \$5.15, but froze the tipped minimum wage at \$2.13. This policy decoupled the tipped wage from the full minimum wage for the first time in the history of U.S. wage law, setting up over two decades of a frozen minimum wage for tipped workers³⁴ in most of the nation.
- The gradual elimination of the subminimum wage for tipped workers is crucial to improving the lives and economic prospects of low-wage workers in D.C. Tipped workers in the city are disproportionately low-income and D.C. residents as well as workers of color, therefore the benefits of gradually raising and eventually eliminating the tipped minimum wage will be most felt by these workers.³⁵ Without raising the tipped wage, a significant share of the District’s lowest-paid workers will continue to be at an increased risk of poverty and various forms of harassment and discrimination.³⁶ As inflation erodes the real value of the tipped wage, tipped workers will become progressively more dependent on the generosity of customers to earn their livelihoods and avoid poverty. D.C. tipped workers already suffer from the largest gap between the tipped and non-tipped wage in the country.
- The D.C. Council has a historic opportunity to preserve a popular law that brings fair pay for D.C.’s tipped workers and addresses the economic insecurity that workers face when their income depends on tips left by customers. To repeal Initiative 77 would be a step backwards for D.C.’s hard-working service workers and for D.C.’s thriving economy.

Endnotes

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