

WORKING BELOW THE LINE

How the Subminimum Wage for Tipped Restaurant Workers
Violates International Human Rights Standards

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EXECUTIVE SUMMARY

"I didn't have very much money for food. You know how places throw away their food in the trash, like a pizza when no one picks it up... I went over there, basically taking [discarded food] from the trash..."

**—27-year-old, white male
working as a server in
Boston, MA**

"I sacrifice other things so I can afford birth control. And, I sacrifice eating the way that I should so my daughter can have everything that she needs—clothes, shoes, and toys and pay all her doctors' visits. And, [I] make sure she is tak[en] care [of] before I make sure that I am tak[en] care of... And that is something that every person in this industry suffers, the biggest issue that we suffer is not being able to budget."

**—25-year-old, white female
working as a bartender
in Houston, TX**

The Universal Declaration of Human Rights recognizes that everyone who works has the right to just and favorable remuneration to ensure an existence worthy of human dignity.¹ However, for many low-wage tipped workers in the U.S. restaurant industry these standards are out of reach. Rooted in exploitation of workers, the custom of tipping has evolved since its origins in the late nineteenth century. It has become codified in a two-tiered minimum wage system that denies tipped restaurant workers fair wages and basic labor protections. This report sheds light on the ways in which federal and state laws maintain this wage structure and enable working conditions in the restaurant industry that violate fundamental human rights protections for tipped workers, particularly women and people of color. This human rights analysis points to significant human rights deprivations and the need for new laws and policies.

The Fair Labor Standards Act establishes a two-tiered wage system that sets the federal minimum wage (currently \$7.25 per hour), as well as the subminimum wage for tipped workers (currently \$2.13 per hour).² Federal law requires that when the hourly wage, subsidized by tips, does not amount to \$7.25, employers must pay workers the difference.³ Twenty-six states (and the District of Columbia) have a subminimum wage between \$2.13 and \$7.00 per hour.⁴ Eighteen states either have no state minimum wage or have adopted the federal subminimum wage of \$2.13 as their tipped minimum wage.⁵ (Figure 1ES)

Adequate minimum wages are a critical component of poverty alleviation. Table 1ES shows tipped restaurant workers living in poverty at rates ranging from 1.4 (District of Columbia) to 2.4 times (Pennsylvania) the average rate of each respective state's employed population. This problem is compounded by that fact that approximately two-thirds of women employed in this sector earn the subminimum wage.⁶ People of color comprise 44% of the workforce of the restaurant industry⁷ and 42% of restaurant workers earning at or below the minimum wage are people of color.⁸ Within the restaurant industry, workers of color experience poverty at nearly twice the rate of white restaurant workers.⁹

The social and economic marginalization of these workers exacerbates their vulnerability to human rights violations.

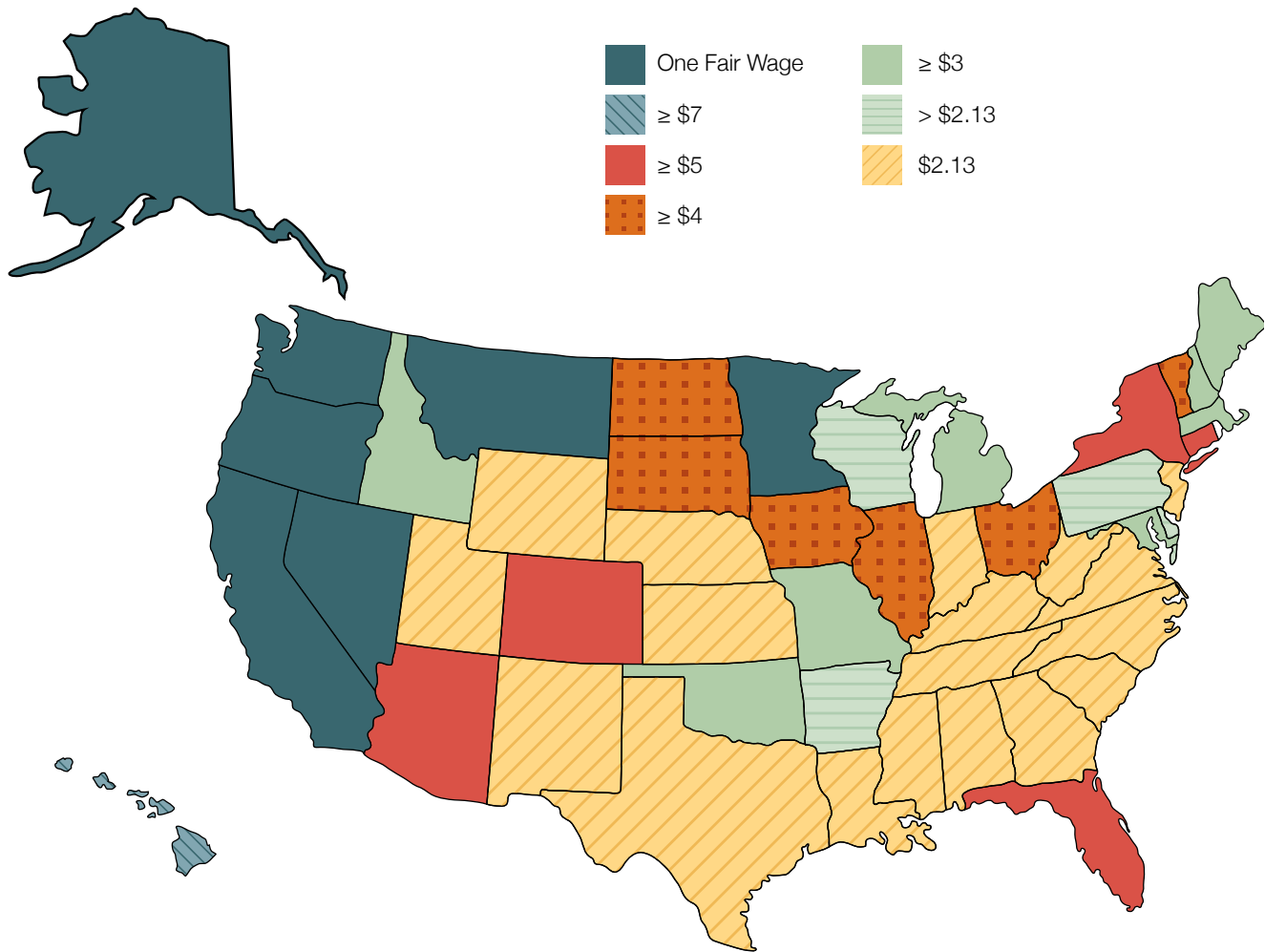
Some progress has been made at the state and local levels to raise the minimum wage. Importantly, several states across the United States (including the District of Columbia) that currently operate under a two-tiered minimum wage system are considering ballot measures or legislation to eliminate the subminimum wage.¹⁰

TABLE 1ES
Poverty Rate Overall Employed and Among Tipped and Tipped Restaurant Workers

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Overall	12.3%	11%	10.1%	11.5%	13.9%	11.9%	12.9%	10.1%	13.8%
Tipped	20.5%	13.2%	15.8%	19.4%	26.5%	18.3%	23.5%	20.5%	22.2%
Tipped Restaurant	23.7%	14.8%	20%	22.2%	32%	20.7%	28%	23.7%	25.3%

FIGURE 1ES

Minimum Wage Distribution for Tipped Workers



International human rights and core labor standards establish fundamental guarantees to promote dignified work and human prosperity. Applying these internationally accepted norms to the lived experiences of tipped workers earning subminimum wages in U.S. restaurants draws our urgent attention to the human impacts of the current system of regulation.

Minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families, [and its] fundamental purpose should be to give wage earners necessary social protection as regards minimum permissible levels of wages.¹¹

The subminimum wage structure violates the human rights to an adequate standard of living and to just and favorable remuneration of tipped restaurant workers. International principles to alleviate poverty and to promote human rights call on States to “ensure that all workers are paid a wage

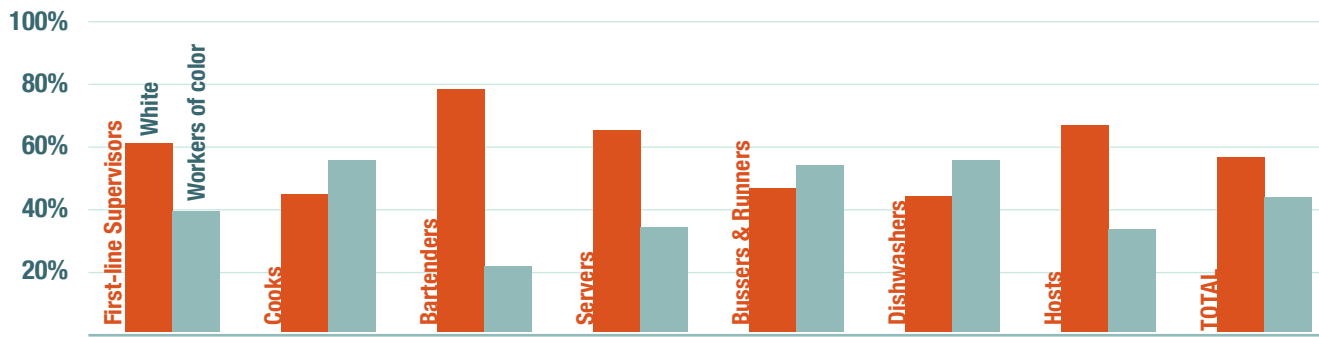
sufficient to enable them and their family to have access to an adequate standard of living.”¹² In determining the minimum wage, international labor standards require States to take account of the necessity of enabling workers to maintain a suitable standard of living.¹³ Yet, tipped restaurant workers in the United States struggle to receive fair wages, and “wage theft” and other wage violations by employers are significant problems. The subminimum wage structure deprives workers of a living wage and the high poverty rates for low-wage tipped restaurant workers confirm that wage protections are inadequate and violate human rights guarantees.

Health is a fundamental human right indispensable for the exercise of other human rights.¹⁴

The subminimum wage structure violates the human right to health of tipped restaurant workers. International human rights standards stipulate that “every human being is

FIGURE 2ES

Percentage of White and Workers of Color in Select Restaurant Industry Occupations



Workers of color are concentrated in the lowest paying occupations in the U.S. restaurant industry.

entitled to the enjoyment of the highest attainable standard of [physical and mental] health conducive to living a life with dignity.”¹⁵ The right to health is linked to the right to work, as the enjoyment of good health enables work and the ability to work facilitates the realization of related rights, such as the right to food and the right to housing. Yet, access to affordable basic and preventive healthcare is beyond the reach of many tipped restaurant workers. A 2011 survey of over 4,000 restaurant workers found that 90% did not have access to health insurance through their employer.¹⁶ Poverty levels among tipped workers are revealed in rates of food insecurity and reliance on public assistance programs. One study found that nearly half of all tipped workers rely on public assistance to supplement their income.¹⁷ Thus, subminimum wages for tipped restaurant workers deprive them of full access to their human right to health.

Each [State Party] undertakes to declare and pursue a national policy designed to promote . . . equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.¹⁸

Tipped restaurant workers are vulnerable to discrimination based on gender and race in violation of their human rights. The prohibition against discrimination is a fundamental, universally recognized right, which requires States to dismantle barriers to equal enjoyment of human rights. States are also called upon to develop policies and to promote practices that will effectively guarantee workers equal pay for equal work and access to advancement without regard to gender or race.

Women are vulnerable to particular human rights violations in the workplace and the International Labour Organization (ILO) and U.N. human rights bodies recognize sexual harassment in the workplace as a violation of women’s fundamental human rights.¹⁹ One investigation concluded that workers in the U.S. food services industry filed 37% of all claims of sexual harassment with the federal government during a 10-month period in 2011.²⁰

Workers of color laboring in the U.S. restaurant industry are concentrated in the lowest-paid “front and back of the house” occupations such as cooks, dishwashers, bussers, and runners while non-Hispanic whites are disproportionately found in higher paid “front of the house” positions like wait staff and managers.²¹ (Figure 2ES) In states with the subminimum wage, 25% of tipped restaurant workers of color live in poverty.²²

In an industry populated mostly by women and people of color, this racial and wage hierarchy points to the failure of the U.S. government to regulate this sector adequately and constitutes discrimination under international standards.

Reflecting an international consensus regarding universal rights for workers, human rights instruments and ILO conventions and standards comprise a robust body of norms and best practices. The United States has an obligation to protect the fundamental human rights of its residents, particularly the rights of those who have been historically victims of discrimination and social marginalization. We have looked to these international standards to formulate our recommendations to policymakers to address the human rights deprivations surfaced by this report and to improve conditions for tipped restaurant workers in the United States.

Based on this analysis, we make the following recommendations:

TO THE FEDERAL GOVERNMENT:

Promote the international human rights to an adequate standard of living and to just and favorable remuneration:

- Ensure compliance in the restaurant industry with fundamental international human rights that set a baseline for fair working conditions and an adequate standard of living, free of discrimination.
- Support legislation such as the Raise the Wage Act and the Pay Workers a Living Wage Act, which raise the federal minimum wage and eliminate the lower minimum wage for tipped workers. Policymakers should dismantle laws and practices such as the tipped minimum wage that effectively discriminate against women.

Promote the international human right to health:

- Ensure that restaurant workers and their families have affordable access to healthcare.
- Address the unique challenges tipped restaurant workers face in accessing affordable, adequate housing by eliminating the subminimum wage and expanding existing federal programs related to housing the poor.

Promote the international right to protection from discrimination based on gender and race:

- Strengthen anti-sexual harassment employment laws and enforcement efforts, and require written policies and training on sexual harassment, while strengthening workers' voices on the job to ensure these laws are implemented.
- Support the Schedules that Work Act to prevent management's abuse of scheduling that can be used to punish workers who try to practice their rights. Workers' refusal to accept sexualized behavior should not result in the loss of prime shifts.

- Ensure working mothers are accorded paid leave in order to prevent discrimination against women on the grounds of marriage or maternity and to enable their effective right to work.
- Support the Healthy Families Act (earned sick days) and the Family and Medical Insurance Leave Act (paid leave) so that women are less economically vulnerable to sexual harassment.
- Support job-training programs that provide accessible, quality training to help women and workers of color gain special skills and advance within the industry.
- Initiate and support further study on sexual harassment and industry-specific measures to protect women from sexual violence in the workplace.
- Promote policy that ensures, free of discrimination, the right to free choice of profession and employment, the right to promotion and job security, and the right to receive vocational training and retraining.

TO STATE POLICYMAKERS & OFFICIALS:

Promote the international human right to work and fundamental employment standards:

- Support state and local efforts to realize fundamental human rights of workers by raising the minimum wage and eliminating the tipped minimum wage, establishing earned sick days and fair scheduling policies, and strengthening protections against sexual harassment and other abuses.
- Create incentives for employers who provide transparent internal promotion pathways.
- Consider initiatives that prohibit racialized filters such as a criminal record information request of applicants (i.e., 'ban the box' initiatives).

NOTES

- 1 Universal Declaration of Human Rights art. 23(3), G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).
- 2 29 U.S.C. § 206(a)(1)(C) (2012) (setting the federal minimum wage at \$7.25 per hour); 29 C.F.R. § 531.51 (2011) (“(a) With respect to tipped employees, section 3(m) provides that, in determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee’s employer shall be an amount equal to—(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [i.e., \$2.13]; and (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title. (b) ‘Tipped employee’ is defined in section 3(t) of the Act as follows: ‘Tipped employee’ means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.”) (emphasis in original).
- 3 29 U.S.C. § 203(m) (2012).
- 4 See Wage and Hour Div., *Minimum Wages for Tipped Employees*, U.S. DEP’T OF LAB. (last updated Dec. 2014).
- 5 *Id.*
- 6 RESTAURANT OPPORTUNITIES CENTERS UNITED, *REALIZING THE DREAM: HOW THE MINIMUM WAGE IMPACTS RACIAL EQUITY IN THE RESTAURANT INDUSTRY AND IN AMERICAN 3* (2013) [hereinafter *REALIZING THE DREAM*].
- 7 Statistical data included in this report has been analyzed by ROC-United based primarily on the American Community Survey, 2010-2013. American Community Survey 2010- 2013, U.S. CENSUS BUREAU (data calculations were made using Ruggles et al., *INTEGRATED PUBLIC USE MICRODATA SERIES: VERSION 5.0* (machine-readable database)), Minnesota Population Center (2010) [hereinafter ACS]. For further detail see INTERNATIONAL HUMAN RIGHTS LAW CLINIC AND ROC-UNITED, *WORKING BELOW THE LINE: HOW THE SUBMINIMUM WAGE FOR TIPPED RESTAURANT WORKERS VIOLATES INTERNATIONAL HUMAN RIGHTS STANDARDS* n. 35.
- 8 *REALIZING THE DREAM*, *supra* note 6, at 1 (based on data analysis prepared by the Institute for Women’s Policy Research of the 2012 Current Population Survey Annual Social and Economic Supplement for the use of the Restaurant Opportunities Centers United (ROC-United)).
- 9 Heidi Shierholz, *Low Wages and Few Benefits Mean Many Restaurant Workers Can’t make Ends Meet* 18 (Econ. Pol’y Inst., Briefing Paper No. 383, 2014).
- 10 See, e.g., *Recent State Minimum Wage Laws and Current Campaigns*, RAISE THE MINIMUM WAGE (last visited Nov. 14, 2015); *Potential Ballot Measure in D.C. Would Raise Minimum Wage to \$15*, NAT’L CTR. FOR WOMEN & POLICING (last visited Nov. 14, 2015); *One Fair Wage: Rhode Island*, RESTAURANT OPPORTUNITIES CENTERS UNITED (last visited Nov. 14, 2015).
- 11 Recommendation concerning Minimum Wage Fixing, with Special Reference to Developing Countries (ILO No. 135) arts. 1-2, *adopted* June 22, 1970.
- 12 Human Rights Council, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, 19, U.N. GAOR, U.N. Doc. A/HRC/21/39 (July 18, 2012).
- 13 Recommendation concerning the Application of Minimum Wage-Fixing Machinery (ILO No. 30) art. III, *adopted* June 16, 1928.
- 14 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12), ¶ 1, U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000).
- 15 *Id.* ¶ 1.
- 16 RESTAURANT OPPORTUNITIES CENTERS UNITED, *BEHIND THE KITCHEN DOOR: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY* tbl. 1 (2011) (presenting key findings from the organization’s national survey data of 2011); see also Stacy Cowley, *Insurance Out of Reach for Many Despite Law* (retitled *Many Low-Income Workers Say ‘No’ to Health Insurance* online), N.Y. TIMES, Oct. 21, 2015, at B1 (noting that, 10 months after the first phase of the Affordable Care Act’s implementation, “many business owners say they are finding very few employees willing to buy the health insurance that they are now compelled to offer. The trend is especially pronounced among smaller and midsize businesses in fields filled with low-wage hourly workers, like restaurants, retailing and hospitality.”).
- 17 Sylvia Allegretto & David Cooper, *Twenty-Three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage*, 15 (Econ. Pol’y Inst., Briefing Paper No. 379, 2014).
- 18 Convention concerning Discrimination in Respect of Employment and Occupation (ILO No. 111) art. 2, *adopted* June 25, 1958, 362 U.N.T.S. 31.
- 19 Rep. of the Int’l Labour Office, Gender Equality at the Heart of Decent Work, ¶ 229, International Labour Conference, 98th Sess. (2009); Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 19: Violence Against Women*, ¶ 17, U.N. GAOR, U.N. Doc. A/47/38, Supp. No. 38 (1992).
- 20 Eve Tahmincioglu, *Sexual claims Common in Pressure-cooker Restaurant World*, NBC News (Nov. 1, 2011).
- 21 RESTAURANT OPPORTUNITIES CENTER OF NEW YORK & NEW YORK CITY RESTAURANT INDUSTRY COALITION, *BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK CITY’S THRIVING RESTAURANT INDUSTRY*, 2 (Jan. 25, 2005).
- 22 ACS, *supra* note 7.



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