

WORKING BELOW THE LINE

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

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FOOD LABOR RESEARCH CENTER

BERKELEY LABOR CENTER, UNIVERSITY OF CALIFORNIA, BERKELEY

The Food Labor Research Center was launched in fall 2012 by Saru Jayaraman as a project of the Labor Center at the University of California, Berkeley. As a leader in the movement for food worker justice, Saru saw a gap in the study of the intersection of food and labor. While there are several university centers that focus on labor studies, and others that focus on food studies, the Food Labor Research Center at the University of California, Berkeley is the first academic institution anywhere in the country to focus on the intersection between food and labor issues in the U.S. and abroad. For more information, please visit <http://laborcenter.berkeley.edu/topic/food-labor-research-center/>.

INTERNATIONAL HUMAN RIGHTS LAW CLINIC

UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW

The International Human Rights Law Clinic (IHRLC) designs and implements innovative human rights projects to advance the struggle for justice on behalf of individuals and marginalized communities through advocacy, research, and policy development. The IHRLC employs an interdisciplinary model that leverages the intellectual capital of the university to provide innovative solutions to emerging human rights issues. The IHRLC develops collaborative partnerships with researchers, scholars, and human rights activists worldwide. Students are integral to all phases of the IHRLC's work and acquire unparalleled experience generating knowledge and employing strategies to address the most urgent human rights issues of our day. For more information, please visit www.humanrightsclinic.org.

RESTAURANT OPPORTUNITIES CENTERS UNITED

The Restaurant Opportunities Centers United was originally founded in New York after September 11th, 2001 to provide support to restaurant workers displaced as a result of the World Trade Center tragedy. ROC NY quickly grew to support restaurant workers all over New York City and advocate for improved wages and working conditions. ROC NY grew into ROC United, a national organization with a presence across the country, including in Miami, New Orleans, Houston, New Mexico, Michigan, Chicago, Philadelphia, Boston, Los Angeles, Oakland, Seattle, and Washington, DC. Over the last five years, ROC has won 13 workplace justice campaigns against exploitative high-profile restaurant companies, obtaining more than \$10 million and improvements in workplace policies for restaurant workers. ROC has also trained more than 1,000 restaurant workers to find good jobs and advance within the industry, published several ground-breaking reports on the restaurant industry, played an instrumental role in winning statewide minimum wage increases for tipped workers, organized 40 restaurant workers to open their own cooperatively-owned restaurant, and grown to include more than 13,000 restaurant workers from at least 26 states. For more information, please visit <http://rocunited.org>.

CONTENTS

1 EXECUTIVE SUMMARY

7 INTRODUCTION

9 BACKGROUND

9 A Brief History of Tipping in the United States

11 Federal Minimum Wage Laws

11 State Minimum Wage Laws

13 INTERNATIONAL HUMAN RIGHTS ANALYSIS OF THE SUBMINIMUM WAGE STRUCTURE IN THE UNITED STATES

14 International Human Rights Guarantee an Adequate Standard
of Living with Human Dignity for Workers

15 International Human Rights Guarantee the Right
to Just and Favorable Remuneration for Workers

15 International Human Rights Guarantee the Right to Health

19 International Human Rights Guarantee Equality
And Non-Discrimination For Workers

26 CONCLUSION AND RECOMMENDATIONS

28 NOTES

42 AUTHORS & ACKNOWLEDGEMENTS

GLOSSARY

Back of the House

A restaurant industry term for placement and function of workers in a restaurant setting which generally refers to kitchen staff, including chefs, cooks, food preparation staff, dishwashers, and cleaners.

CEDAW

The Committee on the Elimination of Discrimination against Women is a treaty-based body of the United Nations comprised of independent experts tasked with monitoring the implementation of the ICEDAW by its States party through a process of periodic reporting by the States and review and concluding observations made by the committee. The CEDAW also issues written decisions on individual and group complaints brought before it, initiates inquiries into situations of grave or systematic violations of women's rights, and issues general recommendations interpreting the content of the ICEDAW and addressing thematic issues.

CESCR

The Committee on Economic, Social and Cultural Rights is a treaty-based body of the United Nations comprised of independent experts tasked with monitoring the implementation of the ICERD by its States party through a process of periodic reporting by the States and review and concluding observations made by the committee. The CESCR also issues written decisions on individual and inter-state complaints brought before it; initiates inquiries into situations of grave or systematic violations of economic, social, and cultural rights; and issues general comments interpreting the content of the ICESCR.

FLSA

Fair Labor Standards Act

Front of the House

A restaurant industry term for placement and function of workers in a restaurant setting which generally refers to those interacting with guests in the front of the restaurant, including hosts, waitstaff, bussers, and runners.

ICCPR

International Covenant on Civil and Political Rights

ICEDAW

International Convention on the Elimination of All Forms of Discrimination against Women

ICERD

International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR

International Covenant on Economic, Social and Cultural Rights

ILO

International Labour Organization

UDHR

Universal Declaration of Human Rights

Workers of Color

Refers to the categories of African American/black, Latino/a, Asian, American Indian, Native Hawaiian and Pacific islander, mixed race individuals, and other categories, as gathered by the Current Population Survey (CPS) and American Community Survey (ACS).

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**

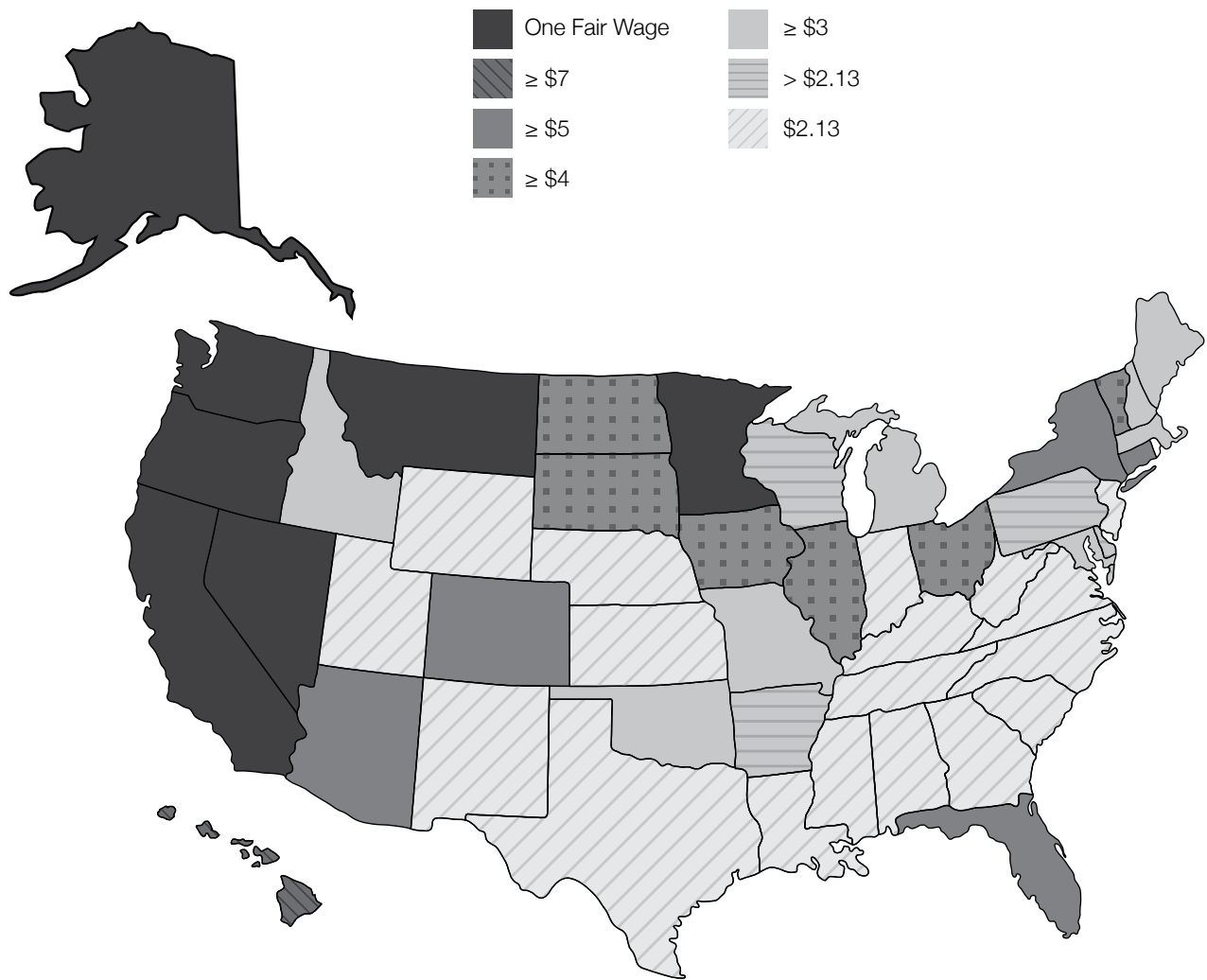
The Universal Declaration of Human Rights recognizes that everyone who works has the right to just and favorable remuneration to ensure an existence worthy of human dignity.¹ However, for many low-wage tipped workers in the U.S. restaurant industry these standards are out of reach. Rooted in exploitation 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

FIGURE 1ES

Minimum Wage Distribution for Tipped Workers



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

International human rights and core labor standards establish fundamental guarantees to promote dignified work and human prosperity. Applying these internation-

ally 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 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

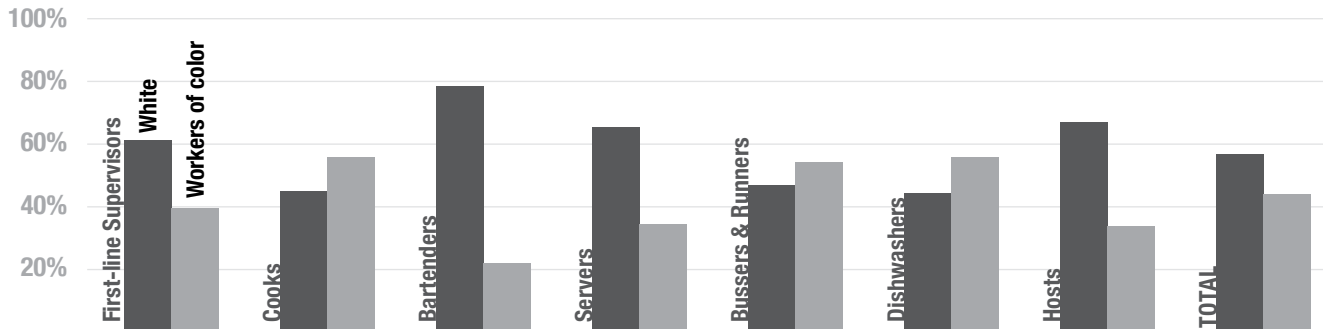
TABLE 1ES

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 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.

"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

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).

A SINGLE MOTHER'S STRUGGLE TO LIVE WITH DIGNITY ON A SUBMINIMUM WAGE

As a black, single mother of two and the sole provider for her family, Jane* has struggled to make ends meet. She has worked nearly half of her life in the restaurant industry, recently working for just over a year as a server and bartender at a large chain restaurant in Detroit, Michigan. In this job, Jane earned \$2.65 per hour plus tips, which were systematically garnished by management. Over an eight-hour shift, Jane was almost always required to work straight through, without a coffee or lunch break. As a tipped server, she was not entitled to paid sick or vacation leave.

It was not uncommon for Jane's employer to cancel her scheduled shifts, limiting her ability to plan and control her finances, and placing her family in a precarious position.

[W]hen you tell me not to come in, I'm missing out on pay, which means I'm missing out on bill money, which causes me to be behind on bills or need to go ask someone else for money... I've fallen behind on bills because of that... It was very, very bad.

To avoid paying overtime, her employer would cancel her next shift if she was approaching forty hours of work in a week—a practice that deprived her of a whole day's work and further reduced her earnings.

While working for the national chain, Jane was forced to skip or reduce the size of her meals about twice a month. This happened when she was a few days away from a paycheck or hadn't made enough tips that day to buy food. Although Jane has had a long career in the restaurant industry, she works multiple jobs and depends on public assistance programs to keep her family afloat. Her family receives food stamps and one of her children is provided free breakfast and lunch at school. Management never gave Jane a raise, and she witnessed coworkers with greater seniority argue with management to increase their pay.

At the restaurant, Jane suffered sexual harassment from both management and coworkers. She observed staff make homophobic remarks repeatedly to one of her coworkers. Management created an environment in which aggressive threats, yelling, cursing, and demeaning comments were commonplace.

There are both men and women servers in the restaurant but when [the owner] gets in his mood, he likes to yell at us and he says this thing, 'Sell it lady,' which I hate to the core, because to me it sounds like we are prostituting... I'm serving food!

Jane draws a direct connection between the elimination of the tipped subminimum wage and an adequate standard of living that will allow her family to live a life of dignity.

[An increase in the minimum wage] would [mean] more stability. Oh Lord, so much more! Just not pressure, not worrying, being able to know that you have this amount of money coming in even if you don't make enough tips. If you're giving us \$8 an hour, at least we know we're making \$8 an hour. We might not be getting tips, but at least we have the \$8 an hour and I know I'll be alright. I don't have to worry, [if] I know I'm not coming in today or I can't come in tomorrow... Because, \$2.65, that's not enough for anyone at all. Just knowing that...I'm stable and that the house is taken care of—that would be perfect.

*A pseudonym has been used to protect the privacy of the worker.

INTRODUCTION

"[T]hey don't too much care about what you've got going on. They physically have to see you, in a sick state. So you literally have to go up there and say 'hey, I'm sick. You see me, I'm sick, I need to leave.' It's like you literally have to get up out of your sick day to go show your face because they won't believe you."

**—31-year-old, black female
working as a server
in Troy, MI**

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.²³ However, for many low-wage workers in the U.S. restaurant industry these standards are out of reach. These workers find themselves trapped in a two-tiered minimum wage system that denies them fair wages and basic labor protections.²⁴ This report sheds light on the ways in which the two-tiered wage structure and working conditions in the restaurant industry deny tipped workers in this sector access to fundamental human rights protections, and it points to areas in which domestic policy reform urgently is needed.

Many low-wage restaurant workers who prepare and serve food in restaurants across the country cannot afford to put food on their own tables.²⁵ According to the Bureau of Labor Statistics, restaurant workers occupy seven of the ten lowest-paid occupations in the United States.²⁶ Also, all non-supervisory restaurant occupations have a mean annual wage below \$25,000.²⁷

Enacted in 1938, the Fair Labor Standards Act established 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).²⁸ Today, forty-three states operate under this two-tiered system,²⁹ which relies on consumers to supplement the hourly wages of tipped workers. Researchers have criticized this system for perpetuating poverty for tipped restaurant workers.³⁰ The demographic and income data regarding this population bear out this assessment. These workers are at least two times more likely to live in poverty than the general U.S. population,³¹ despite the fact that most work long and hard to earn a living. The economic inequality experienced by workers in the restaurant industry hits women and people of color the hardest.³² For instance, women make-up two-thirds of tipped restaurant workers in the country and 73% of these workers living in poverty are women.³³ This wage structure also disproportionately impacts workers of color. In states with no subminimum wage, 19% of workers of color in tipped restaurant worker occupations live below the poverty line, compared to 25% of workers of color in states with a subminimum wage.³⁴

WHO IS A TIPPED WORKER?

There is no official list of tipped occupations and under federal law, any worker can be classified as a tipped worker if she customarily and regularly receives more than \$30 per month in tips. Since 1966, customers have been responsible for paying for a substantial portion of tipped workers' wages—a portion that has grown to account for over 70% of the minimum hourly wage.

Sources: 29 U.S.C. 203(t); 29 C.F.R. 531.56(a).

These figures highlight that low-wage tipped restaurant workers are particularly vulnerable to economic and social marginalization. International human rights law includes guarantees, like the right to a minimum wage and an adequate standard of living, that are designed to combat poverty and promote work with human dignity. While the subminimum wage system for tipped workers has been the historic status quo in the United States, its adverse impacts on the human rights of low-wage tipped restaurant workers draw attention to the need for legal reform.

The domestic laws that establish the two-tiered wage structure for tipped workers in the restaurant industry form the context for this report. Against this background, statistical data regarding demographics and poverty rates among tipped restaurant workers indicate some of the characteristics and impacts of this wage structure.³⁵ These statistical data are supplemented by published research and secondary sources including scholarly articles, reports by nongovernmental organizations, and newspaper articles. These sources indicate some important effects of the subminimum wage on tipped restaurant workers. This report analyzes these impacts using relevant international human rights standards enshrined in widely-recognized international and regional human rights treaties and jurisprudence, as well as International Labour Organization (ILO) instruments. Observations drawn from interviews with thirty-eight tipped restaurant workers earning a subminimum wage who worked in states across the country and the District of Columbia, illustrate some of the personal impacts of the human rights issues identified by the international legal analysis and are reflected in the text boxes throughout this report.³⁶

"[A]bout a year and a half ago. . . I was working three serving jobs at once, and I had a DJ gig at night as well. It was still hard for me to pay my bills, because, [at] two of the places, I was drawing solely on tips for income, and two of the places were extremely slow. And [at] the third place, the customers didn't tip at a high percentage—they were just really bad at tips."

—32-year-old, white male working as a bartender and server in Detroit, MI

BACKGROUND

A Brief History of Tipping in the United States

The practice of tipping originated in Europe, and spread quickly throughout areas with a servant class.³⁷ In the nineteenth century, Americans returning from travel abroad mimicked the practice to demonstrate their familiarity with the customs of Europe.³⁸ While these Americans were the first to tip, research indicates that private companies encouraged the practice.³⁹ In 1899, the New York Times criticized tipping as an unethical tactic used by employers to boost profits:

*The real takers of tips are the hotel and restaurant proprietors, the owners of steamships, the offices [sic] and stock-holders of railways, and a dozen other classes of employers... every tip saves the payment of wages to an equal amount... . This throws a flood of light on the frequent assertions that the abolition of the tipping system is impossible.*⁴⁰

Toward the end of the nineteenth century, a powerful anti-tipping movement arose in the United States. Critics viewed the practice as un-American and undemocratic. They argued that the custom was “degrading to the tip-takers who have to ‘ask for favors’ instead of earning a fair wage, and that tipping makes the tip-takers servile,” thus creating a hierarchical class structure with “the tip givers being superior to tip takers.”⁴¹ However, opponents of tipping were not successful in stopping the practice, which spread after the end of the Civil War.

The Pullman Train Company, and hospitality industries such as hotels and restaurants relied on their customers to pay part of their workers’ wages;⁴² those employed in positions such as hotel porters, bellboys, and barbers relied almost exclusively on customer tips for their income.⁴³ George Pullman purposely fostered the “servile relations” characteristic of the anti-bellum South in train travel and almost exclusively employed black men as porters and black women as maids.⁴⁴ Pullman became the largest employer of African Americans by the 1920s.⁴⁵ Black workers organized in-

“When I was there, there was only one manager who did the scheduling and, sad to say, that he was very, very biased in a sense that he would...give you a good schedule and he would take your request and honor...[it] based on whether he liked you or not.”

**—25-year-old Latina working
as a server in Houston, TX**

dependently through the Brotherhood of Sleeping Car Porters throughout the 1920s and 1930s to successfully eliminate tipping as a method of payment for porters and to improve the working conditions of railroad workers.⁴⁶ However, tipping became codified in federal law when the first minimum wage law, enacted in 1938, contained an exemption for businesses not engaged in interstate commerce, including chain restaurants.⁴⁷ While Pullman workers won their right to a standard wage, restaurant workers did not.

Today, Europe has almost entirely eliminated the practice of tipping.⁴⁸ The United States, on the other hand, maintains this custom in law, and tipping remains deeply ingrained in American culture and in the domestic restaurant industry, in particular.⁴⁹ Like its earlier incarnation on Pullman's trains, the modern American restaurant industry is segregated economically along race and gender lines. According to a recent study by Restaurant Opportunities Centers United (ROC-United), "[w]omen and workers of color are largely concentrated in the lowest paying segments and sections of the restaurant industry."⁵⁰

FIGURE 1

Minimum Wage Distribution for Tipped Workers

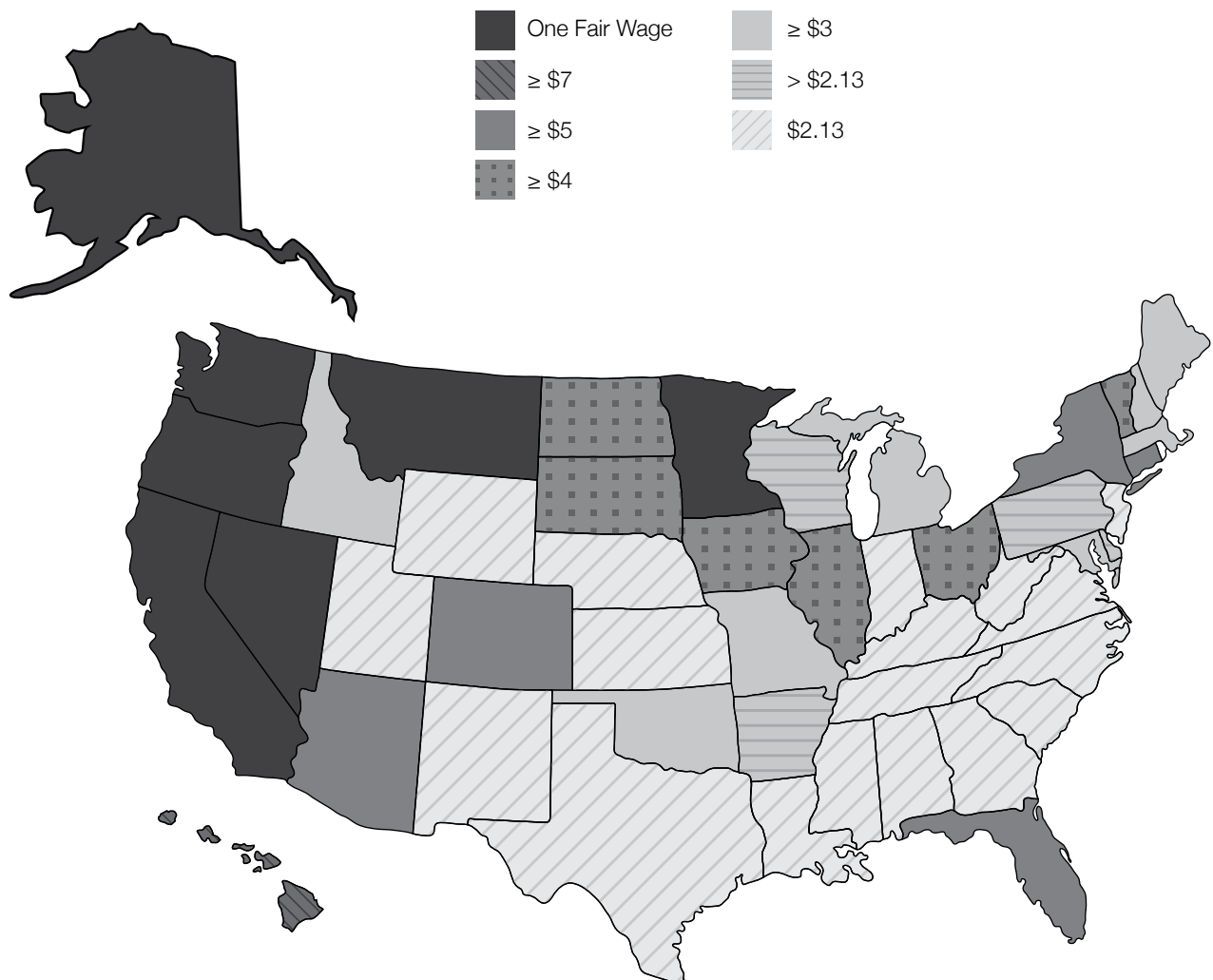


TABLE 1

Subminimum Wage, Median Hourly Wage, and Median Annual Income of All, Tipped, and Tipped Restaurant Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Subminimum Wage	\$2.13	\$2.77	\$2.23	\$4.95	\$2.13	\$3.00	\$3.10	\$2.83	\$2.13
All Occupations									
Median Wage	\$17.09	\$31.20	\$18.03	\$17.59	\$15.20	\$21.48	\$16.70	\$17.13	\$16.18
Median Income	\$35,547.20	\$64,896.00	\$37,502.40	\$36,587.20	\$31,616.00	\$44,678.40	\$34,736.00	\$35,630.40	\$33,654.40
Tipped Occupations									
Median Wage	\$9.54	\$10.44	\$10.25	\$9.47	\$8.86	\$11.30	\$9.23	\$9.48	\$9.16
Median Income	\$15,874.56	\$21,715.20	\$15,990.00	\$14,773.20	\$16,125.20	\$17,628.00	\$14,398.80	\$14,788.80	\$16,671.20
Tipped Restaurant Occupations									
Median Wage	\$9.07	\$10.10	\$9.49	\$9.10	\$8.61	\$10.68	\$8.89	\$9.02	\$8.78
Median Income	\$14,149.20	\$21,008.00	\$14,804.40	\$14,196.00	\$13,431.60	\$16,660.80	\$12,481.56	\$12,664.08	\$14,609.92

Federal Minimum Wage Laws

The Fair Labor Standards Act (FLSA) became law in 1938, and established basic labor protections for workers, such as a 40-hour workweek, overtime protection, and the national minimum wage.⁵¹ However, lawmakers excluded restaurant and other service workers from this landmark legislation.⁵² The 1966 amendments to the FLSA were especially significant. These revisions extended some new protections to hotel, restaurant, and other service workers, yet the amendments simultaneously “introduced an unprecedented new ‘subminimum wage’ for workers who customarily and regularly receive tips,” including restaurant workers.⁵³ Since its establishment, the subminimum wage has increased several times in the period from 1966 to 1991. However, the last increase was almost a quarter-century ago, when it was set at \$2.13 in 1991.⁵⁴

In 1996, the subminimum wage was delinked from the federal minimum wage and was no longer required to increase at the same pace as the standard minimum wage.⁵⁵ Since then, the minimum wage has increased to \$7.25 per hour while the subminimum wage has re-

mained stagnant at \$2.13 per hour.⁵⁶ Federal law requires that when the hourly wage, subsidized by tips, does not amount to \$7.25, employers must pay workers the difference.⁵⁷ However, in practice, employers often fail to comply with the law.⁵⁸ A federal review of employment records from 2010-2012 indicated that almost 84% of approximately 9,000 full-service restaurants had committed wage and hour violations.⁵⁹ These violations involved 82,000 workers and included 1,170 incidents of improperly calculated wages for tipped, which resulted in approximately \$5.5 million in back pay, and the federal government assessing \$2.5 million in civil penalties.⁶⁰

State Minimum Wage Laws

Only seven states (largely concentrated in the western region of the country) operate under a one-wage system, which requires employers to pay tipped and non-tipped workers the full state minimum wage, before tips.⁶¹ Twenty-six states (and the District of Columbia) have a subminimum wage between \$2.13 and \$7.00 per hour.⁶² Eighteen states either have no state minimum wage or

have adopted the federal subminimum wage of \$2.13 as their tipped minimum wage.⁶³ (Figure 1 and Table 1)

Notably, a number of major cities throughout the United States have increased their local minimum wage,⁶⁴ though such increases have not always benefitted tipped workers. Earlier this year, Los Angeles became the largest city in the nation to enact a higher minimum wage law when it increased the city's minimum wage to \$15.00 per hour (effective by the year 2020).⁶⁵ While most of the cities that have raised the minimum wage are located

in states with a single wage system,⁶⁶ cities like Chicago, Louisville, and Santa Fe are located in states that retain a two-tiered system and thus, increases to their minimum wage do not always benefit tipped restaurant workers.⁶⁷

Several states across the country (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.⁶⁸

ADVERSE IMPACTS OF WORKING CONDITIONS ON TIPPED WORKER WELFARE

Workers are entitled to “safe and healthy working conditions” under international law. This standard demands access to rest and leisure through the provision of rest periods, the reasonable limitation of working hours, paid vacations, remuneration for national holidays, sufficient advance notice of the work schedule, and consideration of the part-time restaurant workers’ needs and interests in setting the work schedule.

Reasonable Working Hours, Rest Periods and Paid Leave

Experiences related by tipped restaurant workers interviewed for this report demonstrate the difficulties they encounter in securing adequate rest periods between shifts and paid leave from their employers.

“I don’t want to go back. This is my first Thanksgiving in 7 years. Sometimes we didn’t even get a Thanksgiving meal in [the] restaurant.”—**47-year-old, black female working as a server and bartender in Washington D.C.**

Scheduling Practices

Workers also describe how haphazard scheduling practices affect their economic well-being and non-work lives.

“Because of days when you are expecting to work, and then they call you and tell you not to come in, that can mess you up because you’re working for tips. That’s how we make our money. And when you tell me not to come in, I’m missing out on pay, which means I’m missing out on bill money, which causes me to be behind on bills or need to go ask someone else for money. So yes, I’ve fallen behind on bills because of that... [I was told:] ‘Don’t come in today... you can go home early,’ like wow. It was very, very bad.”—**31-year-old, black female working as a server and bartender in Troy, MI**

“They’ll schedule you for a set schedule. For instance, you have to go in at noon, and work from noon till close. At close, that doesn’t mean your shift has ended, it means then you will have to work until they don’t need you anymore.... Basically, you don’t work when they don’t need you, and you are required to work in excess when they do need you.”—**37-year-old, white female working as a server in New Orleans, LA**

“When she started making the schedule it was like, ‘I’m going to need you at this time and it doesn’t matter really what you want’ kind of thing, even though I’d been working there for so long. It just completely changed. It wasn’t fair at all.”—**22-year-old, white female working as a server in Houston, TX**

Sources: ICESCR, arts. 7(b), 7(d), 24; ILO Convention No. 172, arts 3, 4(3)-(4); ILO Recommendation No. 179, art. 10; ILO Convention No. 111, art. 2(b); Recommendation concerning Part-Time Work (ILO No. 182) art. 12(1)-(2), adopted June 24, 1994.

INTERNATIONAL HUMAN RIGHTS ANALYSIS OF THE SUBMINIMUM WAGE STRUCTURE IN THE UNITED STATES

"It is common practice in all restaurants that everyone always keeps track of their hours, because your paycheck will never represent what you worked. And, it is a continuous battle, no matter where you work and no matter what position, to be chasing the bookkeepers down to get your proper check. That's just common practice."

**—26-year-old, white female
working as a garde-
manger (pantry chef)
in New Orleans, LA**

International law provides well-established, universal standards for workers that set a baseline for fair working conditions and an adequate standard of living. These international standards flow from several sources, including: the Universal Declaration of Human Rights (UDHR),⁶⁹ the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁷⁰ the Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW),⁷¹ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁷² International law also recognizes that wages must be paid directly to workers on a regular basis by their employers, and that fair and equal wages for equal work must be provided to all workers.⁷³ Furthermore, international human rights law recognizes that the right to equal remuneration includes the right to employment benefits, and equal treatment with respect to work of equal value.⁷⁴

Although the United States has ratified the ICERD and, therefore, is legally bound by its terms, the United States has signed but not ratified the ICESCR and ICEDAW. As a signatory, the United States has indicated its recognition of the rights contained in these instruments, and is obligated not to act in ways contrary to their intent, but is not legally bound by their terms.⁷⁵

In the regional context, numerous human rights instruments promulgated through the Organization of American States (OAS) address labor standards.⁷⁶ As a member of the OAS, the United States is bound by the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man;⁷⁷ the latter instrument enshrines the right to work.⁷⁸

Similarly, the International Labour Organization (ILO) has promoted international labor rights and standards for almost a century. A tripartite organization established in 1919 as part of the Treaty of Versailles,⁷⁹ the ILO has maintained a system of international labor standards that aim to promote equal opportunities for women and men to obtain decent work, "in conditions of freedom, equity, security, and dignity."⁸⁰ Drafted by States, employers, and workers, these standards either take the form of conventions, which are legally binding international treaties that may be

TABLE 2

Poverty Rate of All, Tipped, and Tipped Restaurant Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
All	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%

ratified by member States, or recommendations, which serve as non-binding guidelines.⁸¹ The United States has ratified twelve ILO conventions which are currently in force.⁸² However, the United States has not ratified any ILO treaties that directly protect tipped restaurant workers. This analysis draws on ILO instruments relevant to tipped restaurant workers that, taken collectively, offer a robust set of standards that should guide law reform in this area.

International Human Rights Guarantee an Adequate Standard of Living with Human Dignity for Workers

*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.*⁸³

The typical restaurant worker in the United States earns approximately \$15,000 per year, or one-third of what the average American worker earns.⁸⁴ Consequently, restaurant workers have higher rates of poverty or near-poverty than other workers.⁸⁵ Tipped restaurant servers, in particular, live in poverty at nearly three times the rate of the total employed U.S. population.⁸⁶ Women are concentrated in the bottom of the wage tier: approximately two-thirds of women in this sector earn the subminimum wage.⁸⁷

The general poverty pattern for tipped workers employed in states with the subminimum wage reveals high rates of poverty. Tipped restaurant workers live 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. (Table 2)

The International Bill of Human Rights protects the right of workers and their families to an adequate standard of living, including adequate food, clothing, and housing, and to the continuous improvement of their living conditions.⁸⁸ Absent the guarantee of an adequate and stable minimum wage, tipped restaurant workers often struggle to work and live with dignity. The U.N. Committee on Economic, Social and Cultural Rights (CESCR) has stated: "[t]he right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity."⁸⁹ Poverty and income inequality undermine the effective realization of human rights. "A family's income is ... one of the most important determinants of their economic well-being. Most working families depend on their income to meet their immediate consumption needs..."⁹⁰

International standard setting has sought to promote a living minimum wage. In 2010, the International Labour Conference concluded that governments of member States should design and promote policies with regard to wages, hours, and other working conditions that "ensure a just share of the fruits of progress to all" and a "minimum living wage" to all workers.⁹¹ The Guiding Principles on Extreme Poverty and Human Rights also 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."⁹² The ILO has recognized that a liv-

able minimum wage has the power to “increase demand and contribute to economic stability” while reducing poverty and inequity.⁹³

When determining the minimum wage, States should take account of the necessity of enabling workers to maintain a suitable standard of living.⁹⁴ Various elements, outlined in Article 3 of the ILO’s Minimum Wage Fixing Convention, should “so far as possible and appropriate in relation to national practice and conditions” be taken into consideration in setting minimum wages including:

(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; [and]

*(b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.*⁹⁵

International Human Rights Guarantee the Right to Just and Favorable Remuneration for Workers

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular[,] . . . [r]emuneration which provides all workers, as a minimum, with . . . [f]air wages and equal remuneration for work of equal value without distinction of any kind, . . . [and a] decent living for themselves and their families*⁹⁶

The right of workers to just and favorable remuneration is a widely recognized international human right. The ICERD and the ICESCR both establish this right,⁹⁷ and ILO treaty law mandates fixed minimum wage rates, which are binding on employers and intended to help “protect disadvantaged groups of wage earners.”⁹⁸ Furthermore, the ILO convention on working conditions in hotels and restaurants provides that restaurant workers

are entitled to payment of overtime in accordance with national law and practice.⁹⁹ The accompanying ILO recommendation and additional instruments clarify that restaurant workers should be compensated for overtime work at a higher rate than their base hourly wage.¹⁰⁰ States should enforce these provisions by taking necessary measures—through a system of supervision of rates actually being paid, penalties for infringements, and appropriate penal or other sanctions for employers who violate the law—to ensure that wages are not paid at less than the minimum permissible rates.¹⁰¹ The ILO further recommends that a worker who has not been paid in accordance with the convention is entitled to recover the amount by which she has been underpaid.¹⁰²

Tipped workers in the U.S. restaurant industry report a variety of ways in which employers fail to pay them fully and fairly, despite domestic wage laws.¹⁰³ Experts working in the field have coined such practices “wage theft”—a term which encompasses “paying workers less than the minimum wage or agreed-upon wage, requiring employees to work ‘off the clock’ without pay, failing to pay overtime, stealing tips, illegally deducting fees from wages owed, or simply not paying a worker at all.”¹⁰⁴ Accordingly, the failure to pay the difference between the tipped subminimum wage and standard minimum wage when tips do not make up the difference also constitutes wage theft.

International Human Rights Guarantee the Right to Health

*Health is a fundamental human right indispensable for the exercise of other human rights.*¹⁰⁵

International human rights standards stipulate that “every human being is entitled to the enjoyment of the highest attainable standard of [physical and mental] health conducive to living a life with dignity.”¹⁰⁶ This means that workers should have available and accessible essential medicines as well as basic and preventive healthcare services.¹⁰⁷ The right to health is not limited to a right to healthcare,

but also includes access to food with nutritional value, housing, water, healthy working conditions, and a healthy environment.¹⁰⁸ A safe workplace environment is one in which health hazards are minimized as far as reasonable or practicable.¹⁰⁹ The right to health takes into account the individual's biological and socio-economic preconditions as well as a State's available resources.¹¹⁰ 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.¹¹¹

ILO conventions require signatories ensure the provision of medical care and sick leave for workers.¹¹² Medical care must be afforded with a view to maintaining, restoring, or improving an individual's health and her ability to work and attend to her personal needs.¹¹³ Furthermore, States should extend medical care and sick leave, by stages if necessary, to *all* economically active persons and their families.¹¹⁴ Beneficiaries should not be required to share in the costs of medical care if their "means do not exceed specific prescribed amounts."¹¹⁵

These international standards reflect an understanding that access to the highest attainable standard of health depends upon the affordability of healthcare, which must be available equally to all workers without discrimination. As the Committee on Economic Social and Cultural Rights (CESCR) has stated:

*Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.*¹¹⁶

The U.S. Constitution does not contain the right to health. Federal provision of health coverage is generally limited to the poor, elderly, and disabled—those "who are deemed 'deserving'" and coverage is "far from universal."¹¹⁷ Nevertheless, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving

federal financial assistance, including health care.¹¹⁸ At the same time, states are free to enact state constitutional provisions or other laws that recognize social and economic rights,¹¹⁹ and at least one state recently has enacted legislation codifying the right to health.¹²⁰

Yet, access to affordable, basic, and preventive health-care 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.¹²¹

The Right to Housing

*[I]n order to be effective, strategies to address violations of the right to adequate housing must be based on an equality rights framework and must address the systemic patterns of discrimination and inequality that deprive particular groups of the equal enjoyment of that right.*¹²²

The right to housing is a component of the right to an adequate standard of living and is central to the enjoyment of all economic, social, and cultural rights.¹²³ As the highest U.N. expert on housing has stated: "The consequences of inadequate housing and homelessness are severe, with implications for almost every other human right," including the rights to health, work and, in many cases, life.¹²⁴ The right to housing requires not only shelter but adequate housing, which the committee that monitors implementation of the ICESCR defines to include: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.¹²⁵ The U.N. expert on housing stated that States "have a positive obligation to address and remedy systemic patterns of inequality" in the area of housing.¹²⁶

There is a growing international consensus that adequate housing is a critical element for "contributing to social equity."¹²⁷ The right to housing does not require States to provide shelter to each and every individual at no cost. According to the expert committee monitoring the ICESCR, States have an obligation of progressive

realization. This means the State must take steps, “to the maximum of its available resources, with a view to achieving progressively the full realization of the right to housing by all appropriate means, including the adoption of legislative measures.”¹²⁸

There is no enumerated federal constitutional right to housing in the United States, nor does federal law establish such a right.¹²⁹ There are a number of federal programs aimed at facilitating access to housing for the poor, elderly and disabled.¹³⁰ The Fair Housing Act protects people from discrimination on the basis of race, color, national origin, religion, sex, disability, and the presence of children when they are renting, buying, or securing financing for housing.¹³¹

The Right to Food

*[T]he right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights.*¹³²

The right to food also derives from the right to an adequate standard of living. The CESCR considers that “the core content of the right [i]mplies. . . [t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [and] [t]he accessibility of such food in ways that are sustainable.”¹³³ Accessibility means food must be economically available such that the “costs associated with the acquisition of food for an adequate diet should be at a level” where the satisfaction of other basic needs are not compromised.¹³⁴

The right to food and the enjoyment of living wages are mutually dependent. The U.N. expert on the right to food has stated that hunger is “not simply a problem of supply and demand, but primarily a problem of. . . a failure to guarantee living wages to all those who rely on waged employment to buy their food.”¹³⁵ Accordingly, the expert found that “[f]or a minimum wage to make strides in improving equality and ensuring access to an adequate standard of living, including an adequate diet,

“Well, there was one time in particular, and it was in 2012, I was working as a server at a sushi restaurant and they basically would garner all of our tips. So they would take it all from us and put it in a tip jar. . . . So we would get our money, sometimes not necessarily on a schedule, more like [] whenever they feel like giving us money, they would give us the money. It wasn’t really clear how we were making the amount of money we were making. When I was working there, I actually did become homeless at that time.”

**—29-year-old, white female working
as a bartender in Philadelphia, PA**

it must provide at least a living wage.”¹³⁶ He also noted that “[e]nsuring in law access to decent work and a living wage is a key factor for families and individuals who rely on an earned income to meet their food needs.”¹³⁷

In its general survey of reports from State Parties to the Minimum Wage Fixing Convention and the Minimum Wage Fixing Recommendation, the ILO found that minimum wages can reduce poverty and inequality.¹³⁸ 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.¹³⁹ A 2013 ROC-United study found food insecurity to be a significant problem among restaurant workers, with servers in states with the federal subminimum wage using food stamps at twice the rate of the U.S. workforce.¹⁴⁰ Other studies have reached similar conclusions. A report on restaurant workers found that in New York and California, both states that pay above the federal subminimum wage, 32% of nearly 300 survey participants would be considered food insecure under federal guidelines, with the rate 25% higher among undocumented restaurant workers.¹⁴¹

TABLE 3

Food Stamp Usage Rate for All, Tipped, and Tipped Restaurant Workers
in Selected Subminimum Wage States and the District of Columbia.

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
All	9.6%	5.2%	11.8%	9.2%	12.2%	7.0%	12.9%	7.7%	11.2%
Tipped	15.2%	10.7%	16.4%	14.7%	20.2%	13.2%	22.0%	12.7%	17.1%
Tipped Restaurant	16.4%	10.4%	15.9%	16.0%	22.5%	12.2%	23.9%	13.4%	18.3%

There is no federal constitutional right to food. The bulk of nutrition assistance is provided through four federal programs—the Supplemental Nutrition Assistance Program;¹⁴² the National School Lunch Program;¹⁴³ the School Breakfast Program;¹⁴⁴ and the Special Supplemental Nutrition Program for Women, Infants, and Children.¹⁴⁵ States participate in the administration of these benefit programs, and have the authority to enact state legislation or state constitutional provisions recognizing the right to food.¹⁴⁶

Tipped restaurant workers depend on food stamps at rates ranging from 1.4 (Delaware) to 2 times (District of Columbia) the average rate of each respective state's employed population. (Table 3)

The Right to Protections for the Family

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*¹⁴⁷

The UDHR establishes that the right to work is essential to guaranteeing an existence worthy of human dignity to the family.¹⁴⁸ The ICESCR recognizes that “[t]he widest possible protection and assistance should be accorded to the family” particularly while it is responsible for the care of dependent children.¹⁴⁹ The ILO also has promulgated standards that call upon States to make it an aim of national policy to enable individuals to “exercise their right [engagement of employment] without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.”¹⁵⁰ Relevant ILO instruments stipulate

that States should take measures to provide workers with families flexible arrangements regarding working schedules, rest periods, and holidays¹⁵¹ and to develop community services, such as childcare and family services and facilities.¹⁵² In relation to advancement and job security, workers with family responsibilities also should enjoy equality of opportunity and treatment relative to other workers.¹⁵³

In the United States, workers with children have little legal recourse to protect themselves from discrimination based on their caretaking obligations. As a leading policy institute has found, “most federal and state statutes do not expressly prohibit family responsibilities discrimination.”¹⁵⁴ A patchwork of protections provide “limited coverage” for family caregivers under federal law, including the Family and Medical Leave Act (FMLA),¹⁵⁵ the Americans with Disabilities Act,¹⁵⁶ the Rehabilitation Act,¹⁵⁷ and the Employee Retirement Income Security Act of 1974.¹⁵⁸ Yet, federal law often fails to protect employees who need leave, because only about half of the workforce is covered by the FMLA.¹⁵⁹ Furthermore, federal law has nothing to offer workers who need accommodations other than leave, such as flexible scheduling, or even other minor workplace adjustments to meet their caregiving needs.¹⁶⁰ Only a handful of states and the District of Columbia have passed laws to enhance protections for family caregivers beyond what the federal laws mandate.¹⁶¹

Nationally, 24.7% of tipped restaurant workers are parents, 30% of women who are tipped restaurant workers are mothers, 54.3% of these mothers are single mothers. The rate of mothers who are single who are tipped restaurant workers ranges from 44.6% in Massachusetts to 76.6% in Louisiana. (Tables 4A and 4B)

TABLE 4A

Marital and Parental Status of Tipped Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Married	32.6%	37.9%	30.9%	32.6%	24.7%	30.7%	28.9%	32.4%	31.4%
Parents	31.4%	31.5%	30.6%	31.7%	30.1%	29.9%	30.9%	29.6%	33.5%
Men who are fathers	21.8%	30.1%	18.2%	24.3%	19.0%	21.8%	14.6%	18.3%	19.1%
Women who are mothers	36.4%	33.7%	37.4%	35.9%	35.6%	33.9%	36.2%	34.2%	41.3%
Single mothers	16.8%	16%	18.6%	16.9%	22%	14.1%	17.2%	14.4%	19.7%
Mothers who are single	46.3%	47.4%	49.8%	46.9%	61.7%	41.6%	47.3%	42%	47.8%

TABLE 4B

Marital and Parental Status of Tipped Restaurant Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Married	22.1%	23.7%	20.3%	23.1%	12.4%	21%	18.5%	21.9%	21.7%
Parents	24.7%	20.7%	22.7%	26.6%	21.4%	23.1%	25.1%	23.2%	26.6%
Men who are fathers	14.2%	16.4%	7.1%	18.4%	8.3%	11.8%	7.9%	10.5%	13.1%
Women who are mothers	30%	27%	30.3%	31%	27.6%	27.8%	30.8%	27.7%	34.7%
Single mothers	16.3%	13.1%	17.3%	16.3%	21.1%	12.4%	17.5%	14%	19.7%
Mothers who are single	54.3%	48.5%	57%	52.6%	76.6%	44.6%	57%	50.5%	56.7%

International Human Rights Guarantee Equality and Non-Discrimination for Workers

*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.*¹⁶²

The prohibition against discrimination is incorporated into every international human rights treaty and States acknowledge it as a fundamental, universally recognized right.¹⁶³ Two international treaties are dedicated to the topic of discrimination: ICERD on race discrimination and ICEDAW on discrimination against women.¹⁶⁴ The committee that interprets the race discrimination treaty has observed that this principle of non-discrimination is “immediately applicable and is neither subject to pro-

gressive implementation nor dependent on available resources. [Rather,] [i]t is directly applicable to all aspects of the right to work.”¹⁶⁵

The ILO convention on discrimination in employment and occupation (No. 111) is the “reference point for the fundamental right of non-discrimination at work.”¹⁶⁶ It requires States to declare and pursue national policies designed to promote “equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.”¹⁶⁷ Discrimination includes “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”¹⁶⁸ The very high number of ratifications of this convention—172 States as of November 2015¹⁶⁹—indicates the widespread recognition of the principle of non-discrimination in international human rights law.¹⁷⁰ Furthermore,

membership in the ILO confers on States an obligation to respect, promote, and realize fundamental rights, including the elimination of discrimination with respect to employment and occupation—even if a State has not ratified the convention.¹⁷¹

In addition, States have an affirmative duty to protect individuals against discrimination in employment by private actors, including employers.¹⁷² Moreover, States are obligated to work toward the elimination of both overt discrimination as well as indirect discrimination.¹⁷³ Thus, even when discriminatory intent is absent, States must act to address institutional and structural biases that lead to indirect discrimination or disparate treatment.¹⁷⁴

As a fundamental component of non-discrimination in employment, States must guarantee that employers provide equal pay for equal work.¹⁷⁵ The preamble of the

ILO Constitution calls for the improvement of working conditions by recognition of the principle of equal remuneration for work of equal value.¹⁷⁶ This principle is particularly relevant in the context of the U.S. subminimum wage system. The ILO convention on social policy requires States to establish policies aimed at abolishing all discrimination among workers on the grounds of race, color, or sex in respect to “wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.”¹⁷⁷ Furthermore, States are required to take all practicable measures to equalize the wages of low-wage workers to eliminate discriminatory differences based on race or sex.¹⁷⁸

Tables 5A and 5B depict the race and gender demographics of tipped workers and tipped restaurant workers across various regions in seven subminimum wage states and the District of Columbia.

TABLE 5A

Gender and Race Demographics of Tipped Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Female	65.6%	36.9%	64.5%	63.7%	66.7%	67.3%	75.4%	71.1%	65%
Male	34.4%	63.1%	35.5%	36.3%	33.3%	32.7%	24.6%	28.9%	35%
White	60.7%	24.6%	67.9%	63.1%	58.1%	74.7%	79.9%	80%	40.6%
Latina/o	17.8%	21.9%	7.5%	20%	5.3%	9.4%	4.3%	5.4%	38.8%
Black	9.9%	38.1%	16.5%	9.6%	28.9%	6.5%	9.1%	8.1%	10.1%
Asian	8.9%	12.7%	5.8%	5.7%	6.2%	6.8%	4%	4.9%	8.6%
Other	2.7%	2.7%	2.3%	1.5%	1.5%	2.6%	2.8%	1.7%	1.8%

TABLE 5B

Gender and Race Demographics of Tipped Restaurant Workers in Selected Subminimum Wage States and the District of Columbia

	National	D.C.	Delaware	Illinois	Louisiana	Massachusetts	Michigan	Pennsylvania	Texas
Female	66.3%	40.4%	67%	65.3%	67.9%	71.1%	75.2%	73.8%	62.4%
Male	33.7%	59.6%	33%	34.7%	32.1%	28.9%	24.8%	26.2%	37.6%
White	64.3%	32.8%	72.9%	63.4%	62.5%	78.9%	81.8%	83.2%	42.8%
Latina/o	19.5%	31.2%	10%	24.8%	6.3%	9.2%	5.1%	5.7%	43.7%
Black	7.9%	23.9%	12.2%	6.3%	26.3%	4.5%	7.5%	6.2%	7.8%
Asian	5.5%	9.6%	2.4%	3.9%	3.3%	5%	2.9%	3%	3.8%
Other	2.9%	2.5%	2.6%	1.6%	1.7%	2.4%	2.7%	1.8%	1.9%

Protection from Discrimination on the Basis of Gender

*[T]he full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields...*¹⁷⁹

International human rights law protects women from discrimination.¹⁸⁰ The UN, ILO, and the Inter-American human rights systems have recognized women's right to work free from any form of discrimination.¹⁸¹ ICEDAW defines discrimination against women as:

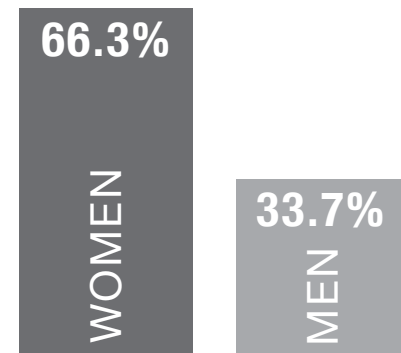
*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*¹⁸²

States thus have the obligation to dismantle laws and practices that effectively discriminate against women.¹⁸³ The CESCR also recognizes discrimination against women in the workplace and “underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value.”¹⁸⁴ Similarly, the ILO convention on equal remuneration, considered a “fundamental” convention, has been ratified by 171 States,¹⁸⁵ further demonstrates an international consensus regarding gender equality among wage earners.

In subminimum wage states, the concentration of women in tipped occupations in the restaurant industry constitutes human rights discrimination, as men are concentrated in non-tipped, higher wage occupations.¹⁸⁶ With regard to the link between equal remuneration and occupational segregation, ILO specialists have documented that imbalance in the number of men and women in each segment of the work force is a key factor in the gender wage gap.¹⁸⁷ (Figure 2) The ILO recommends

FIGURE 2

Gender of Tipped Restaurant Workers



Nearly two-thirds of tipped restaurant workers are women.

(data on transgender tipped restaurant workers not available)

“I’ve seen employees be ‘called off’ as a disciplinary action, but it’s only the five black females; it’s never the two white males... I noticed that the males are treated differently from the females. Specifically, because there are two white males in the kitchen and there are five black females, they are treated more favorabl[y] than the black females are.”

—34-year-old, black female working as a server and sous chef in New Orleans, LA

THE TOLL OF WORKPLACE SEXUAL HARASSMENT AS TOLD BY TIPPED RESTAURANT WORKERS

The committee of experts that monitors the implementation of the ICEDAW has observed that:

Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Ineffective Response by Restaurant Management to Reported Sexual Harassment Puts Workers at Risk.

"[A prep cook] followed me back...and started like massaging my shoulders...and then he started moving his hands down. I said 'no, stop' and he was like: 'It's ok, it's ok' and he was... groping me all the way down. And I was like pretty shaken by it and I was afraid to go in to the back again because he knew like where and how to corner me... [He] was fired because he had been reported [for] groping on [other female servers, including a pregnant woman]... [A]bout three months later,...basically as soon as [my pregnant coworker] was put on maternity leave, they hired him back. [W]hen I went back there, I saw him and it was just a slap in the face...that he harassed multiple girls at this restaurant and they still hired him back!"

—28-year-old, white female working as a server in Washington, D.C.

Sexual Harassment on the Job Creates a Highly Stressful and Hostile Work Environment.

"I was in the docking court getting some lemon, and the head chef for that shift ... came in behind me and he had closed the doors and he turned off the lights and he put a hand on my waist. And I don't remember what he said to me, but I remembered instantly kind of backing up and he kind of hit the objects [off] the wall and then I was just looking for the door, just to get out and I just walked out... I didn't want to pass through the kitchen again because of that. Yeah, I would say that that was probably the worst thing that happened to me in that situation. [At other times,] if you needed something, like let's say an extra side of sauce and we would ask the kitchen staff and they would they would kind of blow[] kisses or say: 'if you need this, you have to do something for me' or 'you have to tell me that you love me before I give this to you.'"

—25-year-old Latina working as a server in Houston, TX

Tipped Restaurant Workers Face Challenges in Reporting Sexual Harassment.

"[O]ne time I was closing the bar and I walked down the hallway by myself and [the sous chef]...looked at me and he said: ... 'Whenever I see you, I feel so out of control. I just want to grab you by the dreads and throw you in the beer cooler.' ... He said, 'You're just so fucking hot.'...[N]ormally, I don't think I would say anything to management about that...because I know it's something that's considered normal for chefs to talk to female staff like that... But, in this particular situation...I didn't like the fact that he said he's out of control. That made me feel ... like he was trying to advance on me. [After reporting the harassment to management,] [t]hey just alerted everybody that something was going on. It was really uncomfortable because I didn't feel comfortable talking to guys about something so personal to me. To m[e], I have never ever been validated when it comes [to] sexual harassment."

—29-year-old, white female working as a bartender in Philadelphia, PA

that States enact domestic legislation to guarantee equal pay for equal work and that this principle be applied to occupations subject to minimum wage laws.¹⁸⁸

The ILO Resolution Concerning Gender Equality at the Heart of Decent Work notes that “[p]overty has been increasingly feminized; [and] the gender pay gap persists,”¹⁸⁹ and that “[c]ontrary to popular belief, women’s lower educational qualifications and intermittent labour market participation are not the main reasons for the gender pay gap. The gap is in fact a visible symptom of deep, structural sex discrimination.”¹⁹⁰ Further, under U.S. law, the federal Equal Pay Act of 1962 prohibits sex-based wage discrimination and enshrines the principle of equal pay for equal work.¹⁹¹

Women are vulnerable to particular rights violations in the workplace and the ILO and U.N. human rights bodies recognize sexual harassment in the workplace as a violation of women’s fundamental human rights.¹⁹² Sexual harassment includes “such unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, and sexual demands, whether by words or actions.”¹⁹³ Sexual harassment is “a hazard encountered in workplaces across the world that reduces the quality of a working life, jeopardizes the well-being of women and men, undermines gender equality and imposes costs on firms and organizations.”¹⁹⁴ The committee that monitors the implementation of the ICEDAW requests that States report on sexual harassment and the measures they are taking to protect women from this and other forms of sexual violence in the workplace.¹⁹⁵

The U.S. Constitution protects women from discrimination.¹⁹⁶ Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination in employment on the basis of sex,¹⁹⁷ which the Supreme Court has extended to include sexual harassment.¹⁹⁸

The ILO has found that women are far more likely than men to suffer sexual harassment while at work.¹⁹⁹ According to one investigation, U.S. workers in the food services industry filed 37% of all claims of sexual harassment with the federal government during a 10-month period in 2011.²⁰⁰ Among the tipped restaurant workers interviewed for this report, many mentioned incidences of sexual harassment in the workplace. (See textbox)

THE RIGHT TO EQUALITY OF OPPORTUNITY IN SECURITY OF TENURE OF EMPLOYMENT

International human rights law recognizes that all workers should, without discrimination, enjoy equality of opportunity and treatment in respect of security of tenure of employment. In the United States, generally workers operate as “at will” employees and can be fired without cause.

Tipped restaurant workers lack job security.

“It is common knowledge that everyone is replaceable. And at any minute...they could find someone to do your job. The only security you have is that it is really inconvenient and really annoying to train people. ... [B]ut if you tip the balance and it becomes more convenient to just train someone new than keep you, then you will be fired.”

—26-year-old, white female working in the back of the house in New Orleans, LA

Employers use scheduling practices to maintain a sense of vulnerability and job insecurity among workers.

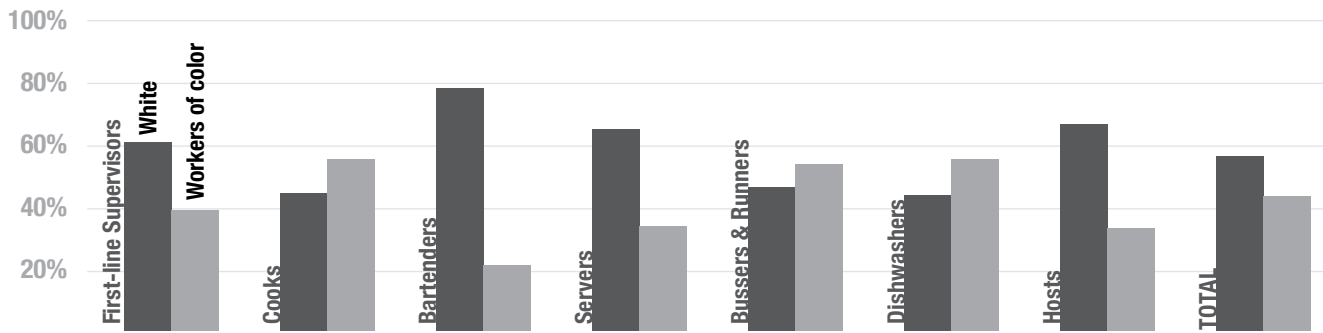
“They keep cutting. . . peoples’ schedule[s]. [For example,] if they had been [o]n a regular schedule and now they only have one shift. So, it’s just like. . .they are [making] people . . . an example: [‘If you don’t behave, this is what’s gonna happen to you.’ So it’s this kind of thing that makes me feel like they don’t want people to be happy. They want people to be scared, and afraid they’re gonna lose their job.”

—44-year-old Latino working as a server in New York, NY

Sources: Protocol of San Salvador, arts. 3 and 7(c)-(d); ILO Recommendation No. 111, art. 2(b)(iv); see generally Charles Muhl, *The Employment At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., U.S. BUREAU OF LAB. & STATS. (2011).

FIGURE 3

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.

Protection from Discrimination on the Basis of Race

*Poverty, economic and social exclusion constitute both causes and effects of racism... . [P]overty, under-development, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance and contribute to the persistence of racist attitudes and practices which in turn generate more poverty.*²⁰¹

The prohibition against race discrimination is a universal human rights norm,²⁰² elaborated upon in ICERD, which the United States has ratified subject to certain limitations.²⁰³ Under ICERD, States are obligated to not engage in acts or practices of racial discrimination and to ensure that all public institutions conform to this obligation.²⁰⁴ States must ensure that laws and policies comply with the treaty obligations and work toward eliminating all barriers between the races.²⁰⁵

Racial discrimination in the workplace is a matter of international concern. The Programme of Action coming out of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance urged States to “take concrete measures that would eliminate racism, racial discrimination, xeno-

phobia and related intolerance in the workplace against all workers, including migrants, and ensure the full equality of all before the law, including labour law.”²⁰⁶ As noted earlier, the ILO Convention No. 111 is the widely-ratified labor convention prohibiting employment discrimination on the basis race, as well as other characteristics, and places on States the obligation to work to eliminate discrimination.²⁰⁷

Race and immigration status are also linked in employment discrimination. A 2008 report by the U.S. Human Rights Network Labor Caucus (a broad-based group of human rights and workers’ rights organizations, and law school centers and clinics) in conjunction with the United States report to the ICERD monitoring committee, noted how immigrants and people of color are often relegated to low-wage work and “suffer disproportionately from workplace injustices in violation of their rights under ICERD.”²⁰⁸ Specifically,

*entire categories of workers employed in industries with high concentrations of minorities and immigrants are excluded from statutory protections relied upon by the U.S. government to demonstrate compliance with the Convention, resulting in unfavourable conditions of work, unequal pay, and unjust and unfavourable remuneration, contributing to the stark income disparities for people of color and immigrants.*²⁰⁹

People of color comprise 44% of the workforce of the restaurant industry and 42% of minimum wage earners.²¹⁰ Within the restaurant industry, a study has found that workers of color experience poverty at nearly twice the rate of white restaurant workers.²¹¹ Moreover, ROC-United has reported that 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, and bussers, and runners while non-Hispanic whites are disproportionately found in “front of the house” positions like wait staff and managers.²¹² (Figure 3)

Like gender, the U.S. Constitution provides protection against racial discrimination,²¹³ and there are federal as well as state laws that protect against employment discrimination based on race.²¹⁴ As mentioned above, Title VII protects individuals against employment discrimination, including harassment, on the basis of race.²¹⁵ The statute prohibits intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.²¹⁶

A ROC-United report examining the treatment of tipped workers in the New York City restaurant industry found that these workers reported “discriminatory hiring, promotion and disciplinary practices, as well as verbal abuse motivated by race, national origin or English language facility.”²¹⁷ In a recent study of discrimination in the restaurant industry, white job candidates were twice as likely as equally or better qualified black candidates to receive favorable treatment in the interview process.²¹⁸

The Right to Vocational Training and Promotions without Discrimination

International human rights law acknowledges the right to vocational training and access to promotions without discrimination.²¹⁹ Unlike federal law, the ILO promotes job training to advance workers’ rights and has promulgated a convention on human resource development.²²⁰ This convention requires States to adopt and develop comprehensive policies and programs of vocational guidance and training, enabling all persons, on an equal basis, to develop their work capabilities.²²¹ Training is linked to the promotion of decent work, job retention, and poverty reduction.²²² In particular, the ILO recommends that States establish policies and programs of vocational education and training, and of management development for different occupations in restaurants in order to enhance participants’ career prospects.²²³ Additionally, the ILO has promulgated standards to guide States in their development of training programs to promote equal pay for equal work.²²⁴

“Some [employees] got certain advantages over others because of their...romantic relationship[s]. They were able to get things that others couldn’t get; get days off that others couldn’t get... . Everyone should be treated fair, but some people had advantages over others during certain situations... . So, mainly romantic relationships; there was a lot of that going on in there. And we had a manager who had to leave the facility because of it... . I am never going back there in my life. Never.”

—25-year-old Latina working as a server in Houston, TX

CONCLUSION AND RECOMMENDATIONS

*"[Sexual harassment] is like
the norm, I see it happen to
most of the females . . ."*

**—40-year-old, black female
working as a server
in Delaware**

The two-tiered minimum wage structure traps many low-wage tipped restaurant workers in conditions of economic and social vulnerability and violates their fundamental human rights. Earning subminimum wages, these workers do not realize their human rights to an adequate standard of living and to just and fair remuneration. Consequently, high rates of poverty mean that tipped restaurant workers earning a subminimum wage are deprived of other fundamental human rights when they cannot access healthcare, adequate housing, experience food insecurity, or are deprived of adequate support for family caregiving responsibilities. Discrimination and low wages are linked and particularly affect women and people of color in the food service sector. Tipped restaurant workers, who are mostly women, are vulnerable to harassment and mistreatment. People of color are concentrated in the lowest paying occupations in the restaurant industry. The human rights prohibition against discrimination aims to eliminate such inequities and promote the right to work with dignity.

Reflecting an international consensus regarding universal rights for workers, human rights instruments and International Labour Organization 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) [hereinafter UDHR].
- 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 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) [hereinafter Wage and Hour Div., *Minimum Wages for Tipped Employees*].
- 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 ACS, *infra* note 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) [hereinafter *Recent State Minimum Wage Laws and Current Campaigns*]; *Potential Ballot Measure in D.C. Would Raise Minimum Wage to \$15*, NAT’L CTR. FOR WOMEN & POLICING (last visited Nov. 14, 2015) [hereinafter *Potential Ballot Measure in D.C. Would Raise Minimum Wage to \$15*]; *One Fair Wage: Rhode Island*, RESTAURANT OPPORTUNITIES CENTERS UNITED (last visited Nov. 14, 2015) [hereinafter *One Fair Wage: Rhode Island*].
- 11 Recommendation concerning Minimum Wage Fixing, with Special Reference to Developing Countries (ILO No. 135) arts. 1-2, *adopted* June 22, 1970 [hereinafter ILO Recommendation No. 135].
- 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) [hereinafter *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights*].
- 13 Recommendation concerning the Application of Minimum Wage-Fixing Machinery (ILO No. 30) art. III, *adopted* June 16, 1928 [hereinafter ILO Recommendation No. 30].
- 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) [hereinafter CESCR, *General Comment No. 14*].
- 15 *Id.* ¶ 1.
- 16 RESTAURANT OPPORTUNITIES CENTERS UNITED, *BEHIND THE KITCHEN DOOR: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY* tbl. 1 (2011) [hereinafter *BKD: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY*] (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.”); RESTAURANT OPPORTUNITIES CENTERS UNITED, *BEHIND THE KITCHEN DOOR: THE HIGHS AND LOWS OF SEATTLE’S BOOMING RESTAURANT INDUSTRY* 17 (2015) [hereinafter *BKD: THE HIGHS AND LOWS OF SEATTLE’S BOOMING RESTAURANT INDUSTRY*] (“A significant majority of restaurant workers do not receive workplace benefits such as employer-provided health coverage (87.7%).”); RESTAURANT OPPORTUNITIES CENTERS UNITED, *BEHIND THE KITCHEN DOOR: EXTREME INEQUALITY AND OPPORTUNITY IN HOUSTON’S VIBRANT RESTAURANT ECONOMY* 13 (2015) [hereinafter *BKD: EXTREME INEQUALITY AND OPPORTUNITY IN HOUSTON’S VIBRANT RESTAURANT ECONOMY*] (reporting that 93.1% of tipped restaurant workers in Houston do not have employer-provided health insurance).
- 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 [hereinafter ILO Convention No. 111].
- 19 Rep. of the Int'l Labour Office, Gender Equality at the Heart of Decent Work, ¶ 229, International Labour Conference, 98th Sess. (2009) [hereinafter Report on Gender Equality at the Heart of Decent Work]; 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) [hereinafter CEDAW, *General Recommendation No. 19*].
- 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: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY, 2 (Jan. 25, 2005) [hereinafter BKD: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY].
- 22 ACS, *infra* note 35.
- 23 UDHR, *supra* note 1.
- 24 See REALIZING THE DREAM, *supra* note 6 (explaining how the subminimum wage system affects poverty rates for restaurant workers); RESTAURANT OPPORTUNITIES CENTERS UNITED, ENDING JIM CROW IN AMERICA'S RESTAURANT INDUSTRY: RACIAL AND GENDER OCCUPATIONAL SEGREGATION IN THE RESTAURANT INDUSTRY 9, 28, (2015) [hereinafter ENDING JIM CROW] ("This study found occupational segregation leading to real world negative outcomes in wages for workers of color in the restaurant industry, and found that in a select sample of well-intentioned, primarily fine-dining establishments, structural barriers to occupational segregation remain a clear obstacle to establishing racially equitable career ladders within the industry.").
- 25 Allegretto & Cooper, *supra* note 17, at 15 ("35.5 percent of non-tipped workers and their families rely on public benefits, compared with 46.0 percent and 46.2 percent, respectively, of tipped workers in general and waiters/bartenders," and "Tipped workers receiving some public assistance get about \$475 more, on average, in benefits than non-tipped workers who receive aid; waiters and bartenders receive over \$600 more, on average, than non-tipped workers receiving aid.").
- 26 RESTAURANT OPPORTUNITIES CENTERS UNITED, THE GREAT SERVICE DIVIDE: OCCUPATIONAL SEGREGATION & INEQUALITY IN THE US RESTAURANT INDUSTRY 2 (Oct. 22, 2014) [hereinafter THE GREAT SERVICE DIVIDE] (ROC-United's analysis of Bureau of Labor Statistics (BLS), Occupational Employment Statistics, 2014.); see also BUREAU OF LAB. STATS., EMPLOYMENT AND WAGES FOR THE HIGHEST AND LOWEST PAYING OCCUPATIONS, May 2014 (last modified May 25, 2015) (identifying the ten lowest paid occupations as: food preparers, shampooers, cooks, dishwashers, dining room attendants, waiters/waitresses, counter attendants, hosts/hostesses, gaming dealers, and farmworkers).
- 27 BUREAU OF LAB., MAY 2014 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES UNITED STATES (last modified May 25, 2015) (these data exclude cooks and private households from the category of non-supervisory restaurant occupations).
- 28 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). See generally Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 II*, 54 POL. SCI. Q. 29-55 (1939) (discussing in detail the scope of the then newly enacted Fair Labor Standards Act).
- 29 Wage and Hour Div., *Minimum Wages for Tipped Employees*, *supra* note 4 (indicating that seven states have no subminimum wage and operate under one minimum wage structure).
- 30 Allegretto & Cooper, *supra* note 17, at 13 ("[P]overty rates for non-tipped workers do not vary much by state tipped-wage policies. Yet, for tipped workers, and particularly for waiters and bartenders, the correlation between low tipped wages and high poverty rates is dramatic.").
- 31 THE WHITE HOUSE, THE NEW WHITE HOUSE REPORT: THE IMPACT OF RAISING THE MINIMUM WAGE ON WOMEN AND THE IMPORTANCE OF ENSURING A ROBUST TIPPED MINIMUM WAGE 1 (2014) ("Workers in predominantly tipped occupations are twice as likely as other workers to experience poverty, and servers are almost three times as likely to be in poverty.").
- 32 See ENDING JIM CROW, *supra* note 24, at 9, 28 (2015) ("Women and workers of color are largely concentrated in the lowest paying segments and sections of the restaurant industry."); see also RAJESH D. NAYAK & PAUL K. SONN, NATIONAL EMPLOYMENT LAW PROJECT, RESTORING THE MINIMUM WAGE FOR AMERICA'S TIPPED WORKERS 12 (2009) ("Even after accounting for tips, the vast majority of tipped workers are still barely getting by... As a result, a sizeable percentage of waitresses and waiters live in families below the poverty level—and the rates are even higher for black and Hispanic waitresses and waiters.").
- 33 ACS *infra* note 35.
- 34 *Id.* (data analysis by ROC-United using a four-year merged sample to ensure adequate sample size in smaller states). High levels of poverty among tipped restaurant workers is not a new phenomenon; reports dating back a decade or more noted this trend. See, e.g., NAYAK & SONN, *supra* note 32, at 12 ("[A] sizeable percentage of waitresses and waiters live in families below the poverty level—and the rates are even higher for black and Hispanic waitresses and waiters."); see also *id.* at 12 (providing data on family poverty by race

among waitresses and waiters between 2003 and 2007 in Table 5).

- 35 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]. Specific categories of data have been analyzed as follows: **Figures 1, 2 and 3** are based on the ACS. **Table 1** was derived by multiplying the median wage obtained from Bureau of Labor Statistics by the median number of weeks worked and median hours worked per week derived from the ACS 2013. Bureau of Labor Statistics, *Occupational Employment Statistics* (2014), U.S. DEP'T OF LAB. (last visited Nov. 17, 2015). The latest minimum and tipped minimum wages reported in this table were drawn from the Wage and Hour Division of the Department of Labor. See Wage and Hour Div., *Minimum Wages for Tipped Employees*, *supra* note 4. **Tables 2, 3, 4A, 4B, 5A, and 5B** were derived from the ACS by examining the universe of currently employed tipped workers, as found in food preparation and serving, healthcare support, personal care and service, and transportation and material moving occupations. For the District of Columbia, workers working as opposed to residing within the city were examined due to geographic and economic constraints, in particular the high cost of living in the District of Columbia, and the large metro area spanning several states.
- 36 Interviews were conducted with tipped restaurant workers employed in seven states (Texas, Louisiana, Pennsylvania, Massachusetts, Illinois, Delaware, and Michigan) and the District of Columbia, where the subminimum wage ranges from \$2.13 to \$4.95 per hour. Participants were recruited from one of the affiliate offices of ROC-United with a flyer announcing the study, and workers who expressed interest were connected to trained researchers. All participants are self-identified tipped restaurant workers and, therefore, the sample set is not representative of all restaurant workers in the United States or their respective regions. Participants did not receive compensation for participating in the interviews, nor were they obligated to do so as part of their job requirements.
- 37 Ofer H. Azar, *The History of Tipping—from Sixteenth-Century England to United States in the 1910s*, 33 J. Soc.-ECON. 745, 753-54 (2004).
- 38 *Id.* at 754 (citing J.E. SCHEIN ET AL., *THE ART OF TIPPING: CUSTOMS & CONTROVERSIES* (1984)).
- 39 *Id.* at 757.
- 40 *Id.* (citing *Topics in the times*, N.Y. TIMES, Nov. 21, 1899, at 6).
- 41 *Id.* at 762.
- 42 BETH THOMPkins BATES, *PULLMAN PORTERS AND THE RISE OF PROTEST POLITICS IN BLACK AMERICA, 1925-1945*, 22-23 (2001) ("Officials of the Pullman Company admitted in 1915 to the Commission on Industrial Relations that porters were underpaid, that the standard salary of porters—\$27.50 per month—'obliged' porters to secure tips from the public in order to live.").
- 43 KERRY SEGRAVE, *TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES* 32-33, 35 (2009).
- 44 JOSEPH HUSBAND, *THE STORY OF THE PULLMAN CAR* 155 (1917).
- 45 BATES, *supra* note 42, at 18 ("Pullman sleeping car porters were exclusively African Americans except for a brief period in the late twenties when the Pullman Company, in an effort to break the back of the fledgling Brotherhood of Sleeping Car Porters, hired Filipino workers.").
- 46 *Id.* at 161.
- 47 Fair Labor Standards Act of 1938, ch. 676, Pub. L. No. 75-718, § 13(a)(2), 52 Stat. 1060, 1067 (codified as amended at 29 U.S.C. §§ 201-219 (2012)). See generally Douglas & Hackman, *supra* note 28 (discussing in detail the scope of the then newly enacted Fair Labor Standards Act).
- 48 EDWARD D. MANSFIELD, *THE POLITICAL ECONOMY OF THE ITCHING PALM: A CROSS-NATIONAL ANALYSIS OF TIPPING* 6 (2013).
- 49 See *id.* at 25 ("It is widely argued that tipping rates in the U.S. are very high because people working in tipping professions earn low wages and often toil in poor labor conditions. In fact, employers in the U.S. can pay such people as little as \$2.13 per hour (compared to the national minimum wage of \$7.25 per hour) and guidebooks routinely advise foreign travelers that they are expected to tip generously in the U.S. because service workers depend on tips to make a living. It has also been argued that tipping rates in the U.S. have risen as a result of growing income inequality.").
- 50 ENDING JIM CROW, *supra* note 24, at 2.
- 51 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012).
- 52 Allegretto & Cooper, *supra* note 17, at 2.
- 53 *Id.*
- 54 *Id.*
- 55 Minimum Wage Increase Act of 1996, Pub. L. No. 104-188, § 2104, 110 Stat. 1755, 1928-29 (codified as amended at 29 U.S.C. § 206(a)(1) (2012)) (revising the tip credit provisions to allow employers to pay qualifying tipped employees no less than \$2.13 per hour if they received the remainder of the statutory minimum wage in tips); see 29 U.S.C. § 203(m) (setting out provisions that require an employer to make up the difference between the tipped minimum wage (\$2.13) and the standard minimum wage (\$7.25), if their employees' tip earnings are insufficient to do so); see also GERALD MAYER ET AL., CONGRESSIONAL RESEARCH SERVICE, *THE FAIR LABOR STANDARDS ACT: AN OVERVIEW* 4 (2013) (discussing the development of the tipped minimum wage in U.S. federal law).
- 56 Sylvia A. Allegretto, *Waiting for Change: Is it Time to Increase the \$2.13 Subminimum Wage?*, in A PAPER SERIES COMMEMORATING THE 75TH ANNIVERSARY OF THE FAIR LABOR STANDARDS ACT 1 (U.S. Dept. of Lab. and Inst. for Research on Labor and Emp't, Univ. of Cal., Berkeley, 2014) [hereinafter Allegretto, *Waiting for Change: Is it Time to Increase the \$2.13 Sub-*

minimum Wage?].

57 29 U.S.C. § 203(m); 29 C.F.R. § 531.50(a).

58 See generally BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 49-50 (2009) (based on a study of over 4,300 low-wage workers, the authors "estimate[d] that these workers lost an average of \$2,634 annually due to workplace violations, out of total annual earnings of \$17,616" and "estimate[d] that in a given week, approximately 1,114,074 workers in [Chicago, Los Angeles and New York City] have at least one pay-based violation. Extrapolating from this figure, front-line workers in low-wage industries in [these cities] lose more than \$56.4 million *per week* as a result of employment and labor law violations."); EUNICE HYUNHYE CHO ET AL., NATIONAL EMPLOYMENT LAW PROJECT & UCLA LABOR CENTER, *HOLLOW VICTORIES: THE CRISIS FOR COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS* 4 (2013) (discussing the high incidence of wage theft and obstacles to recovery among low wage workers in California).

59 Allegretto & Cooper, *supra* note 17, at 18 (citing author's email correspondence with U.S. Department of Labor program analysts with the Wage and Hour division).

60 Allegretto, *Waiting for Change: Is it Time to Increase the \$2.13 Subminimum Wage?*, *supra* note 56, at 3, 6, n.2.

61 See Wage and Hour Div., *Minimum Wages for Tipped Employees*, *supra* note 4.

62 *Id.*

63 *Id.*

64 See generally Time, *This Map Shows Which Cities Have the Highest Minimum Wages*, U.S. BUSINESS (May 21, 2015) (providing an overview of cities that have increased their minimum wage using data from the National Employment Law Project).

65 L.A., CAL., MUNICIPAL CODE ch. XVIII, art. 7 (American Legal Publishing Corp. through Sept. 30, 2015) (increasing the city's minimum wage from \$9.00 to \$15.00 per hour).

66 In addition to Los Angeles, several other cities within a unitary-minimum wage state have increased their minimum wage. OAKLAND, CAL., CODE OF ORDINANCES ch. 5.92.020 (Municipal Code Corp. through Resolution No. 85111, passed July 15, 2014) (increasing Oakland's minimum wage from \$9.00 to \$12.50 per hour); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 42 (2014) (increasing San Diego's minimum wage from \$9.00 to \$12.50 per hour); S.F., CAL., ADMINISTRATIVE CODE ch. 12R (American Legal Publishing Corp. through Ordinance 183-15, File No. 150758, approved Oct. 16, 2015) (increasing San Francisco's minimum wage from \$9.00 to \$15.00 per hour); SEATTLE, WASH., MUNICIPAL CODE ch. 14.19 (Municipal Code Corp. through Ordinance No. 124843) (increasing Seattle's minimum wage from \$9.47 to \$15.00 per hour).

67 Chicago, Louisville, and Santa Fe also have raised their minimum wage. The City of Chicago passed a local ordinance to phase-in its minimum wage increase to \$13.00 per hour and

its subminimum wage to \$5.50 per hour by the year 2019. CHI., ILL., MUNICIPAL CODE ch. 1-24 (American Legal Publishing Corp. through Council Journal of June 17, 2015). The City of Louisville increased its minimum wage from \$7.75 to \$9.00 per hour, becoming the first city in the South to increase its minimum wage. LOUISVILLE, KY., METRO CODIFIED ORDINANCES § 112.10 (American Legal Publishing Corp. through Ordinances passed by the Council and approved by the Mayor as of Sept. 28, 2015). However, "the Ordinance does not appear to affect the Kentucky law requiring employers to pay tipped employees a minimum of \$2.13/hour." Kathryn A. Quesenberry & Gabriel McGaha, *July 2015 Minimum Wage Increase in Louisville-Metro Jefferson County Kentucky*, NAT'L L. REV., July 2, 2015. The City of Santa Fe increased its minimum wage from \$8.50 to \$10.84 per hour for minimum wage workers, but not for tipped workers. SANTA FE, N.M., CITY CODE ch. 28-1 (Coded Systems through July 29, 2015) ("For workers who customarily receive more than one hundred dollars (\$100) per month in tips or commissions, any tips or commissions received and retained by a worker shall be counted as wages and credited towards satisfaction of the minimum wage provided that, for tipped workers, all tips received by such workers are retained by the workers, except that the pooling of tips among workers shall be permitted."). See generally NAT'L EMP'T LAW PROJECT, *CITY MINIMUM WAGE LAWS: RECENT TRENDS AND ECONOMIC EVIDENCE* 2-3 (2015) (providing a listing of cities throughout the U.S. that have passed local minimum wage ordinances and the rates set); *State and Local Minimum Wage Rates: 2015 (as of July 1)*, NAT'L REST. ASS'N (Apr. 7, 2015).

68 See, e.g., *Recent State Minimum Wage Laws and Current Campaigns*, *supra* note 10; *Potential Ballot Measure in D.C. Would Raise Minimum Wage to \$15*, *supra* note 10; *One Fair Wage: Rhode Island*, *supra* note 10.

69 UDHR, *supra* note 1, art. 23 ("(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests.").

70 International Covenant on Economic, Social and Cultural Rights arts. 6-7, 11, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter ICESCR].

71 *Convention on the Elimination of All Forms of Discrimination against Women*, art. 11, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13, entered into force Sept. 3, 1981 [hereinafter ICEDAW].

72 International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(i), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014

(1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 [hereinafter ICERD].

- 73 ICESCR, *supra* note 70, art. 7(a)(i) (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;”); ICERD, *supra* note 72, art. 5(e)(i) (setting out: “The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration”); ICEDAW, *supra* note 71, art. 11(d) (recognizing “The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;”); Equal Remuneration Convention (ILO No. 100) art. 1, *adopted* June 29, 1951, 165 U.N.T.S. 303 [hereinafter ILO Convention No. 100] (stating: “Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”); Recommendation concerning Discrimination in Respect of Employment and Occupation (ILO No. 111) art. 2(b)(v), *adopted* June 25, 1958 [hereinafter ILO Recommendation No. 111] (“[A]ll persons should, without discrimination, enjoy equality of opportunity and treatment in respect of...remuneration for work of equal value”).
- 74 ICESCR, *supra* note 70, art. 7(a)(i); ICERD, *supra* note 72, art. 5(e)(i); ICEDAW, *supra* note 71, art. 11(d).
- 75 Vienna Convention on the Law of Treaties art. 18, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980 (providing that a state is “obliged to refrain from acts that would defeat the object and purpose” when the state has signed the treaty or expressed its consent to be bound).
- 76 Charter of the Organization of American States arts. 33, 44-46, 1609 U.N.T.S. 119, *entered into force* Dec. 13, 1951 (amended by the Protocol of Buenos Aires of 1967); American Declaration of the Rights and Duties of Man arts. 11, 14-16, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) [hereinafter American Declaration], *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); American Convention on Human Rights art. 26, 1144 U.N.T.S. 123, *entered into force* July 18, 1978; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights arts. 6, 7, 9, 10, 12, 15, O.A.S.T.S. 69, 28 I.L.M. (1989) [hereinafter Protocol of San Salvador].
- 77 American Declaration, *supra* note 76.
- 78 *Id.*
- 79 International Labour Organization (ILO), *Origins and History*

(last visited Oct. 27, 2015).

- 80 ILO, *Introduction to International Labour Standards* (last visited Oct. 27, 2015); *accord* ILO CONST., pmbl. (as adopted in 1919 and amended in 1946 and 1953) (noting that “universal and lasting peace can be established only if it is based upon social justice; [a]nd whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled” and affirming that “an improvement of those conditions is urgently required” through efforts to regulate the hours of work, establish a maximum working day and week, provision of an adequate living wage and recognition of the principle of equal remuneration for work of equal value).
- 81 ILO, *Conventions and Recommendations* (last visited Nov. 8, 2015).
- 82 *Ratifications for the United States*, INTERNATIONAL LABOR ORGANIZATION (last visited Nov. 8, 2015). The United States has ratified only two of the eight fundamental treaties of the ILO (Convention concerning the Abolition of forced Labour (ILO No. 105) and Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182)), and the remaining treaties that it has ratified and which are in force concern governance (Convention concerning Tripartite Consultation to Promote the Implementation of International Labour Standards (ILO No. 144)) and technical issues (Convention concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships (ILO No. 53), Convention concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of a Seaman (ILO No. 55), Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (ILO No. 58), Convention concerning the Certification of Able Seamen (ILO No. 74), Convention for the Partial Revision of the Conventions Adopted by the General Conference of the International Labour Organisation at Its First Twenty-Eight Sessions for the Purpose of Making Provision for the Future Discharge of Certain Chancery Functions Entrusted by the Said Conventions to the Secretary-General of the League of Nations and Introducing therein Certain Further Amendments Consequential upon the Dissolution of the League of Nations and the Amendment of the Constitution of the International Labour Organisation (ILO No. 80), Convention concerning Minimum Standards in Merchant Ships (ILO No. 147), Convention concerning Labour Administration: Role, Functions and Organisation (ILO No. 150), Convention concerning Labour Statistics (No. 160), and Convention concerning Safety and Health in Mines (ILO No. 176)). *Id.* The ILO designates some conventions as expressions of principles so fundamental that they “apply[] to all States belonging to the ILO, whether or not they have ratified the core Conventions.” INTERNATIONAL LABOUR OFFICE, THE INTERNATIONAL LABOUR ORGANIZATION’S FUNDAMENTAL CONVENTIONS 8 (2004) [hereinafter FUNDAMENTAL CONVENTIONS]. *See also id.* at 7 (discussing the nature of a fundamental convention, as being “fundamental to the rights of human beings at work, irrespective of the level of development of individual member

States;” and identifying the four main areas that establish a social “floor” in the world of work: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labour, [and] the elimination of discrimination in respect of employment and occupation).

- 83 ILO Recommendation No. 135, *supra* note 11, arts. 1-2.
- 84 See ACS, *supra* note 35.
- 85 Shierholz, *supra* note 9, at 18 (“When looking at these measures, it is important to note that poverty researchers generally do not consider the poverty threshold to be a good measure of what it takes to make ends meet, in part because the poverty threshold was set in the 1960s and has not evolved to reflect changing shares of spending on various necessities by low-income families. Due to such limitations, the ‘twice-poverty’ rate—the share of people whose income is below twice the official poverty line—is often used as a more meaningful metric for determining what share of workers do not earn enough to make ends meet. For reference, in 2013, the poverty threshold for a family of four was \$23,836, and the twice-poverty threshold was \$47,672.”).
- 86 Sylvia A. Allegretto & Kai Filion, *Waiting for Change: The \$2.13 Federal Subminimum Wage* 5 (Econ. Pol’y Inst. and Ctr. on Wage and Emp. Dynamics, Briefing Paper No. 297, 2011).
- 87 REALIZING THE DREAM, *supra* note 6, at 3.
- 88 The International Covenant on Economic, Social and Cultural Rights, which, together with the Universal Declaration and the International Covenant on Civil and Political Rights, forms what is referred to as the “International Bill of Human Rights.” These instruments lay out fundamental human rights guarantees, including the right to adequate food, clothing, and housing, and to the continuous improvement of living conditions. UDHR, *supra* note 1, art. 25(1) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”); ICESCR, *supra* note 70, arts. 7(a)(ii) and 11(i) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”). See generally Committee on Economic, Cultural and Social Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para. 1) ¶¶ 2-3, contained in* U.N. Doc. No. E/1991/23 (noting with respect to progressive realization that “while the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant” and recalling that “all appropriate means, particularly the adoption of legislative measures” should be employed to satisfy the state’s obligations under the Convention).
- 89 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work*, ¶11, U.N. Doc. No. E/C. 12/GC/18 (Nov. 24, 2005) [hereinafter CESCR, *General Comment No. 18*].
- 90 LAWRENCE MISHLE ET AL., ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2006/2007 2 (2006).
- 91 INTERNATIONAL LABOUR OFFICE, GENERAL SURVEY OF THE REPORTS ON THE MINIMUM WAGE FIXING CONVENTION, 1970 (No. 131), AND THE MINIMUM WAGE FIXING RECOMMENDATION, 1970 (No. 135) 10 (2004) [hereinafter GENERAL SURVEY ON MINIMUM WAGE FIXING].
- 92 *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights*, *supra* note 12 (also stating: “States should: (a) Adopt rigorous labour regulations and ensure their enforcement through a labour inspectorate with adequate capacity and resources to ensure enjoyment of the right to decent working conditions:... (c) Ensure that legal standards regarding just and favourable conditions of work are extended to and respected in the informal economy, and collect disaggregated data assessing the dimensions of informal work;... (f) Put in place specific measures to expand opportunities for persons living in poverty to find decent work in the formal labour market, including through vocational guidance and training and skills development opportunities; (g) Eliminate discrimination in access to employment and training, and ensure that training programmes are accessible to those most vulnerable to poverty and unemployment, including women, migrants and persons with disabilities, and tailored to their needs.”).
- 93 GENERAL SURVEY ON MINIMUM WAGE FIXING, *supra* note 91, at 10.
- 94 See ILO Recommendation No. 30, *supra* note 13, art. IV (stating “For effectively protecting the wages of the workers concerned and safeguarding the employers affected against the possibility of unfair competition, the measures to be taken to ensure that wages are not paid at less than the minimum rates which have been fixed should include: (a) arrangements for informing the employers and workers of the rates in force; (b) official supervision of the rates actually being paid; and (c) penalties for infringements of the rates in force and measures for preventing such infringements.”).
- 95 Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries (ILO No. 131) art. 3(a)-(b), adopted June 22, 1970, 825 U.N.T.S. 77 [hereinafter ILO Convention No. 131].
- 96 ICESCR, *supra* note 70, arts. 7(a)-(b).
- 97 See *id.* art. 7(a)(i) (stating: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particu-

lar women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;"); see also ICERD, *supra* note 72, art. 5(i) (guaranteeing: "The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and *favourable remuneration*."") (emphasis added).

- 98 See ILO Convention No. 131, *supra* note 95, pmb. (noting that the convention is intended to protect wage earners and complement other previous conventions that "protect disadvantaged groups of wage earners"); see also Convention concerning the Creation of Minimum Wage-Fixing Machinery (ILO No. 26) art. 3(2)(3), *adopted* June 16, 1928, 39 U.N.T.S. 3 [hereinafter ILO Convention No. 26] (stating that: "minimum rates of wages which have been fixed shall be binding on the employers and workers concerned so as not to be subject to abatement by them by individual agreement, nor, except with general or particular authorisation of the competent authority, by collective agreement.").
- 99 Convention concerning Working Conditions in Hotels, Restaurants and similar Establishments (ILO No. 172) art. 4, *adopted* June 25, 1991, 1820 U.N.T.S. 000 [hereinafter ILO Convention No. 172] (establishing: "1. Unless otherwise determined by national law or practice, the term *hours of work* means the time during which a worker is at the disposal of the employer. 2. The workers concerned shall be entitled to reasonable normal hours of work and overtime provisions in accordance with national law and practice. 3. The workers concerned shall be provided with reasonable minimum daily and weekly rest periods, in accordance with national law and practice. 4. The workers concerned shall, where possible, have sufficient advance notice of working schedules to enable them to organise their personal and family life accordingly."") (emphasis added).
- 100 See Recommendation concerning Working Conditions in Hotels, Restaurants and similar Establishments (ILO No. 179) art. 11(7)(3), *adopted* June 25, 1991 [hereinafter ILO Recommendation No. 179] (stating: "Overtime work should be compensated by time off with pay, by a higher rate or rates of remuneration for the overtime worked, or by a higher rate of remuneration, as determined in accordance with national law and practice and after consultations between the employer and the workers concerned or their representatives."); see also Reduction of Hours of Work Recommendation (No. 116) art. 19, *adopted* June 26, 1962 (noting: "(1) Overtime work should be remunerated at a higher rate or rates than normal hours of work. (2) The rate or rates of remuneration for overtime should be determined by the competent authority or body in each country: Provided that in no case should the rate be less than that specified in Article 6, paragraph 2, of the Hours of Work (Industry) Convention, 1919.").
- 101 ILO Convention No. 26, *supra* note 98, art. 4(1) (stating: "Each Member which ratifies this Convention shall take the necessary measures, by way of a system of supervision and sanctions, to ensure that the employers and workers concerned are informed of the minimum rates of wages in force and that wages are not paid at less than these rates in cases where they are applicable."); see also ILO Recommendation No. 30, *supra* note 13, art. IV (stating: "For effectively protecting the wages of the workers concerned and safeguarding the employers affected against the possibility of unfair competition, the measures to be taken to ensure that wages are not paid at less than the minimum rates which have been fixed should include: (a) arrangements for informing the employers and workers of the rates in force; (b) official supervision of the rates actually being paid; and (c) penalties for infringements of the rates in force and measures for preventing such infringements.").
- 102 ILO Convention No. 26, *supra* note 98, art. 4(2) (stating: "A worker to whom the minimum rates are applicable and who has been paid wages at less than these rates shall be entitled to recover, by judicial or other legalised proceedings, the amount by which he has been underpaid, subject to such limitation of time as may be determined by national laws or regulations."); Convention concerning Basic Aims and Standards of Social Policy (ILO No. 117) art. 10(4), *adopted* June 22, 1962, 494 U.N.T.S. 249 [hereinafter ILO Convention No. 117] (stating: "A worker to whom minimum rates are applicable and who, since they became applicable, has been paid wages at less than these rates shall be entitled to recover, by judicial or other means authorised by law, the amount by which he has been underpaid, subject to such limitation of time as may be determined by law or regulation.").
- 103 Allegretto, *Waiting for Change: Is it Time to Increase the \$2.13 Subminimum Wage?*, *supra* note 56, at 3 and 6, n.2 (noting extensive wage and hour violations discovered in a Bureau of Labor review which involved 82,000 workers and included 1,170 incidents of improperly calculating tipped worker wages, which resulted in approximately \$5.5 million in back wages, and the department assessed \$2.5 million in civil penalties.).
- 104 HYUNHYE CHO ET AL., *supra* note 58, at 4; see also BERNHARDT ET AL., *supra* note 58, at 59-60. See generally Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year* 1 (Econ. Pol'y Inst. and Ctr. on Wage and Emp. Dynamics, Issue Brief #385, 2014) (discussing the economic consequences the practice).
- 105 CESCR, *General Comment No.14*, *supra* note 14, ¶1.
- 106 *Id.* ¶11; see also UDHR, *supra* note 1, art. 25(1) (affirming: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services"); ICESCR, *supra* note 70, arts. 12(1) (recognizing "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health") and 12(2) (enumerating illustrative examples of "steps to be taken by the States parties ... to achieve the full realization of" the right to health); ICERD, *supra* note 72, art. 5(e) (iv) (guaranteeing the right to "public health, medical care,

social security and social services” without discrimination); ICEDAW, *supra* note 71, arts. 11(1)(f) (ensuring: “The right to protection of health and to safety in working conditions”), 12(1) (requiring State Parties to “eliminate discrimination in the field of health care in order to ensure...access to health-care services, including those related to family planning”), and 12(2) guaranteeing “women appropriate services in connection with pregnancy, confinement, and the postnatal period,” including adequate nutrition during pregnancy and lactation).

- 107 ICESCR, *supra* note 70, art. 12(2) (guaranteeing the reduction of child mortality and their healthy development; improved environmental and industrial hygiene; “the prevention, treatment and control” of disease; and access to medical care for sickness).
- 108 CESCR, *General Comment No. 14*, *supra* note 14, ¶4 (noting “the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment;”); *see also* UDHR, *supra* note 1, art. 25(1) (affirming: “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”); ICESCR, *supra* note 70, arts. 12(1) (recognizing “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”) and 12(2) (enumerating illustrative examples of “steps to be taken by the States parties ... to achieve the full realization of” the right to health).
- 109 CESCR, *General Comment No. 14*, *supra* note 14, ¶15 (noting the improvement of all aspects of environmental and industrial hygiene enshrined in (art. 12.2(b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health).
- 110 *Id.* ¶19.
- 111 Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AM. U. INT’L L. REV. 441, 457 (2011).
- 112 Convention concerning Minimum Standards of Social Security (ILO No. 102) arts. 7, 13, *adopted* June 28, 1952, 210 U.N.T.S. 131 (stating that “[e]ach Member for which this Part of this Convention is in force shall secure to the persons protected the provision of benefit in respect of a condition requiring medical care of a preventive or curative nature” and “the provision of sickness benefit in accordance with the following Articles of this Part” and also setting out limitations for the persons protected; *see also* Convention concerning Medical Care and Sickness Benefits (ILO No. 130) arts. 8, 18, *adopted* June 25, 1969, 826 U.N.T.S. 3 [hereinafter ILO Convention No. 130] (stating that “[e]ach Member shall secure to the persons protected, subject to the prescribed conditions, the provision of medical care of a curative or preventive nature” and “the provision of sickness benefit.”).
- 113 ILO Convention No. 130, *supra* note 112, art. 9.
- 114 Recommendation concerning Medical Care and Sickness Benefits (ILO No. 134).
- 115 *Id.* art. 7(a).
- 116 CESCR, *General Comment No. 14*, *supra* note 14, ¶12(b).
- 117 Elizabeth Tobin Tyler, “Small Places Close to Home”: Toward a Health and Human Rights Strategy for the U.S., 15 HEALTH & HUM. RTS. 80, 84 (2013) (citing David Orentlicher, *Rights to Health Care in the US: Inherently Unstable*, 38 AM. J. L. & MED. 326, 326 (2012)).
- 118 42 U.S.C. § 2000d (2012).
- 119 *See generally* Tyler, *supra* note 117, at 86. For example, Article XVII of the New York State Constitution imposes an affirmative duty on the state to address the health of its inhabitants: “The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner and by such means as the legislature shall from time to time determine.” N.Y. CONST. art. XVII, § 3 (West, Westlaw through Nov. 2001 amendments).
- 120 Act Relating to a Universal and Unified Health System, VT. STAT. ch. 48, § 1(a) (2011) (setting out the purpose of the law “to provide, as a public good, comprehensive, affordable, high-quality, publicly financed health care coverage for all Vermont residents in a seamless manner regardless of income, assets, health status, or availability of other health coverage.”).
- 121 BKD: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY, *supra* note 16 (presenting key findings from the organizations national survey data of 2011); *see also* Cowley, *supra* note 16 (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.”); BKD: THE HIGHS AND LOWS OF SEATTLE’S BOOMING RESTAURANT INDUSTRY, *supra* note 16, at 17 (reporting that “A significant majority of restaurant workers do not receive workplace benefits such as employer-provided health coverage (87.7%).”); BKD: EXTREME INEQUALITY AND OPPORTUNITY IN HOUSTON’S VIBRANT RESTAURANT ECONOMY, *supra* note 16, at 13 (reporting that 93.1% of tipped restaurant workers in Houston do not have employer-provided health insurance).
- 122 Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard

- of Living, and on the Right to Non-Discrimination in this Context (Leilani Farha), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, ¶ 37, U.N. GAOR, U.N. Doc. No. A/69/274 (Aug. 7, 2014) [hereinafter *SR Report on Adequate Housing*].
- 123** Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 1, contained in U.N. Doc. No. E/1992/23 (Dec. 13, 1991) [hereinafter CESCR, *General Comment No. 4*].
- 124** *SR Report on Adequate Housing*, *supra* note 122, ¶ 18.
- 125** CESCR, *General Comment No. 4*, *supra* note 123, ¶ 8(a)-(g); see also ICESCR, *supra* note 70, art. 11.
- 126** See *SR Report on Adequate Housing*, *supra* note 122, ¶ 45.
- 127** Human Rights Council Res. 6/27, Adequate Housing as a Component of the Right to an Adequate Standard of Living, 6th Sess., Sept. 10-28, 2007, U.N. GAOR, A/HRC/6/22, at 51 (Apr. 14, 2008); see *SR Report on Adequate Housing*, *supra* note 122, ¶ 37 (stating that “[i]n order to be effective, strategies to address violations of the right to adequate housing must be based on an equality rights framework and must address the systemic patterns of discrimination and inequality that deprive particular groups of equal enjoyment of that right.”).
- 128** *SR Report on Adequate Housing*, *supra* note 122, ¶ 29.
- 129** See Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. 3601-3619, 3631 (2012)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 42 U.S.C. and 28 U.S.C.); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (noting that “Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”).
- 130** See, e.g., 42 U.S.C. § 1437 (2012) (providing for federally subsidized and regulated public housing developments for low-income tenants); 42 U.S.C. § 1437f(o) (2012) (establishing the section 8 voucher program); 12 U.S.C. § 1701q (2012) (setting out a program of federal funding to non-profit organizations for the development of housing tailored to the needs of elderly tenants); Supportive Housing for Persons with Disabilities, 42 U.S.C. § 8013 (2012) (creating program of federal grants to non-profit organizations for the development of low-rent housing for persons with disabilities); see also MAGGIE MCCARTY ET AL., CONGRESSIONAL RESEARCH SERVICE, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY (2014) (providing a comprehensive overview of the history and current state of U.S. federal housing assistance programs); NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY (NLCHP), “SIMPLY UNACCEPTABLE:” HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 2011 29-33 (2011) (analyzing the scope and limitations of federal housing programs from an international human rights perspective).
- 131** Fair Housing Act, *supra* note 129, § 3604 (relating to discrimination in the sale or rental of housing and other prohibited practices) and § 3605 (relating to discrimination in residential real estate-related transactions). See generally NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES (5th ed. 2011) (discussing the application of the human right to adequate housing to the U.S. context and advocacy strategies to promote this right).
- 132** Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11)*, ¶ 4, U.N. Doc. No. E/C.12/1999/5 (May 12, 1999).
- 133** *Id.* ¶ 8.
- 134** *Id.* ¶ 13.
- 135** Special Rapporteur on the Right to Food (Olivier De Schutter), *Interim Report of the Special Rapporteur on the Right to Food*, ¶ 47, U.N. GAOR, U.N. Doc. No. A/68/288 (Aug. 7, 2013).
- 136** Press Release, Office of the High Comm’r for Hum. Rts., *End of Mission statement by the Special Rapporteur on Right to Food Mission to Malaysia from 9 to 19 December 2013*, U.N. Press Release (Dec. 18, 2013). Special Rapporteur on the Right to Food (Olivier De Schutter), *Report of the Special Rapporteur on the Right to Food, Mission to Malaysia*, ¶ 38, Hum. Rts. Council, U.N. Doc. No. A/HRC/25/57/Add.2 (Feb. 3, 2014) [hereinafter *SR on Food, Malaysia Report*].
- 137** *SR on Food, Malaysia Report*, *supra* note 136, ¶ 38.
- 138** Rep. of the Comm. of Experts on the Application of Conventions and Recommendations (arts. 19, 22 and 35 of the Constitution), Minimum Wage Systems: General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), 10, International Labour Conference, 103rd Sess. (2014) (“In 2010, following the recurrent discussion on employment, the Conference concluded that governments of member States should design and promote policies in regard to wages and earnings, hours and other conditions of work that ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection, and consider options such as minimum wages that can reduce poverty and inequity, increase demand and contribute to economic stability.”).
- 139** Allegretto & Cooper, *supra* note 17, at 12.
- 140** REALIZING THE DREAM, *supra* note 6, at 4.
- 141** FOOD CHAIN WORKERS ALLIANCE ET AL., FOOD INSECURITY OF RESTAURANT WORKERS 5 (July 24, 2014).
- 142** 7 U.S.C. §§ 2011-2036 (2012).
- 143** 42 U.S.C. §§ 1751-1769 (2012).
- 144** 42 U.S.C. § 1773 (2012).
- 145** 42 U.S.C. § 1786 (2012).

- 146** For example, in March, 2015, legislators in the State of Maine proposed the following amendment to the state Constitution which would establishing a right to food in law: “Every individual has a natural and unalienable right to food and to acquire food for that individual’s own nourishment and sustenance by hunting, gathering, foraging, farming, fishing or gardening or by barter, trade or purchase from sources of that individual’s own choosing, and every individual is fully responsible for the exercise of this right, which may not be infringed.” H.R. 783, 127th Leg., Reg. Sess. (Me. 2015).
- 147** UDHR, *supra* note 1, art. 16(3).
- 148** *Id.* art. 23(3) (specifying that “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”).
- 149** ICESCR, *supra* note 70, art. 10(1).
- 150** Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO No. 156) art. 3(1), *adopted* June 23, 1981, 1331 U.N.T.S. 295 [hereinafter ILO Convention No. 156] (reading, in full: “With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.”).
- 151** Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO No. 165) art. 18(b), *adopted* June 23, 1981 [hereinafter ILO Recommendation No. 165] (also noting: “Particular attention should be given to general measures for improving working conditions and the quality of working life, including measures aiming at... more flexible arrangements as regards working schedules, rest periods and holidays, account being taken of the stage of development and the particular needs of the country and of different sectors of activity.”).
- 152** ILO Convention No. 156, *supra* note 150, art. 5(b) (stating: “All measures compatible with national conditions and possibilities shall further be taken... to develop or promote community services, public or private, such as child-care and family services and facilities.”).
- 153** ILO Recommendation No. 165, *supra* note 151, art. 15 (recommending that “Workers with family responsibilities should enjoy equality of opportunity and treatment with other workers in relation to preparation for employment, access to employment, advancement within employment and employment security.”).
- 154** JOAN C. WILLIAMS ET AL., AARP PUB. POLICY INST., PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 6 (2012). Rather, family responsibilities discrimination claims in the workplace “have been framed from other legal theories in federal and state law,” for example, as sex discrimination or violation of family and medical leave laws. *Id.* See generally EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION, UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007) (discussing the circumstances under which discrimination against caregivers might constitute unlawful disparate treatment in the absence of federal equal employment opportunity laws explicitly prohibiting such discrimination).
- 155** Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2012).
- 156** Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012).
- 157** Rehabilitation Act, 29 U.S.C. §§ 701-797b (2012).
- 158** Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2012); 26 U.S.C. §§ 401-415, 4972-4975 (2012).
- 159** Wage and Hour Div., *Families and Employers in a Changing Economy*, U.S. DEP’T OF LAB. (last visited Nov. 15, 2015) (noting that, based on two 1995 studies commissioned by the U.S. Department of Labor: “Approximately two thirds (66.1 percent) of the U.S. labor force, including private and public sector employees, work for employers covered by the FMLA. Slightly more than half (54.9 percent) of U.S. workers (and 46.5 percent of private sector workers) also meet the FMLA’s length of service and hours related eligibility requirements”).
- 160** WILLIAMS ET AL., *supra* note 154, at 8.
- 161** *Id.* at 10.
- 162** ILO Convention No. 111, *supra* note 18, art. 2.
- 163** See, e.g., UDHR, *supra* note 1, art. 2; International Covenant on Civil and Political Rights art. 2(1), *entered into force* Oct. 5, 1977, 999 U.N.T.S. 171; ICESCR, *supra* note 70, art. 2(1); ICERD, *supra* note 72, arts. 1(1) and 2; ICEDAW, *supra* note 71, arts. 1 and 2; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 1, *entered into force* June 26, 1987, 1465 U.N.T.S. 85.
- 164** ICERD, *supra* note 72; ICEDAW, *supra* note 71.
- 165** CESCR, *General Comment No. 18*, *supra* note 89, ¶ 33.
- 166** Report on Gender Equality at the Heart of Decent Work, *supra* note 19, ¶ 31.
- 167** ILO Convention No. 111, *supra* note 18, art. 2.
- 168** *Id.* art. 1(a).
- 169** *Ratifications of C111-Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, INTERNATIONAL LABOUR ORGANIZATION (last visited Nov. 18, 2015).
- 170** See Report on Gender Equality at the Heart of Decent Work, *supra* note 19, ¶ 31.
- 171** International Labour Conference, *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*,

86th Sess., ¶ 2 (June 18, 1998) (annex revised June 15, 2010).

- 172** Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 20 on Article 5 of the Convention*, ¶ 2, U.N. Doc. No.A/51/18, annex VIII at 124 (Mar. 14, 1996) (establishing: “Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to *all within its jurisdiction*, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards.”) (emphasis added).
- 173** ICESCR, *supra* note 70, art. 2(2) (stipulating: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).
- 174** See ILO Convention No. 111, *supra* note 18, art. 1(1)(a) (defining discrimination to include “any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”); Discrimination (Employment and Occupation) Recommendation (No. 111) art. 1(1)(a), *adopted* June 25, 1958; Rpt. of the High Comm’r for Human Rights, *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Nondiscrimination in the Context of Globalization*, ¶ 12, U.N. Doc. E/CN.4/2004/40, (Jan. 15, 2004), COMM. ON HUM. RTS., 60th Sess., Mar. 15-Apr. 23, 2004 (noting that “indirect discrimination occurs when a neutral measure has a disparate and discriminatory effect on different groups of people and that measure cannot be justified by reasonable and objective criteria. Indirect discrimination recognizes that treating unequals equally can lead to unequal results which can have the effect of petrifying inequality. Combating indirect discrimination is an important means of dealing with the institutional and structural biases—often unintentional and unperceived—that result in discrimination and that act as impediments to the achievement of equal human rights for all.”).
- 175** ICERD, *supra* note 72, art. 5(a)(i) (stipulating that: “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . The rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.”); ICEDAW, *supra* note 71, art. 11(1) (d) (stating that: “The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”); Protocol of San Salvador, *supra* note 76, art. 7 (specifying that “particularly with respect to: . . . Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction.”).
- 176** ILO CONST., pmb. (1919), amended Nov. 1, 1974 (setting out that “whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example by... recognition of the principle of equal remuneration for work of equal value.”).
- 177** ILO Convention No. 117, *supra* note 102, art. 14(1)(i) (establishing: “It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of... wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.”).
- 178** *Id.* art. 14(2) (requiring: “All practicable measures shall be taken to lessen, by raising the rates applicable to the lower-paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, sex, belief, tribal association or trade union affiliation.”).
- 179** ICEDAW, *supra* note 71, pmb.
- 180** ICESCR, *supra* note 70, art. 3; ICEDAW, *supra* note 71, art. 1.
- 181** ICEDAW, *supra* note 71, art. 1; ILO Convention No. 111, *supra* note 18, art. 2.; Inter-Am. Comm’n on Human Rights, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, ¶ 86, OEA/Ser.L/V/II.143 Doc. 59 (Nov. 3, 2011) (addressing the body of international law specific to discrimination against women, the Inter-American Commission on Human Rights notes that “[a]s previously observed, both the international and inter-American human rights systems have recognized women’s right to work free from any form of discrimination.”).
- 182** ICEDAW, *supra* note 71, art. 1.
- 183** *Id.* art. 2 (mandating that: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: . . . (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”).
- 184** ICESCR, *supra* note 70, art. 7(a)(i) (recognizing that the right to work contains equal pay for equal work); CESC, *General Comment No. 18*, *supra* note 89, ¶ 13 (underlining “the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal

value.”); see also Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social, and Cultural Rights* (art. 3 of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 23-24, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter CESCR, *General Comment No. 16*] (noting “men and women have equal access to jobs at all levels and all occupations and that vocational training and guidance programmes... provide men and women with the skills, information and knowledge necessary for them to benefit equally from the right to work” and setting out that “the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist”); see also Inter-Am. Comm’n on Human Rights, *supra* note 181, ¶ 11 (noting that many states in the region have “crafted their laws to recognize the principle of equal pay for equal work for men and women”).

- 185 *Ratifications of C-100 Equal Remuneration Convention, 1951 (No. 100)*, INTERNATIONAL LABOUR ORGANIZATION (last visited Nov. 12, 2015); ILO Convention No. 100, *supra* note 73, art. 2(1) (providing: “Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”). See also FUNDAMENTAL CONVENTIONS, *supra* note 82.
- 186 See generally ENDING JIM CROW, *supra* note 24; RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., *TIPPED OVER THE EDGE: GENDER INEQUITY IN THE RESTAURANT INDUSTRY* (2012).
- 187 María Elena Valenzuela, *Desigualdad de Género y Pobreza en América Latina*, in MUJERES, POBREZA Y MERCADO DE TRABAJO: ARGENTINA Y PARAGUAY 42-43 (María Elena Valenzuela ed., 2003).
- 188 Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO No. 90) art. 3(1), adopted June 29, 1951 [hereinafter ILO Recommendation No. 90] (recommending “[w]here appropriate in the light of the methods in operation for the determination of rates of remuneration, provision should be made by legal enactment for the general application of the principle of equal remuneration for men and women workers for work of equal value.”); *id.* art. 2(a) (noting that: “Appropriate action should be taken...to ensure...the application of the principle of equal remuneration for men and women workers for work of equal value in all occupations...in which rates of remuneration are subject to statutory regulation... particularly as regards—the establishment of minimum... wage rates.”).
- 189 Gen. Conf. of the Int’l Labour Org. Resolution Concerning Gender Equality at the Heart of Decent Work, 98th Sess., June 3-19, 2009 (adopted on June 17, 2009).
- 190 Report on Gender Equality at the Heart of Decent Work, *supra* note 19, ¶ 58. The report notes in this regard “[t]he

data show that about 829 million people living below the poverty line were female (girls and young, adult and older women), compared with about 522 million in the same situation who were male. These findings confirm that poverty is increasingly feminized.”).

- 191 Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (codified as amended in part at 29 U.S.C. § 206(d)(1) (2012)) (“prohibit[ing] sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.”); see also Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 253 (codified as amended in part at 42 U.S.C. §§ 2000e (2013); Civil Rights Act of 1991, Publ. L. 102-166, 105 Stat. 1071 (codified as amended in part at 42 U.S.C. § 1981A (2013)) (amending Title VII to “provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII.”); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5, 5-6 (codified as amended at 42 U.S.C. § 2000a (2013)) (amending the statute of limitations set out in Title VII to begin or be reset with the issuance of each paycheck, rather than the original discriminatory action). See generally, BENJAMIN COLLINS AND JODY FEDER, CONGRESSIONAL RESEARCH SERVICE, *PAY EQUITY: LEGISLATIVE AND LEGAL DEVELOPMENTS* (2013) (discussing the development of the EPA and subsequent related legislation, and presenting data on the pay gap).
- 192 CEDAW, *General Recommendation No. 19*, *supra* note 19, at ¶ 17 (recognizing that “equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.”); Report on Gender Equality at the Heart of Decent Work, *supra* note 19, ¶ 229 (“Like gender-based violence [examined earlier in this report], sexual harassment at work is a human rights and sex discrimination issue, and has accordingly been examined in the light of the requirements of Convention No. 111.”).
- 193 CEDAW, *General Recommendation No. 19*, *supra* note 19, ¶ 18 (recognizing that “[s]exual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions.”); see also INT’L LABOUR OFFICE, *ABC OF WOMEN WORKERS’ RIGHTS AND GENDER EQUALITY* 165 (2d ed. 2007) (explaining that: “Sexual harassment may consist of insults, remarks, jokes and insinuations of a sexual nature and inappropriate comments on a person’s dress, physique, age or family situation; undesired and unnecessary physical contact such as touching, caresses, pinching or assault; embarrassing remarks and other verbal harassment; lascivious looks and gestures associated with sexuality; compromising invitations; requests or demands for sexual favours; explicit or implied threats of dismissal, refusal of promotion, etc. if sexual favours are not granted.”). International instruments also call for additional protections for women workers. For instance, ICEDAW proscribes that “[s]pecial protection[s] should be accorded to mothers during a reasonable period before and after childbirth.”

- ICEDAW, *supra* note 71, art. 10; see also *id.* art. 11(2) (stating that “[i]n order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures to prohibit discrimination based on pregnancy or marriage, ensure paid maternity leave, encourage provision of childcare to working parents, and provide women protection at from harmful duties.”).
- 194** CEDAW, *General Recommendation No. 19*, *supra* note 19, ¶ 18 (also noting that “[sexual harassment] can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”).
- 195** *Id.* ¶ 24(j) (recommending: “States [i]nclude in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace.”).
- 196** *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a state law that gave preference to men over women in the administration of a deceased child’s estate violated the Equal Protection Clause of the U.S. Constitution); see *Craig v. Boren*, 429 U.S. 190 (1976) (establishing that the legal test for gender-based discrimination is “intermediate scrutiny” which requires that the government demonstrate that specific, important governmental objectives exist to justify the law or policy and that the law is substantially related to the achievement of those objectives).
- 197** *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that an employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children under Title VII of the Civil Rights Act of 1964).
- 198** *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that employees could sue their employers for sexual harassment under Title VII of the Civil Rights Act of 1964); See generally Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333 (1990).
- 199** Report on Gender Equality at the Heart of Decent Work, *supra* note 19, ¶ 230 (observing that “National research establishes beyond doubt that women are far more likely than men to suffer sexual harassment at work.”).
- 200** Tahmincioglu, *supra* note 20 (establishing that 75 of 400 discrimination cases and settlements reported by the federal government from January to October 2011 involved sexual harassment and 26 of these came from the food service industry).
- 201** Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (Mutuma Ruteere), *Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶15, Hum. Rts. Council, U.N. Doc. No. A/HRC/20/33 (May 15, 2012) (citation omitted).
- 202** See instruments cited in *supra* note 163.
- 203** The United States ratified the ICERD with several reservations, declarations and understandings, one of which specifies that the treaty would not be self-executing, meaning that the government would need to pass federal legislation in order for individuals to enforce rights pursuant to the treaty in U.S. courts. *Chapter IV, Human Rights, 2. International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION (current as of Nov. 18, 2015).
- 204** ICERD, *supra* note 72, art. 2(a) (providing: “Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”).
- 205** *Id.* art. 2(1)(c) (requiring: “Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”).
- 206** World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 32, U.N. Doc. A/ Conf.189/12 (Aug. 31 - Sept. 8 2001); see also U.S. HUMAN RIGHTS NETWORK LABOR NETWORK, LABOR AND EMPLOYMENT RIGHTS IN THE UNITED STATES: A CRITICAL LOOK AT U.S. COMPLIANCE WITH THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 2 (Feb. 2008) (citations omitted) [hereinafter LABOR AND EMPLOYMENT RIGHTS].
- 207** ILO Convention No. 111, *supra* note 18, arts. 2-3 (obligating states to promote “equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof” and “to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy”); see also ILO Recommendation No. 111, *supra* note 73, art. 2 (calling on member states to formulate national policies and employers to incorporate policies and procedures aimed at addressing discrimination in employment in line with the principles of equality of opportunity and treatment, equal access to training and employment of the employees’ own choice on the basis of their individual suitability, merit-based advancement, security of tenure of employment; remuneration for work of equal value; fair conditions of work, and access to social security measures and welfare facilities and benefits provided in connection with employment).
- 208** LABOR AND EMPLOYMENT RIGHTS, *supra* note 206, at 2.
- 209** *Id.* at 10 (discussing categories of worker exclusion, including by industry, by agricultural work, and by citizenship determination).
- 210** REALIZING THE DREAM, *supra* note 6, at 1 (based on data analy-

sis conducted by the Institute for Women's Policy Research of the 2012 Current Population Survey Annual Social and Economic Supplement for ROC-United).

- 211 Shierholz, *supra* note 9, at 18.
- 212 BKD: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY, *supra* note 21, at 33 ("While in an ideal world, one would expect these demographics to remain consistent across occupations in the restaurant industry, this is not the case. Rather, a greater proportion of workers of color are relegated to the lowest paying jobs under the worst workplace conditions, while underrepresented white workers are employed primarily in better positions. As a result, disparities in job quality between the front of the house and the back of the house have disproportionate impacts on workers of color."). For example, a 2000 study found that undocumented immigrants are estimated to comprise 28% of dishwashers. JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, PEW HISPANIC CENTER, PEW HISPANIC CENTER 15 (2009). A recent study found that "Blacks are disproportionately likely to be cashiers/counter attendants, the lowest-paid occupation. Hispanics are disproportionately likely to be dishwashers, dining room attendants, and cooks, also relatively low-paid occupations. Asians are disproportionately likely to be chefs/head cooks. White non-Hispanics are disproportionately likely to be hosts/hostesses, wait staff, bartenders, and managers." Shierholz, *supra* note 9, at 8.
- 213 Korematsu v. United States, 323 U.S. 214 (1944) (the first case establishing that, under the 14th Amendment of the U.S. Constitution, race-based classifications are suspect and are subject to a "strict scrutiny" test which requires that the state demonstrate that the law or policy in question serves a compelling governmental interest, is narrowly tailored to achieve that interest, and that it is the least restrictive means to achieving that interest).
- 214 Guide to Employment Law and Regulation §§ 21:4, 22:2, 23:4, [etc. for a total of 51 jurisdictions, inc. DC] (2d ed. West), Westlaw (database updated September 2015).
- 215 42 U.S.C. § 2000e-2(a)(1)-(2) (2012) (establishing that it is unlawful for an employer (1) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").
- 216 42 U.S.C. § 2000e-2(k) (2012) (setting out the terms under which an unlawful employment practice may be established based on disparate impact).
- 217 BKD: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY, *supra* note 21, at 2.
- 218 THE GREAT SERVICE DIVIDE, *supra* note 26, at 15; see also BKD: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY, *supra* note 21, at 2 (reporting that 33% of surveyed workers reported that they or a co-worker had been passed over for a promotion, which they attributed to race, immigration status, or language fluency).
- 219 ICESCR, *supra* note 70, art. 6(2) (provision of technical and vocational guidance and training programmes) and art. 7 (opportunity for promotion); ICEDAW, *supra* note 71, art. 11(c) (vocational training); ICERD, *supra* note 72, art. 5(e)(v)(the right to education and training.); ILO Recommendation No. 111, *supra* note 73, art. 2(b)(i)-(iii) (formulation of national policy to prevent discrimination in employment).
- 220 Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (ILO No. 142) *adopted* June 23, 1975, 1050 U.N.T.S. 9 [hereinafter ILO Convention No. 142]. In contrast, Title VII prohibits discrimination in training programs, but does not require employers to develop these programs. 42 U.S.C. § 2000e(d) (2012).
- 221 ILO Convention No. 142, *supra* note 220, arts. 1(1), 1(5).
- 222 Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (ILO No. 195) art. 3(b), *adopted* June 17, 2004 [hereinafter ILO Recommendation No. 195] (recommending that "Members should identify human resources development, education, training and lifelong learning policies which... give equal consideration to economic and social objectives, emphasize sustainable economic development in the context of the globalizing economy and the knowledge- and skills-based society, as well as the development of competencies, promotion of decent work, job retention, social development, social inclusion and poverty reduction.").
- 223 ILO Recommendation No. 179, *supra* note 100, art. 12.
- 224 ILO Recommendation No. 90, *supra* note 188, art. 6(a) (recommending appropriate action to ensure workers of both sexes have equal or equivalent facilities for vocational training and for placement); see also ILO Recommendation No. 195, *supra* note 222, art. 5(g) (recommending that States should "promote equal opportunities for women and men in education, training and lifelong learning"); see also ILO Convention No. 117, *supra* note 102, art. 14(1)(c)-(d) (recommending that States should advance policy objectives aimed at abolishing all discrimination among workers with regard to "conditions of engagement and promotion [and] opportunities for vocational training").

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