



**NRA/CSRA Joint State
Restaurant Association
Members**

Alabama Restaurant Association
Alaska CHARR
Arizona Restaurant Association
Arkansas Hospitality Association
California Restaurant Association
Colorado Restaurant Association
Connecticut Restaurant Association
Delaware Restaurant Association
Florida Restaurant & Lodging
Association
Georgia Restaurant Association
Hawaii Restaurant Association
Idaho Lodging & Restaurant
Association
Illinois Restaurant Association
Restaurant & Hospitality
Association of Indiana
Iowa Restaurant Association
Kansas Restaurant & Hospitality
Association
Kentucky Restaurant Association
Louisiana Restaurant Association
Maine Restaurant Association
Restaurant Association of Maryland
Massachusetts Restaurant
Association
Michigan Restaurant Association
Minnesota Restaurant Association
Mississippi Hospitality & Restaurant
Association
Missouri Restaurant Association
Montana Restaurant Association
Nebraska Restaurant Association
Nevada Restaurant Association
New Hampshire Lodging
& Restaurant Association
New Jersey Restaurant Association
New Mexico Restaurant Association
New York State Restaurant
Association
North Carolina Restaurant
& Lodging Association
North Dakota Hospitality
Association
Ohio Restaurant Association
Oklahoma Restaurant Association
Oregon Restaurant & Lodging
Association
Pennsylvania Restaurant Association
Puerto Rico Restaurant Association
Rhode Island Hospitality Association
South Carolina Hospitality
Association
South Dakota Retailers Association
Tennessee Hospitality Association
Texas Restaurant Association
Utah Restaurant Association
Vermont Hospitality Council
Virginia Hospitality & Travel
Association
Washington Restaurant Association
West Virginia Hospitality & Travel
Association
Wisconsin Restaurant Association
Wyoming Lodging & Restaurant
Association

April 22, 2011

Montaniel Navarro
FLSA Branch Chief
Wage and Hour Division
US Department of Labor
200 Constitution Avenue, NW.
Room S-3502
Washington, DC 20210
(202) 693-0067

***RE: Final Rule on "Updating Regulations Issued Under the Fair Labor
Standards Act," 76 FR 18832 (April 5, 2011).***

Dear Mr. Navarro:

We are writing to request the Wage and Hour Division of the US Department of Labor to immediately publish notification withdrawing implementation of two sections—one dealing with tip credit notice and the other with tip ownership—of the Final Rule on "Updating Regulations Issued Under the Fair Labor Standards Act," published in the *Federal Register* on April 5, 2011 (76 FR 18832).

In the alternative, as to the tip credit notice section of the Final Rule, we would appreciate an immediate publication to delay implementation for 120 days, so we can poll our members as to the impact and meet to discuss our concerns. We want to work together with the US Department of Labor (DOL) on the new tip notice section to seek a less burdensome alternative for compliance and to educate our members as to how to comply with any new requirements.

The National Restaurant Association is the leading business association for the restaurant and food service industry. The industry is comprised of 960,000 restaurant and foodservice outlets employing 12.8 million people. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer.

No other industry will be more affected by the new tip credit regulatory requirements found in the Final Rule than the restaurant and hospitality industry

members that we represent. In addition, some of the notice requirements appear in the Final Rule for the first time.

Specifically, our first major concern with the Final Rule is the fact that, without any notice and comment process, it mandates new precise and burdensome notice requirements on employers never mentioned, or anticipated, in the notice of proposed rulemaking (NPRM) published in the *Federal Register* on July 28, 2008 (73 FR 43654). We would like to suggest, and would also support, for DOL to reinstate the changes proposed in the NPRM to 29 CFR § 531.59.

Clearly, the new Final Rule makes major and significant changes to the NPRM notice requirement with at least six new notice requirements and a strong suggestion for these notices to be done in writing. This is significant in our industry where there are 2.4 million waitstaff and 500,000 bartenders that are considered directly tipped employees. In addition to the notice and comment requirement under the Administrative Procedure Act, the publication of the new notice requirements may also fail to meet other procedural safeguards, such as those found in the Regulatory Flexibility Act.

In addition, there has been no public outreach, other than publication about two weeks ago in the *Federal Register*, by DOL to prepare employers for the new and enhanced notice requirements. Most employers are not currently aware or positioned to accurately and fully comply with these new and enhanced notice requirements. Withdrawal of the new and enhanced notice requirements that did not benefit from the required notice and comment process, or a 120 day delay for us to poll our members about the changes and then meet with you and explain our concerns, would be very helpful to assist with compliance. Again, we would support reinstating the changes proposed in the NPRM to 29 CFR § 531.59, which were subject to notice and comment.

Our second concern is with the Final Rule's attempt to apply tip credit regulations regarding tip ownership to employers that pay full minimum wage and do not rely on the tip credit. While this issue was covered in the prior NPRM, as stated in the preamble, one US Circuit Court of Appeals has spoken directly on this issue. The exact arguments raised in the Final Rule's preamble, as DOL readily admits, were directly and unequivocally rejected last year by the US Ninth Circuit Court of Appeals in *Cumbie v. Woody Woo, Inc., et al.*, No. 08-35718 (9th Cir. Feb. 23, 2010).

No case is cited on point contradicting the decision of the Ninth Circuit and no mention is made of the fact that employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington are still subject to the decision in *Woody Woo, Inc.* The Final Rule does not explain the significance of the disagreement between DOL and the Ninth Circuit on workers in a region that encompasses 20% of the US population. Withdrawal of this interpretation is warranted.

Indeed, this interpretation needs to be clarified, particularly for those employers doing business in states under the jurisdiction of the US Ninth Circuit Court of Appeals where the

decision in *Woody Woo, Inc.* is binding precedent. Does DOL expect employers in the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) to abide by DOL's interpretation? If so, would this be contrary to the directive of the US Ninth Circuit Court of Appeals directive last year in *Woody Woo, Inc.*?

In accordance with President Obama's Executive Order 13563, we call on DOL to "seek the views of those who are likely to be affected...and those who are potentially subject to such rulemaking" with respect to the new tip notice regulation before implementing the new tip credit notice requirements. We also ask DOL to withdraw its regulatory interpretation of tip ownership in light of the lack of any court support, the contrary position and rejection of DOL's interpretation by the US Ninth Circuit Court of Appeals last year, and the confusion DOL's interpretation would immediately have for restaurants in states covered by last year's ruling as well as on industry elsewhere.

We commend DOL for seeking comments on how to improve its existing regulations by modifying, streamlining, or repealing them. (*See* "Reducing Regulatory Burden; Retrospective Review Under E.O. 13563," 76 *FR* 15224 (March 21, 2011).) Likewise, an immediate withdrawal of the two sections, or 120 day delay as to the tip notice section, would lessen the burdens on employers and allow DOL time to meet with us—the representatives for the industry most affected.

We look forward to meeting with you to expand on the concerns outlined here and give you more detailed feedback on these issues, while continuing to work with DOL to properly inform and educate our members.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Amador", with a large, sweeping flourish extending to the right.

Angelo I. Amador, Esq.
Vice President
Labor and Workforce Policy
National Restaurant Association