

# BRIEFING

 Trends and events shaping foodservice in the Americas region

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Sikarachat Baisamut's family has been serving pad Thai since the Second World War





## TAXING ISSUES

Amelia Levin rounds up the latest developments in two hot topics in foodservice: taxes and tips



**R**estaurants and restaurant workers have been taking action at the Capitol, fighting for revisions to the federal tax reform and for better protections for tips.

In June, more than 100 retail and restaurant companies and associations wrote to members of the House and Senate tax-writing committees, urging them to take quick action on technical corrections to the federal tax reform law that took effect this year, arguing that drafting errors related to depreciation rules and “carryback” of operating losses are costing millions of dollars.

“The delay in correcting these provisions has caused economic hardship for some retailers and restaurants and is delaying investments across the economy,” the National Retail Federation, NRF’s National Council of Chain Restaurants, the Retail Industry Leaders Association and other groups said in the letter.

Under the Tax Cuts and Jobs Act, remodeling and other improvements to

stores or restaurants are supposed to be fully depreciated in the first year the work is done. Instead, the letter asserts, a mistake in the legislative language requires that depreciation occur over 39 years. Congressional officials have conceded that the 39-year requirement is a drafting error but had not yet, at time of going to press, corrected the mistake.

“This very large difference in the after-tax cost of making improvements is causing a delay in some store and restaurant remodeling projects, as well as causing some retailers to decline opportunities to purchase or lease new store locations that would require substantial improvements,” the letter said. “These decisions not only deny communities the jobs associated with substantial construction projects, but also deny our communities the opportunity to bring new, permanent jobs to an otherwise abandoned store or to revitalize a declining mall.”

## “The law cannot be more clear: tips belong to workers and no one else. This landmark victory belongs to all the tipped workers in America”

In another error, the effective date of carryback eligibility was recorded incorrectly, which could result in a retroactive tax increase on businesses that are in loss positions and facing liquidity issues. “This timing difference is critical to cash-strapped businesses that were counting on the carryback to finance continuing operations as well as investments needed to revitalize their businesses,” according to the letter.

### Time for tips

On the workers’ rights front, restaurant employees scored an historic victory this summer, winning bipartisan support from members of Congress and the administration to include a provision in the recently signed omnibus budget bill that will offer more protections for tipped restaurant workers.

The provision, signed by Labor Department officials and other lawmakers, including Reps. Rosa DeLauro (D-Conn.) and Katherine Clark (D-Mass.), sen. Patty Murray (D-Wash.), sen. Chuck Schumer (D-NY) and house minority leader Nancy Pelosi, will protect against the taking away of tips or a portion by employers, supervisors and managers.

“This represents an historic victory for restaurant workers,” Saru Jayaraman, co-founder and president of Restaurant Opportunities Center said in a statement.

Christine Owens, executive director of the National Employment Law Project, noted, “The law cannot be more clear: tips belong to workers and no one else. This landmark victory belongs to

all the restaurant servers, bartenders, car wash workers, valets, attendants, and all the other tipped workers in America.”

The move is a fight against the National Restaurant Association and the current presidential administration, both Jayaraman and Owens pointed out.

In December 2017, the Department of Labor, in conjunction with the National Restaurant Association, proposed a rule under the Fair Labor Standards Act, that workplaces would have the freedom to allow sharing of tips among more employees in an effort to decrease wage disparities between tipped and non-tipped workers, and as is often the case in restaurants – between front-of-the-house servers, bartenders, bussers and runners and back-of-the-house cooks, prep staff and dishwashers.

The proposal challenges a 2011 law prohibiting restaurants from allowing line cooks, dishwashers and other back-of-the-house support to share tips collected by front-of-the-house staff. What happened leading up to that is in 2010, the case of *Cumbie v. Woody Woo Inc.*, set before the 9th Circuit Court of Appeals, did not rule in favor of a server’s lawsuit against a restaurant for requiring her to pool tips with back of the house staff.

This was considered a victory by the National Restaurant Association on behalf of restaurant businesses nationwide, but it prompted the Department of Labor to issue The Fair Labor Standards Act (FLSA) to protect restaurant employees industry-wide.

At the heart of the matter for servers and other tipped employees is the flat wage these workers receive; many receive a base far lower than the minimum wage and rely on tips to make up the difference. For example, in an otherwise legal tip-pooling

scenario, the “tip credit” law currently allowing employers to pay employees \$2.13 per hour as long as they can meet the federal minimum wage of \$7.25 per hour in tips would be extended beyond just servers to include cooks, chefs and dishwashers, who customarily don’t receive tips.

### One Fair Wage

The FLSA was set in place as a measure of protection against restaurants who might otherwise want to pay all their employees – not just the servers – less than minimum wage with the assumption that they would make up the difference or more in tips. There’s always a chance that they would not, however, and that restaurants could seek to pay all employees less while taking cash-earned tips from customers and using them as they see fit.

Since the December proposal and subsequent outcry among restaurant and other tipped employees, nearly 350,000 workers as employers and some consumers submitted public comments opposing the rule. They also testified on Capitol Hill and participated in multiple demonstration in front of the DOL headquarters in Washington, DC, and at related buildings in 20 cities nationwide, according to Jayaraman.

Trupti Patel, a ROC-DC member, says, “As a server in the District of Columbia with over 10 years of experience, I am happy that our elected representatives are paying attention to the voices of tipped professionals. This compromise will protect workers’ income and will allow for more gender and racial equity in the restaurant industry. I urge the House and Senate to pass this language.”

Saru Jayaraman says the next step on her team’s agenda is to push for “One Fair Wage,” which is the elimination of the lower wage for tipped workers so restaurant workers do not have to remain almost entirely dependent on customer tips for their income. ■

