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February 11, 2021

The Honorable Patty Murray
Chair
The Honorable Richard Burr
Ranking Member
Committee on Health, Education, and Labor
United States Senate

The Honorable Bobby Scott
Chairman
The Honorable Virginia Foxx
Republican Leader
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Office of the Secretary, Wage and Hour Division: Tip Regulations Under the Fair Labor Standards Act (FLSA)*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Office of the Secretary, Wage and Hour Division (Department) entitled “Tip Regulations Under the Fair Labor Standards Act (FLSA)” (RIN: 1235-AA21). We received the rule on December 30, 2020. It was published in the *Federal Register* as a final rule on December 30, 2020. 85 Fed. Reg. 86756. The final rule is effective March 1, 2021.

The final rule amends the Department regulations to address amendments in the Consolidated Appropriations Act of 2018 prohibiting employers from retaining tips received by their employees. Pub. L. No. 115–141, div. S, title XII, § 1201, 132 Stat. 348, 1148–49 (Mar. 23, 2018). Further, the final rule amends Department regulations to reflect guidance regarding the tip credit’s application to employees who perform both tipped and non-tipped duties, and revises regulations to address which non-tipped duties are related to a tip-producing occupation. According to the Department, federal law provides that an employer that satisfies certain requirements may count a limited amount of the tips received by its “tipped employees” as a credit toward its federal minimum wage obligation (known as a “tip credit”). See 29 U.S.C. § 203(m)(2)(A). The Department states the final rule would allow an employer that does not take a tip credit to require tipped employees to contribute tips to a “nontraditional” pool that includes back of the house employees, such as dishwashers and cooks, who are not employed in a customarily and regularly tipped occupation. The Department further states that the final rule provides that any employer that collects tips to facilitate a mandatory tip pool must fully redistribute the tips no less often than when it pays wages.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in cursive script that reads "Shirley A. Jones".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Robert Waterman
Compliance Specialist
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
WAGE AND HOUR DIVISION
ENTITLED
“TIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)”
(RIN: 1235-AA21)

(i) Cost-benefit analysis

The Department of Labor (the Department) conducted an economic analysis of this final rule. The Department qualitatively discusses potential economic impacts of the final rule but does not quantify them due to lack of data and the wide range of possible responses by market actors that cannot be predicted with specificity. According to the Department, since the economic analysis relies on data collected before 2020, it reflects the state of the economy prior to the COVID-19 pandemic. The Department states during the short term, as the economic effects of the COVID-19 pandemic linger, the labor market for tipped workers will be less predictable, and aggregate tips may be reduced, though the amount of tips per employee may or may not be impacted. To perform the quantitative analysis, the Department compared the impact relative to a pre-statutory baseline (for example, before Congress amended the Fair Labor Standards Act). The Department states the unemployment rate for the Food Services and Drinking Places industry jumped from 5.7 percent in February 2020 to 35.4 percent in April 2020. Although, according to the Department, the rate has fallen by more than half of its peak, the Department states 16.4 percent of these workers were still unemployed as of September 2020.

According to the Department, under the final rule, transfers could arise when employers that already pay the full federal minimum wage and previously did not have a mandatory tip pool or had only a traditional tip pool institute nontraditional tip pools in which tipped employees, such as servers and bartenders, are required to share tips with employees who do not customarily and regularly receive tips, such as cooks and dishwashers. The Department estimates employers may incur some training costs associated with familiarizing first line managers and staff with the rule; however, the Department believes these costs will be *de minimis*. The Department states the cost savings associated with this rule would result in part from the increased earnings for back-of-the-house employees. Higher earnings for these employees could result in reduced turnover, which reduces hiring and training costs for employers.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Department determined that the impact of this rule on small establishments will be *de minimis*. The Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The Department determined that this final rule will not have an effect on state, local, or tribal governments, in the aggregate. The Department also determined that while this final rule will impact the private sector, it is not expected to result in expenditures greater than \$100 million (adjusted annually for inflation) or more in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On October 8, 2019, the Department published a proposed rule. 84 Fed. Reg. 53956 (Oct. 8, 2019). The Department received 466 timely comments from a broad array of constituencies, including small business owners, restaurant companies, employer and industry associations, worker advocacy groups, trade unions, nonprofit organizations, social scientists, law firms, Members of Congress, state attorneys general, a state department of labor, and other interested members of the public. The Department extended the comment period due to a temporary outage that caused web browsers to refuse access to *Regulations.gov*. The Department received a small number of comments that were beyond the scope of the final rule. The Department responded to comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Department determined that this final rule contains information collection requirements under the Act. The Department submitted a request for Office of Management and Budget (OMB) review of the Notice of Proposed Rulemaking Fair Labor Standards Act information collection requirements (OMB Control Number 1235-0030). OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule. The Department has resubmitted the revised information collection requirements to OMB for approval. The Department reports a slight burden increase for employers keeping records concerning employees who receive tips. The Department estimates 983,359 burden hours (1,953 from this rulemaking), and \$0 in other burden costs.

Statutory authorization for the rule

The Department promulgated this final rule pursuant to various sections of title 5 and title 29, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

The Department determined that this final rule is economically significant under the Order.

Executive Order No. 13132 (Federalism)

The Department determined that this final rule does not have federalism implications and would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.