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Washington, DC 20548

B-333718

November 3, 2021

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

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
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); Partial Withdrawal*

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); Partial Withdrawal" (RIN: 1235-AA21). We received the rule on October 29, 2021. It was published in the *Federal Register* as a final rule on October 29, 2021. 86 Fed. Reg. 60114. The effective date is December 28, 2021.

According to the Department, the final rule finalizes its proposal to withdraw one portion of the "Tip Regulations Under the Fair Labor Standards Act" (FLSA) and finalizes its proposed revisions related to the determination of when a tipped employee is employed in dual jobs under FLSA. Specifically, the Department stated the final rule amends its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation. The Department further stated work that is part of the tipped occupation includes work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.

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.



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); PARTIAL WITHDRAWAL”
(RIN: 1235-AA21)

(i) Cost-benefit analysis

The Department of Labor, Office of the Secretary, Wage and Hour Division (Department) estimated the final rule would create familiarization, adjustment, and management costs in the first year of \$224,882,399. The Department further estimated the final rule would create only management costs in subsequent years of \$177,227,926. The Department estimated the total cost of the rule over 10 years would be \$151.1 million at a 3 percent discount rate or \$183.6 million at a 7 percent discount rate. The Department also estimated an upper bound of a transfer from tipped employees to employers of \$733 million.

The Department also discussed the benefits of the final rule. The Department stated the final rule will increase clarity for employers and tipped employees and provide flexibility for employers by adopting a functional test rather than requiring employers to reference a fixed list of duties on the Occupational Information Network.

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

The Department estimated 469,952 small establishments would be impacted by the final rule at a cost of \$477.56 per establishment in the first year. The Department stated the final 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 performed an analysis of the final rule under the Act. In the analysis, the Department discussed the final rule’s authorizing legislation and its costs and benefits.

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

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

On June 23, 2021, the Department published a proposed rule. 86 Fed. Reg. 32818. The Department received over 1,860 comments from tipped employees, small business owners, worker advocacy groups, employer and industry associations, non-profit organizations, law firms, attorneys general, and other interested members of the public. The Department responded to the comments in the final rule.

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

The Department determined the final rule contained no information collection requirements subject to PRA.

Statutory authorization for the rule

The Department promulgated the final rule pursuant to section 301 of title 4 and section 203 of title 29, United States Code, as well as Public Laws 75–718, 87–30, 89–601, 93–259, 95–151, 104–188, 110–28, and 115–141.

Executive Order No. 12866 (Regulatory Planning and Review)

The Department stated the Office of Management and Budget reviewed the final rule and determined it was economically significant.

Executive Order No. 13132 (Federalism)

The Department determined the final rule will 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.