Fact Sheet
COMMITTEE ON EDUCATION & THE WORKFORCE DEMOCRATS
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The Hon. Bobby Scott • Ranking Member

The Trump Administration's Proposed Tip Rule Allows Tip Theft

Background:
Under the Fair Labor Standards Act (FLSA), an employer may pay tipped employees—workers who receive more than $30 a month in tips—a subminimum wage of no less than $2.13 per hour. An employer can then use up to $5.12 per hour of the worker's tips to meet its obligation to pay the federal minimum wage of $7.25 per hour. This is referred to as a "tip credit." A 2011 Obama administration regulation clarified, "[t]ips are the property of the employee" whether or not the employer has taken a tip credit under section 3(m) of the FLSA.

An employer may also require tipped employees to take part in a tip pool, which can only include employees who customarily and regularly receive tips. **The treatment of tips as the employee's property is supported by the FLSA's legislative history, and has been the Department of Labor's (DOL) position for more than 40 years.**

The Proposed Rule:
On December 5, 2017, DOL published a proposed rule that rescinds parts of the 2011 rule that clarified tips are the property of the employee, regardless of whether or not the employer takes a "tip credit". The proposed rule provides that tips are the property of employees only if the employer takes a "tip credit". Under this rule:

- **Employers could legally pocket workers' tips.**
  - DOL acknowledges that employers could legally pocket their employees' tips under this proposed rule, so long as employees are paid at least the full federal minimum wage of $7.25 per hour.
  - An analysis by the Economic Policy Institute estimates that employers would pocket $5.8 billion of their employees' tips each year under the proposed rule.
  - Even in states with laws that provide better protections for workers' tips, this proposed rule may lead to confusion regarding ownership of tips or increase illegal tip theft.

- **Non-tipped workers are not guaranteed a pay boost.**
  - While DOL has framed this rule as one that will reduce wage disparities by allowing for tip pooling with non-tipped workers, nothing in the proposed rule requires employers to actually increase overall pay for employees who do not customarily receive tips.
  - An employer may simply use this rule to, as the DOL puts it, "reduce its overall wage bill." Employers could opt to reduce non-tipped workers' base pay and redirect tips taken from tipped workers to maintain non-tipped workers at their existing pay levels – leaving both non-tipped and tipped workers no better off.

The Rulemaking Process:
When the DOL proposed this rule it stated it did not conduct any quantitative analysis. On February 1, 2018, Bloomberg reported that senior political officials at DOL allegedly withheld economic analyses that indicated that workers would lose billions of dollars under the proposed rule. On February 5, 2018, the DOL Inspector General informed DOL's Wage and Hour Division it is investigating DOL's rulemaking process for this regulation.