



February 20, 2018

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Scott:

I am writing in response to your letters regarding the U.S. Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM): Tip Regulations under the Fair Labor Standards Act (FLSA). We appreciate your letter and your interest in the rulemaking process.

The initial proposed 30-day comment period for the NPRM was scheduled to end on January 4, 2018. On December 15, 2017, the Department published in the Federal Register an extension of this comment period for an additional 30 days to February 5, 2018, to provide the public additional time to comment. The Department received more than 375,000 comments and is in the process of evaluating the comments as we consider moving forward with a potential final rule.

The proposed rule would rescind the 2011 regulations that barred sharing tips among employees who do not customarily and regularly receive tips, including restaurant cooks, dishwashers, and other traditionally lower-wage job classifications. The proposed rule, "applies only to employers that pay direct cash wages of at least the federal minimum wage and do not take a tip credit." Thus, employees with wages starting below the federal minimum wage without tips would not be impacted. The proposed rule reflects federal courts' and the Department's serious concern that the Department exceeded its authority when promulgating the 2011 final rule. The NPRM also reflects the Department's concern that it unnecessarily prohibited the sharing of tips with many employees who contribute to the customers' experience and who may benefit from the opportunity to participate in tip pools.

The prior administration's 2011 final rule did not include any quantitative economic analysis of the rule's impact. After its implementation, the 2011 rule was repeatedly challenged on the grounds that the Department exceeded its statutory authority. Multiple federal courts agreed and held that the 2011 rule was invalid. When the Department quantifies the costs and benefits of a proposed rule, the Department endeavors to ensure that such calculations are meaningful, as accurate as reasonably possible, and provide a thoughtful description of legal and economic effects to the public. The proposed rule noted, among other things, the challenges to identify and quantify, "market factors that may cause employers not to change their practices with respect to tips," as well as, "how customers will respond to proposed regulatory changes, which in turn would affect total tipped income and employer behavior."

Given these and other variables, the proposed rule stated that the Department lacked, "data to quantify possible reallocations of tips through newly expanded tip pools." Therefore, to assess

the economic impact of the rule, the Department issued a quantitative analysis of the rule's familiarization costs and a qualitative discussion of the benefits and transfers that may result from the proposed rule. The Department also pointedly, "welcome[d] comments that provide data or information regarding the potential benefits and transfers of this proposed rule, and has asked some specific questions that may help the Department quantify benefits and transfers in the Final Rule analysis."

The Department, after receiving public comment, intends to publish an informed cost-benefit analysis as part of any final rule. In keeping with this commitment, the Department will analyze data and other information submitted in the comments to prepare a meaningful quantitative economic analysis.

If we may be of further assistance, please contact the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

A handwritten signature in blue ink, appearing to read "Katherine B. McGuire". The signature is fluid and cursive, with a large initial "K" and "M".

Katherine B. McGuire