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States Challenge DOL's Tip Regulations Final Rule, DOL Withdraws Opinion Letters

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On January 19, 2021, eight states (Delaware, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania), along with the District of Columbia, filed a lawsuit seeking to enjoin the Tip Regulations Final Rule published by the U.S. Department of Labor (DOL) in late December 2020. The Final Rule, which currently is scheduled to become effective in early March, focuses primarily on two things: (1) implementing the Congressional amendment to the Fair Labor Standards Act (FLSA) that permits tip sharing between "back of the house" employees (*e.g.* cooks and bussers) and "front of the house" employees (*e.g.* servers) *if* a tip credit is not taken, while expressly prohibiting managers and supervisors (as defined in the Final Rule) from sharing in tips; and (2) rejecting the so-called "80/20 Rule" limiting the time tipped employees may spend performing allegedly non-tipped duties. The lawsuit focuses primarily on the 80/20 Rule, asserting that the DOL's elimination of the Rule was arbitrary and thus violates the Administrative Procedures Act because, among other things, the DOL did not adequately identify and weigh the costs and benefits of the Rule's elimination.

Because Congress amended the FLSA to permit tip pooling between traditionally tipped and traditionally non-tipped employees, the lawsuit does not (and practically could not) challenge that aspect of the Final Rule, but it does assert that the Rule's definition of who qualifies as a supervisor or manager likewise is invalid. In addition to the DOL's incorporation of the "duties" test of the FLSA's administrative exemption into the Rule's definition of a supervisor or manager, the lawsuit asserts that the DOL should have incorporated the exemption's salary requirements (*i.e.* being paid on a salary basis at least $684 per week). By failing to do so, the lawsuit alleges, the Final Rule excludes some workers who otherwise should be eligible for tip sharing.

Whether President Biden's administration will defend the Final Rule remains to be seen. Notably, in adopting an approach taken at the beginning of the recently departed administration, the White House already has issued a memorandum instructing all agencies to consider delaying the effective date of any regulation that has yet to become effective; if necessary, to consider issuing a rule to further delay the effective date; and if further necessary, to ultimately issue a new rule revising the pending regulation. Much like what occurred with the Obama-era Final Rule that sought to significantly increase the salary level for the FLSA's "white collar" (Executive, Administrative, and

Professional) exemptions, this directive may result in the DOL eventually rescinding both the Tip Regulations Final Rule and the Independent Contractor Final Rule issued earlier this month, neither of which has yet to become effective.

Notably, on January 26, 2021, the DOL withdrew three Opinion Letters that were issued during the last two weeks of the Trump administration. As the basis for the withdrawal, the DOL stated that these Opinion Letters (FLSA2021-4, involving the Tip Regulations Final Rule, and FLSA2021-8 and FLSA2021-9, involving the Independent Contractor Final Rule) improperly referenced regulations that were not yet effective. This action very well may portend the Biden administration's initial efforts to undo these Final Rules. On a related note, under the Congressional Review Act (CRA), Congress has the power to disapprove any regulation issued during the sixty (60) session days prior the regulation's effective date. With both houses of Congress now under Democratic control, this provides a further path to the potential demise of these pending regulations.

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