



February 5, 2018

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Melissa Smith
Director of the Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., NW
Washington, DC 20210

Dear Ms. Smith:

In light of reports that the Department of Labor (DOL) purposefully covered up critical information about its proposed rule, "Tip Regulations under the Fair Labor Standards Act (FLSA)" (RIN 1235-AA21) (hereinafter "Tip Pooling Rule") – data showing the rule would cost workers billions of dollars – we request the immediate withdrawal of the Notice of Proposed Rulemaking (NPRM).

According to *Bloomberg Law*, "Senior department political officials – faced with a government analysis showing that workers could lose billions of dollars in tips as a result of the proposal – ordered staff to revise the data methodology to lessen the expected impact. . . ."¹ After revising the calculations in an effort to make them work more favorably for the Department, "Labor Secretary Alexander Acosta and his team are said to have still been uncomfortable with including the data in the proposal" because they "disagreed with assumptions in the analysis that employers would retain their employees' gratuities, rather than redistribute the money to other hourly workers." Ultimately, the DOL decided to scrap the data altogether and proceed as if it never saw the unfavorable analysis at all. In light of these reports, it appears DOL outright lied to the public in the proposal when it claimed it "currently lacks data to quantify possible reallocation of tips."

Instead, these reports suggest that DOL in fact had relevant data on the proposed Tip Pooling Rule's impacts, and these data confirmed exactly what workers and workers' rights advocates have been saying all along: The proposal does nothing to stop employers from simply keeping employees' tips.

¹ <https://bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>

As your office is well aware, several authorities governing federal agency rulemaking instruct the DOL to analyze the costs and benefits of its proposed regulations and to provide the public with accurate and objective information about any regulatory or deregulatory proposal.

The DOL's apparent cover-up defeats the principle of meaningful public participation in the rulemaking process, which is a central pillar of our system of administrative law. By denying the public complete and relevant information on which to assess the proposed Tip Pooling Rule, the DOL has inhibited the public's ability to provide it with meaningful feedback as part of the notice-and-comment process. For this reason alone, the DOL should immediately withdraw its proposal.

Intentionally withholding critical information from the public about the harms of the proposed Tip Pooling Rule is also contrary to the agency's statutory mission and a betrayal to the very people the DOL is supposed to serve and protect. It is most certainly not the mission of the DOL or any other governing institution to facilitate the theft of wages from hard-working Americans and to knowingly assist in transferring those monies to their employers. To make matters worse, taking concrete steps to mislead the American people about the impacts of a regulatory proposal will only serve to further undermine the public trust in the government institutions whose mission it is to protect and serve the people.

Notably, this effort by the DOL, with the apparent assistance or sanction of the White House Office of Information and Regulatory Affairs (OIRA), to skew the analysis in its favor illustrates the many practical and theoretical flaws with cost-benefit analysis in its current form. Indeed, episodes such as these reveal that cost-benefit analysis is little more than an elaborate form of political advocacy.

The *Bloomberg Law* story reports that agency leadership instructed career staff to repeatedly revise the cost-benefit analysis for the proposed Tip Pooling Rule until its results showed that the proposal would have politically acceptable economic impacts. (It was only after staff were unable to achieve this result that agency leadership abandoned the cost-benefit analysis altogether.) In other words, the agency had already made its policy decision without the benefit of any supporting economic evidence and only *then* tried to reverse-engineer a cost-benefit analysis that supported that decision.

In light of the forgoing, we request that the DOL immediately withdraw its NPRM for the Tip Pooling rule. In that NPRM, the DOL asks the public to comment with suggestions about how to quantify the Tip Pooling Rule's impact. Thus, if the DOL declines to withdraw this flawed proposal, we at least encourage it to publish the economic analysis it chose to withhold from the public and to extend the comment period by at least 120 days following the release of the analysis to permit adequate public review and comment.

Sincerely,

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