

## **Advocacy Suggests DOL’s Certification is Improper and the Agency should Prepare and Publish an Initial Regulatory Flexibility Analysis (IRFA) for its Proposed Tip Credit Rule**

On August 20, 2021, the Office of Advocacy sent a public comment letter to the U.S. Department of Labor Wage and Hour Division (DOL) asserting that the agency improperly certified the proposed rule, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*.

1. On June 23, 2021, DOL released a proposed rule that deals with the “dual jobs” portion of the tip credit under the FLSA, which addresses a situation where an employee performs multiple jobs, both tip and non-tip related. The proposed rule adopts a version of a prior 80/20 guidance, with an additional restriction of a 30-minute time limit. An employer can utilize the tip credit if the employee works 80 percent of their job on tip-producing work; and completes directly supporting work if it does not exceed 20 percent of hours work or any continuous periods of time that exceeds 30 minutes during the workweek. The proposal provides examples of tasks that are considered tip-producing work, directly supporting tip-producing work and non-tipped work.
2. DOL certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. Advocacy cautioned DOL that its certification was improper and lacks a factual basis because the agency omitted some and underestimated other compliance costs of this rule. DOL has estimated a per-entity cost for small employers of less than \$500 a year for regulatory familiarization costs, adjustment costs and management costs. DOL omitted increased wages when assessing costs for small businesses in the RFA section, a key impact which was estimated to amount up to \$714 million dollars overall for all employers in another section of the rule.
3. Small businesses have told Advocacy that the proposed rule will be costly and burdensome to implement in their busy restaurants, hotels, nail salons and other workplaces, as it will require businesses to track their workers’ tasks minute to minute to utilize the tip credit wage. Advocacy recommends that DOL prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) that adequately assesses the small business compliance costs from this regulation and consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

A complete copy of Advocacy’s letter to DOL is available [here](#). For more information please contact Janis Reyes, Assistant Chief Counsel, at [Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov).

