



DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

29 CFR Parts 516, 531, 578, 579, and 580

RIN 1235-AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA): Delay of Effective Date

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Proposed delay of effective date.

SUMMARY: In accordance with the Presidential directive as expressed in the memorandum of January 20, 2021 from the Assistant to the President and Chief of Staff, entitled “Regulatory Freeze Pending Review,” this action proposes to delay until April 30, 2021 the effective date of the rule entitled Tip Regulations Under the Fair Labor Standards Act (“Tip Rule”), published in the Federal Register on December 30, 2020. The rule’s current effective date is March 1, 2021. WHD seeks comments on this proposed delay, which would allow the Wage and Hour Division additional opportunity for review and consideration of the new rule.

DATES: Submit written comments on or before February 17, 2021.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA21, by either of the following methods: Electronic Comments: Submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Mail: Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Instructions: Please submit only one copy of your comments by only one method. Commenters submitting file attachments on www.regulations.gov are advised that uploading text-recognized documents—*i.e.*, documents

in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on February 17, 2021, for consideration in this proposed delay of effective date. The Department strongly recommends that commenters submit their comments electronically via <http://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this proposal may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION: In the Consolidated Appropriations Act of 2018 (“CAA”), Congress amended section 3(m) of the Fair Labor Standards Act (“FLSA” or “Act”) to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). On December 30, 2020, the Wage and Hour Division (“WHD”) published Tip Regulations Under the Fair Labor Standards Act (the “Tip Rule”) in the Federal Register to address these amendments. *See* 85 FR 86756. The Tip Rule would also codify WHD’s guidance regarding the tip credit’s application to tipped employees

who perform tipped and non-tipped duties. *See id.* The effective date of the Tip Rule is March 1, 2021. *See id.*

In a memorandum dated January 20, 2021 and entitled “Regulatory Freeze Pending Review,” (“Regulatory Freeze Memorandum”) published in the Federal Register on January 28, 2021 (86 FR 7424), the Assistant to the President and Chief of Staff, on behalf of the President, directed the heads of Executive Departments and Agencies to consider delaying the effective dates of all regulations that had been published in the Federal Register but had not yet taken effect until 60 days following the date of the memorandum or beyond; the Tip Rule falls into this category. The Regulatory Freeze Memorandum states that the purpose of such delays is for agencies to review any questions of fact, law, and policy that the rules may raise. The memorandum notes certain exceptions that do not apply here. On January 20, 2021, the Office of Management and Budget (OMB) also published OMB Memorandum M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, which provides guidance regarding the Regulatory Freeze Memorandum. *See* M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, <https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf> (last visited Jan. 26, 2021). OMB Memorandum M-21-14 explains that pursuant to the Regulatory Freeze Memorandum, agencies “should consider postponing the effective dates for 60 days and reopening [the] rulemaking processes” for “rules that have not yet taken effect and about which questions involving law, fact, or policy have been raised.” *Id.* In accordance with the Regulatory Freeze Memorandum and OMB Memorandum M-21-14, WHD proposes to delay the effective date of the Tip Rule by 60 days to April 30, 2021.

Delaying the effective date of the Tip Rule for 60 days would provide WHD additional opportunity to review and consider the questions of law, policy, and fact raised by the rule, as contemplated by the Regulatory Freeze Memorandum and OMB Memorandum M-21-14, before the rule goes into effect. In particular, WHD could consider whether the Tip Rule properly

implements the CAA Amendments to section 3(m) of the FLSA, which prohibit employers from keeping tips for any purpose, whether the Tip Rule adequately considered the possible costs, benefits, and transfers between employers and employees related to the codification of WHD's guidance regarding the tip credit's application to tipped employees who perform tipped and non-tipped duties, and whether the Tip Rule otherwise effectuates the CAA amendments to the FLSA, including the statutory provision for civil money penalties for violations of section 3(m)(2)(B) of the Act. Additionally, on January 19, 2021, eight states and the District of Columbia filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Pennsylvania, in which they argued that the Department violated the Administrative Procedure Act in promulgating the Tip Rule. The delay of the Tip Rule's effective date would also give WHD the opportunity to review and consider the rule in light of the issues raised by that complaint.

WHD believes that the proposed delay, in accordance with the Regulatory Freeze Memorandum and OMB Memorandum M-21-14, is reasonable given the issues of fact, law, and policy raised by the rule, and will not be disruptive, given that the Tip Rule is not yet effective and WHD has not implemented the rule.

WHD seeks comment on its proposal to delay the Tip Rule's effective date to April 30, 2021 in order to further review and consider the rule. WHD will consider only comments about its proposal to delay the Tip Rule's effective date.

Milton A. Stewart,

Acting Secretary of Labor.

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