National Employment Lawyers Association — Advocates for Employee Rights

February 1, 2018

***VIA* Electronic Submission**

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, D.C. 20210

Dear Ms. Smith:

The National Employment Lawyers Association (NELA) calls on the Department of Labor (DOL) to withdraw immediately the Notice of Proposed Rulemaking, RIN 1235-AA21, Tip Regulations under the Fair Labor Standards Act (FLSA).

A report published by *Bloomberg Law* this morning stated that DOL prepared and then "shelved" economic analysis demonstrating that workers would lose billions of dollars in wages were the above-referenced NPRM to be finalized and implemented.[1] This information is contrary to explicit statements in the NPRM in which the Department stated that that it is "unable to quantify how customers will respond to the proposed regulatory changes" and "currently lacks data to quantify possible reallocations of tips."

DOL's decision not to share the analysis described by the *Bloomberg Law* article is improper and flouts several authorities that govern federal agency rulemaking, including Executive Order 12866, Executive Order 13563, and guidance from the White House Office of Management and Budget, which require that agencies are to quantify costs and benefits of their proposed regulations wherever possible.[2]

[1] Ben Penn, *Labor Department Ditches Data on Worker Tips Retained by Business*, BLOOMBERG BNA, Feb. 1, 2018, https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses.

[2] *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

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DOL's mission is, at its core, "[t]o foster, promote, and develop the welfare of the wage earners. . . of the United States[.]" By intentionally concealing this analysis DOL betrayed its mission with respect to this NPRM.

The choice to not share highly relevant data is counter to the transparency that is essential to ensure that the regulatory process is fair, reasonable, consistent with the law, and based on sound economic information. American workers, and in fact, all of the American public, rely on the transparency, integrity, and honest dealings of the federal government. The rulemaking process requires that stakeholders have the opportunity to review the Department's good-faith economic analysis, including the assumptions underlying it, with adequate time to fully respond to such analysis.

For the sake of the integrity of this process, and for the sake of all stakeholders, especially the low-wage workers who will be impacted most significantly, we call on the Department to immediately withdraw this NPRM.

Respectfully submitted,

Terry O'Neill
Executive Director
National Employment Lawyers Association