Tip Regulations: The Fundamental Legal Issue

Insights
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This week marked the close of the period for public comment on the U.S. Department of Labor's (USDOL) proposed rescission of the hotly-debated regulatory text that, essentially, extended certain tip credit restrictions to circumstances where an employer is not taking the tip credit. While the public has expressed concerns regarding the "fairness" of the proposed rescission and the absence of data, ultimately these concerns are irrelevant with respect to the fundamental legal issue. As set forth in our Comments, the only question on the table is whether the USDOL had the authority to expand the restrictions and, like it or not, fairness and data are not relevant to that question. The proposed regulatory action is effectively a correction based on the limited scope of USDOL's authority with respect to tips and the unauthorized attempt to expand it in 2011.

Staying Focused

When proposing regulatory changes, agencies consider a variety of factors. The appropriateness of a proposed regulation *must* be evaluated against the backdrop of two basic principles:

- The agency's authority is constrained by the statutory law itself; and
- If the statutory language is clear on its face, the agency cannot rely upon legislative history to expand its authority.

In 2011, the agency failed to follow these principles and, instead, issued regulatory text that extended certain tip-credit restrictions to non-tip credit arrangements based upon select, legislative history (and subsequent iterations of it) that simply cannot be relied upon when the language of the statute is clear. At bottom, if an employer does not take the tip credit and has established an understanding that some or even all tips belong to the employer, that employee has no legal claim, *under the FLSA*, with respect to those tips over which the employer exercises dominion. Nothing in the plain language of the statute supports a contrary conclusion. Because these principles limit the agency (in this case, in 2011), then any other factors are irrelevant. Recent remarks seem to be missing, or at least not fully acknowledging, this fundamental point.

What's The USDOL To Do?

Just as these constraints should have been observed by the agency in 2011, they should be observed by the agency now.

by the agency now:

- Does the USDOL have the authority to regulate tips with respect to employees for whom the employer is not taking a tip credit? *The answer is no.*
- With respect to these non-tip-credit-employees, can the agency regulate tips in some circumstances by distinguishing between an employer redistributing tips to non-tipped positions (such as dishwashers), retaining tips for capital improvements, and retaining tips and allocating them to various labor costs? *The answer is no.*
- Should the agency take into account data (whether already in hand or gathered from the responses to the recent request for comments) as part of the current rulemaking process? *The answer is no.*

While it seems that the current USDOL understands its limitations with respect to the first question, it is a bit concerning that it is contemplating drawing a line depending on what the employer would do with the tips. If the USDOL cannot clearly see that this is a distinction without a difference, then perhaps it should simply remove the unauthorized language and leave the rest to the courts. Moreover, while perhaps an interesting collection of anecdotes and fodder for policy debate, there is no purpose in gathering information regarding tip practices (whether past, current, or projected) in relation to this proposed rulemaking. The agency simply is not authorized to regulate tips, for any reason, if the tip credit itself is not implicated. No data or information changes this.

What's The Public To Do?

Members of the public that *oppose* the revision should understand that the USDOL has limited power with respect to tips. Changes in this regard must come from Congress (and, should they occur, we would hope that they would be thoughtful ones). Members of the public in *favor* of it should bear in mind that, in some areas this correction is of little importance due to state laws or even local laws that address tips and/or the ownership of "gratuities" in general and have been reshaping tip-related practices over the last few years. Both sides would do well to take a step back and recognize that, even if the restrictions are lifted without delay, it appears that many employers plan to make only minor changes, if any. Further, at the end of the day, the tip-credit will be alive and well, and still can be a valuable option for employers that want their employees to have some skin-in-the-game, so to speak.

The Bottom Line

The USDOL set out upon a course to right a wrong, a *legal* wrong, and should see it through. Recognizing that those opposed to the revision see this correction as a "wrong" in a different sense, we would not be surprised if there are attempts to expand the FLSA, and possibly USDOL's authority, with respect to all tips. Keep in mind though that to expand the FLSA in this regard would be to single out employees receiving tips as being *legally entitled under federal law* to protections above and beyond any other employee subject to the minimum wage provision.

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