



## BRIEFLY...

### **DOL DID NOT DEMONSTRATE IT FOLLOWED A SOUND PROCESS IN PROMULGATING THE 2017 TIP RULE NOTICE OF PROPOSED RULEMAKING**

December 11, 2020

#### **WHY OIG CONDUCTED THE REVIEW**

On December 5, 2017, the Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to rescind portions of its 2011 tip regulations under the Fair Labor Standards Act because DOL was concerned that it incorrectly construed the statute in promulgating the tip credit regulations. As such, DOL proposed to remove the regulations' limitation on employers' ability to pool tips received by employees, thereby allowing employers to allocate tips into a tip pool shared with employees who do not customarily receive tips, such as dishwashers and cooks, or simply retain the tips.

DOL issued the 2017 NPRM with primarily a qualitative analysis of the potential benefits and transfers. However, multiple news reports noted DOL conducted an economic analysis not included in the final NPRM, raising questions about the soundness of DOL's rulemaking process.

#### **WHAT OIG DID**

We conducted a review to answer the following question:

Did DOL follow a sound process in promulgating the 2017 NPRM?

We reviewed federal and DOL rulemaking guidance and processes; interviewed DOL staff and contractors; and reviewed emails, work products, and draft versions of the NPRM.

#### **WHAT OIG FOUND**

DOL did not demonstrate it followed a sound process in promulgating the 2017 NPRM and did not fully adhere to regulatory guidance.

In the initial phase of the process, a DOL Senior Official considered regulatory action as unnecessary and believed that the courts should be the arbiters. However, DOJ's Office of the Solicitor General believed that rulemaking action was necessary. Based on this, DOL proceeded with the NPRM. Members of DOL's NPRM workgroup and senior leadership told us they felt "pressured" to take regulatory action and were told not to document the decisions they received from management

DOL analyzed various cost estimates of transferring tips from employees who typically receive tips to those who do not or to employers. DOL made several revisions, but ultimately excluded the transfer analysis from the published 2017 NPRM. DOL officials did not demonstrate what was lacking in the analyses that made them insufficient to support what they believed employers would do under the proposed rule. Further, DOL did not provide criteria in support of its rationale for familiarization costs in the published NPRM, and did not include an assessment of the effect the rule would have on families.

Additionally, DOL did not identify to the public the substantive changes it made between the draft NPRM submitted to OIRA and the 2017 NPRM published in the Federal Register.

#### **WHAT OIG RECOMMENDED**

We made five recommendations to improve DOL's rulemaking process. DOL proposed corrective actions for four of the recommendations and disagreed with one.

#### **READ THE FULL REPORT**

<http://www.oig.dol.gov/public/reports/oa/2021/17-21-001-15-001.pdf>