

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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**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Parts 780, 788, and 795**

**RIN 1235-AA34**

**Independent Contractor Status Under the Fair Labor Standards Act: 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 May 7, 2021, the effective date of the rule entitled Independent Contractor Status Under the Fair Labor Standards Act (“Independent Contractor Rule”), published in the **Federal Register** on January 7, 2021. The rule’s current effective date is March 8, 2021. The Wage and Hour Division seeks comments on this proposed delay, which would allow it additional opportunity for review and consideration of the new rule.

**DATES:** Submit written comments on or before February 24, 2021.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA34, 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 NW, Washington, DC 20210. *Instructions:* Please submit only one copy of your comments by only one method. Commenters submitting file attachments on [www.regulations.gov](http://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 24, 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>.

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**SUPPLEMENTARY INFORMATION:** On January 7, 2021, the Department of Labor's Wage and Hour Division ("WHD") published the Independent Contractor Rule in the **Federal Register** with an effective date of March 8, 2021. See 86 FR 1168. The Independent

Contractor Rule would, among other actions, introduce into title 29 of the Code of Federal Regulations a new part (part 795) entitled "Employee or Independent Contractor Classification under the Fair Labor Standards Act." See *id.*

In a memorandum dated January 20, 2021 and entitled "Regulatory Freeze Pending Review," published in the **Federal Register** on January 28, 2021 (86 FR 7424) ("Regulatory Freeze Memorandum"), the Assistant to the President and Chief of Staff, on behalf of the President, directed the heads of Executive Departments and Agencies to review and 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 Independent Contractor Rule falls within 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 process" 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 Independent Contractor Rule to May 7, 2021, which would be 60 days beyond its original effective date.

The delay of the Independent Contractor Rule's effective date would give WHD additional opportunity to review and consider the rule as the Regulatory Freeze Memorandum and OMB Memorandum M-21-14 contemplate. The rule, which would be WHD's first generally applicable regulation addressing the question of who is an independent contractor and,

thus, not an employee under the FLSA, would adopt a new legal standard for determining employee and independent contractor status under the FLSA. In light of the significance of this change, WHD is proposing to allow itself more time to further review and consider, among other important issues, the legal, policy, and/or enforcement implications of adopting that standard, such as: Whether the rule effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly cover workers as employees;<sup>1</sup> the costs and benefits attributed to the rule, including the assertion that workers as whole will benefit from the rule;<sup>2</sup> and/or whether the rule's explanation of the standard provides clarity for stakeholders and for the purposes of WHD enforcement, as was intended.

In addition, WHD believes that the proposed delay is reasonable and would not be disruptive. The Independent Contractor Rule is not yet effective, and WHD has not implemented the rule. For example, WHD's public guidance, including its longstanding Fact Sheet #13, entitled "Employment Relationship under the Fair Labor Standards Act (FLSA)," does not contain the rule's standard for determining whether a worker is an employee or independent contractor and will continue to be available to all. Moreover, Federal courts across the country have developed and applied legal analyses for determining employee and independent contractor status under the FLSA. In sum, employers and workers are already familiar with the standard that WHD and courts will apply when determining a worker's status under the FLSA during any delay of the rule's effective date.

WHD seeks comment on its proposal to delay the Independent Contractor Rule's effective date to May 7, 2021 in order to further review and consider the rule. WHD will consider only comments about its proposal to delay the rule's effective date.

**Milton A. Stewart,**

*Acting Secretary of Labor.*

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<sup>1</sup> See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) ("The [FLSA] definition of 'employ' is broad."); *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945) ("A broader or more comprehensive coverage of employees [than that of the FLSA] . . . would be difficult to frame.")

<sup>2</sup> See 86 FR 1209, 1223.