

Biz Groups Say EPA Decision Helps Their Tip Rule Challenge

By Irene Spezzamonte

Law360 (July 11, 2022, 4:29 PM EDT) -- The U.S. Supreme Court's decision on the Environmental Protection Agency's ability to regulate greenhouse gas emissions highlights that a Department of Labor rule regulating tipped and nontipped pay is illegal, two restaurant groups told a Texas federal court Monday.

In an **unopposed motion** to file a notice of supplemental authority, the Restaurant Law Center and the Texas Restaurant Association told a Texas district court that the [West Virginia et al. v. EPA et al.](#) decision showed the DOL didn't have the authority to issue a rule splitting what tasks are considered tipped or nontipped work.

The Supreme Court **ruled in the EPA case** in late June that under the "major questions" doctrine, the government must point to clear authorization from Congress to regulate and that "a vague statutory grant is not close to the sort of clear authorization required by our precedents."

Attorneys told Law360 that the Supreme Court ruling could have a major impact in wage and hour litigation, especially when it comes to the DOL's ability to regulate **prevailing wages, overtime** and **independent contractors**.

Monday's filing comes in support of the groups' **April bid for summary judgment**. The groups told the court then that the DOL overstepped its authority when it mandated **the rule**, which went into effect in December 2021.

The rule requires employers to pay the full minimum wage to tipped employees who perform nontipped work for up to 20% of their shifts. Employers are also required to pay full minimum wage to tipped workers who spend more than 30 minutes of uninterrupted time on side work that directly supports tip-producing activity, which includes a bartender cleaning the bar where customers are seated.

The industry groups argued that neither Congress nor the Fair Labor Standards Act — which allows employers to pay tipped workers as low as \$2.13 per hour, as long as tips make up the difference between that amount and the federal minimum wage of \$7.25 per hour — allowed the DOL to issue the rule.

The Restaurant Law Center and the Texas Restaurant Association **already tried to block the rule** in December, but the district court **denied that request** in February and the groups appealed to the Fifth Circuit.

On Friday, the DOL filed a brief in the appellate court, arguing that the lower court correctly said the groups relied on "speculative concerns, conclusory claims and incredible assertions" to support their argument that the rule would harm them.

"Plaintiffs provided no evidence or credible argument that the rule's additional restriction that employers may no longer take a tip credit once an employee has performed more than 30 minutes of continuous directly supporting work would require any significant changes to employers' business practices," **the DOL said**.

The groups sued in December, asking the Texas court to prevent the rule from going into effect. Later

that month, the groups filed a motion for **a nationwide preliminary injunction**, leading to the February decision at stake in the Fifth Circuit.

In May, the DOL filed its own bid for summary judgment in the lower court, arguing that the process it followed to issue the rule was not arbitrary or capricious and that the agency acted within its authority.

Paul DeCamp of Epstein Becker Green, who is representing the groups, reiterated Monday that the DOL went beyond its allowed authority to issue the rule and that the agency is trying "to micromanage on a minute-by-minute basis the work of any tipped employee in the United States earning less than \$7.25 per hour in cash wages."

"As the Supreme Court has made perfectly clear, most recently in *West Virginia v. EPA*, the department's approach is unlawful and a violation of constitutional separation of powers," DeCamp said.

The DOL referred questions to the U.S. Department of Justice, which is representing the agency. The DOJ did not immediately respond to requests for comment Monday.

Representatives of the Restaurant Law Center and the Texas Restaurant Association did not immediately respond to requests for comment Monday.

The DOL is represented by Jennifer Utrecht, Alisa Beth Klein and Johnny Hillary Walker III of the U.S. Department of Justice's Civil Division.

The Restaurant Law Center and the Texas Restaurant Association are represented by Paul DeCamp and Kathleen Barrett of Epstein Becker Green. The Restaurant Law Center is also represented in-house by Angelo I. Amador.

The cases are *Restaurant Law Center v. U.S. Department of Labor*, case number 1:21-cv-01106, in the U.S. District Court for the Western District of Texas, and *Restaurant Law Center et al. v. U.S. Department of Labor et al.*, case number 22-50145, in the U.S. Court of Appeals for the Fifth Circuit.

-Additional reporting by Caleb Drickey. Editing by Roy LeBlanc.