

## DOL Says High Court EPA Ruling Doesn't Kill Tip Credit Rule

By **Grace Elletson**

Law360 (July 22, 2022, 8:41 PM EDT) -- The U.S. Department of Labor told a Texas federal court Friday that the U.S. Supreme Court's decision finding that the government can't regulate greenhouse gas emissions does not invalidate an agency rule regulating tipped wages, pushing back on restaurant advocacy groups that said otherwise.

**The DOL said** the rule that the Restaurant Law Center and the Texas Restaurant Association are contesting, which requires that tipped workers earn minimum wage when 20% of their time is spent on untipped work, is not defeated by the high court's ruling in [West Virginia et al. v. EPA et al.](#) The justices found that the Environmental Protection Agency does not have the ability to regulate greenhouse gas emissions under the "major questions" doctrine — which the DOL said doesn't apply to the tip credit rule.

"The rule at issue in this case lacks the qualities that triggered the major questions doctrine in West Virginia," the agency said.

The restaurant groups **filed a notice of supplemental authority** last week, arguing that the major questions doctrine defeats the rule. Under the doctrine, government agencies must point to specific congressional authorization to uphold regulations, and the restaurant groups argued that the DOL does not have this authorization by either Congress or the Fair Labor Standards Act to prop up its tip credit rule.

The rule also requires that tipped workers earn minimum wage when they complete untipped work for periods of 30 minutes or more consecutively. Tipped workers typically earn a wage of \$2.13 an hour, and their tips are supposed to make up the difference to ensure they earn the federal minimum wage.

The restaurant groups first challenged the rule in December 2021 in Texas federal court, where they later requested an injunction to keep the measure from going into effect. The bid was denied, and they're currently appealing in the Fifth Circuit.

In its Friday response, the DOL said the tip credit rule does not trigger the major questions doctrine because it doesn't "substantially restructure" the market, invoke "newfound power" or rely on a "rarely used" and "ancillary provision" of law. It regulates untipped work in a way that largely aligns with a principle that has been used in wage and hour law for decades that has now been formally adopted, the agency said.

The agency also said the restaurant groups inflated the cost of the rule's financial impact by presenting figures that represent a decade of the rule's effects. Annually, the rule will cost \$183.6 million to institute, the DOL said, which is much more than the billions of dollars of costs the justices considered in West Virginia.

Paul DeCamp of Epstein Becker Green, who represents the advocacy groups, told Law360 on Friday that the agency continues to overreach with its defense of the tip credit rule.

"It comes as no surprise that the executive branch continues to pretend that there's nothing to see here with respect to its blatant usurpation of legislative authority," DeCamp said. "Fortunately, the courts get to resolve this issue, not the regulators."

Angelo I. Amador, executive director of the Restaurant Law Center, told Law360 on Friday that he thinks West Virginia "absolutely" applies to the case because the rule is projected to affect 500,000 workplaces and impose hefty compliance costs.

"Thus, the regulation being challenged absolutely involves the 'major questions' doctrine," Amador said. "And, because it lacks clear congressional authorization, it is unlawful."

Representatives for the Texas Restaurant Association did not immediately respond to a request for comment. A DOL spokesperson deferred to a Department of Justice spokesperson, who declined to comment.

The DOL is represented by Jennifer Utrecht, Alisa Beth Klein, Johnny Hillary Walker III, Brian M. Boyton and Brad P. Rosenberg 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 Irene Spezzamonte. Editing by Emma Brauer.