

# PROPOSED RULEMAKING

## DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 21]

### Kennels; Licensure; and Dog-Caused Damage

A public hearing has been scheduled to seek input from persons and organizations concerning proposed amendments to Chapter 21 (relating to general provisions; kennels; licensure; dog-caused damage).

The Bureau of Dog Law Enforcement will conduct the public meeting at 10 a.m. on October 12, 2000, in Room 202 at the Department of Agriculture, 2301 North Cameron Street, Harrisburg, PA. The Bureau is looking for input on the proposed amendments as follows:

1. Amendment of § 21.24(d) (relating to kennels) which would delete the rest board requirements and add vinyl coated wire requirements.
2. Amendment of § 21.51 (relating to lifetime dog license issuance) which would allow for the use of micro-chips.
3. Additional amendments to Chapter 21.

Persons seeking to testify or present statement information or other comments should contact Jan Frushone-Gibas at (717) 787-3062. Written copies of any statements should be provided at time of the meeting.

Written comments may also be sent prior to the meeting to be included in the record. The commentator's name, address and phone number must be included with the comment. Comments may be sent to: Department of Agriculture, Bureau of Dog Law Enforcement, ATTN: Richard F. Hess, Director, 2301 N. Cameron Street, Harrisburg, PA 17110-9408.

SAMUEL E. HAYES Jr.,  
*Secretary*

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## DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

### Food-Service Employee Incentive Program

The Department of Labor and Industry (Department) proposes to amend Chapter 231 (relating to minimum wage) by adding §§ 231.91—231.99, to read as set forth in Annex A.

#### A. *Effective Date*

The proposed regulations will be effective upon publication of final-form regulations in the *Pennsylvania Bulletin*.

#### B. *Statutory Authority*

These regulations are proposed under section 3 of the act of December 21, 1998 (P. L. 1290, No. 168) (43 P. S. § 333.105a note) (Act 168), which requires the Depart-

ment to adopt regulations to enforce and carry out the newly-added provisions of section 5.1 of The Minimum Wage Act of 1968 (MWA) (43 P. S. § 333.105a).

#### C. *Background and Purpose*

Section 2 of Act 168 amended the MWA by establishing a Food-Service Employee Incentive Program (Program) for new employees hired by restaurant and food-service employers. Section 3 of Act 168, in turn, requires the Department to develop regulations to implement this Program, and postpones the effective date of section 2 until that time. This Program will be in effect for 3 years following the Department's promulgation of regulations; at which time, section 2 will expire under its own terms unless renewed by the General Assembly. The Department is required to prepare and submit a report to the Senate Labor and Industry Committee and the House Labor Relations Committee within 30 months after section 2 of Act 168 takes effect.

Under the Program, new employees in the restaurant and the food-service industry and their employers may voluntarily agree to a training program during which the employees will receive a training wage. The training wage may not be less than the statutory minimum wage. The employees covered under these regulations are dishwashers, bus-persons, servers, sales staff, cooks, hostesses/hosts and cashiers. Section 5.1(i) of the MWA prescribes the length of the training program, in terms of minimum and maximum numbers of weeks, depending on the particular position for which the employee is hired.

While the employee is being trained, the difference between the employee's training wage, and the entry level wage to which the employee will be entitled upon completion of the employee's training period, will be deposited by the employer into an escrow account referred to as the Employee Incentive Account. Upon completion of the training program, or the employee's promotion, these escrow payments are to be remitted to the employee in equal installments over a period equal to the period of training. However, if the employee quits or is fired for willful misconduct before the end of the training period, the employee forfeits the moneys deposited for the employee in the Employee Incentive Account.

The proposed regulations are designed to implement section 2 of Act 168, and define many of the details associated with this type of program. In developing this proposed rulemaking, the Department sent drafts to the Majority and Minority Chairpersons of the Senate Labor and Industry and House Labor Relations Committees, as well as employee and employer organizations. Additionally, Department personnel met with a representative of the Pennsylvania Restaurant Association and staff from the House Labor Relations Committee to review their organizations' respective comments.

#### D. *Summary of Proposed Rulemaking*

Most of the rules governing the program already are in place through Act 168. The proposed regulations build upon Act 168's provisions by spelling out many of the underlying details needed for employers to successfully implement these types of programs.

Section 231.91 (relating to authority and effective date) generally sets forth the authority and effective dates of the proposed regulations. Section 231.91(d) prominently reiterates an important rule governing claims under Act 168. Although Act 168 amended the MWA, it requires

claims arising under its provisions to be brought under the Pennsylvania Wage Payment and Collection Law (WPCL), act of July 14, 1961 (P.L. 637) (43 P.S. §§ 260.1—260.12), rather than the MWA. Significantly, this means that employers are potentially subject to statutory liquidated damages of \$500 or 25% of the wages due, whichever is greater, by virtue of section 10 of the WPCL, if they fail to make timely payment of wages, and offer no good faith contest or dispute of the wage claim.

Section 231.92 (relating to eligibility) incorporates some basic, statutory requirements about the Program. It is to be voluntary; it is only open to restaurant and food service industry employers; and participating employes must work a minimum of 20 hours a week.

Section 231.93(a) (relating to amount of training wage) requires that the employer and employe agree to the amount of the training wage in writing. The complete requirements for this writing are spelled out in § 231.96 (relating to writing required).

Section 231.93(b) clarifies that the training wages cannot be less than the minimum wage. Similarly, § 231.93(c) explains that tip credits still can be used toward satisfying the minimum wage for tipped employes, as provided for in section 3(d) of the MWA (43 P.S. § 333.103(d)).

Section 231.94 (relating to length of training period) incorporates Act 168's minimum and maximum training periods for restaurant and food-service industry employes.

Section 231.95 (relating to employe incentive account) contains the substantive and recordkeeping requirements for the Food-Service Employe Incentive Account. Only one account is required per employer, even though multiple employes may be participating in the employer's program. Because these funds are to be maintained in an account for the benefit of the employes, any unlawful diversion of these funds by the employer could be prosecuted under 18 Pa.C.S. (relating to Crimes Code) as a form of theft.

Section 231.96 details what the written agreement between the employer and employe should contain. Specifically, the agreement shall contain:

- (1) The training wage and the starting date of training.
- (2) The length of the training period and the position for which the employe is being trained.
- (3) The entry-level wage which the employe will receive upon completion of the training period.
- (4) The financial institution where the employer maintains the Food-Service Employe Incentive Account.
- (5) The installment-payment schedule to be followed after the employe completes the training period.

Section 231.96(a)(5) also contemplates that revisions to this schedule will have to be made in the case of employes promoted before the end of the training period.

Section 231.96(b) requires employers to obtain a signed acknowledgment from the employes that they have read and understood the agreement terms. Subsection (c) directs the employer to maintain a copy of the employe's signed acknowledgment for 3 years, along with other payroll records already required to be kept under §§ 231.31—231.35 of the MWA's regulations.

These recordkeeping requirements are intended to reduce the occasion for misunderstanding between the employer and employe, to protect both parties in the event of disputes under the agreements and to facilitate the Department's investigation of complaints. The Depart-

ment will develop, and post on its website ([www.dli.state.pa.us](http://www.dli.state.pa.us)), a sample form, which employers can use to enroll new employes in a Program.

Section 231.97 (relating to training) adopts Act 168's rules on training, including the requirement that the employer be responsible for all training costs.

Section 231.98(a) (relating to completion of training) addresses payments from the Employe Incentive Account after the participant completes training or is promoted prior to completion of training. Act 168 only requires that payments be made in equal installments over a period equal to the period of training. Initial attempts to develop more precise rules specifying how the payments are to be calculated, and when specifically they must be paid, proved to be next to impossible—given the likely variations in training periods and hours worked from employe-to-employe, and the different pay periods and pay schedules used by employers. Consequently, the Department proposes to leave the actual installment schedule up to the employer and employe, so long as the two statutory parameters (equal installments and payments over a period equal to the period of training) are met.

The Department further proposes that the payment schedule be part of the written notification given to the employe when the employe starts employment. This up-front notification requirement is intended to discourage an employer from intentionally delaying the installment payments until close to the end of the period by which they must be made (such as, paying 50% on the next-to-the-last day and 50% on the last day), since employes will be less likely to agree to those terms. It is also contemplated that revisions to this schedule will have to be made in the case of employes who are promoted before the end of the training period. This contingency is taken into account in § 231.96(a)(5).

Section 231.98(b) outlines the three circumstances in which separated employes are entitled to payment from the Food-Service Employe Incentive Account. Those circumstances are one of the following:

- (1) Involuntary termination prior to completion of the training period for reasons other than willful misconduct.
- (2) Voluntary termination of employment subsequent to promotion or completion of the training period.
- (3) Involuntary separation from employment after promotion or completion of the training period without regard to cause.

For separated employes remaining eligible for payments, the Department proposes a 30-day deadline, in the interest of clarity, for employers to remit the remaining funds due them from the Food-Service Employe Incentive Account.

Section 231.99(a) (relating to forfeiture of escrowed funds) conversely provides that employes, voluntarily terminating employment with the employer prior to completion of training, forfeit all funds in their Food-Service Employe Incentive Account. Section 231.99(b) similarly directs that employes terminated for "willful misconduct," as that term is used in The Pennsylvania Unemployment Compensation Law (UC Law) (43 P.S. §§ 751—914), prior to completing training, forfeit their entitlement to these funds. Because Act 168 refers to the UC Law to define willful misconduct, questions arose as to the interplay of WPCL complaints and UC Law claims

from involuntarily-separated employes or employes at least claiming to be involuntarily separated. The Department proposes, in § 231.99(c), to rely upon final UC Law adjudications for investigation purposes in these circumstances. However, employes are not required to go through the Department under the WPCL, and may bring suit on their own under that statute. Moreover, the Department only intends to rely upon final adjudications in its investigation. It does not intend to postpone investigations while UC Law claims work their way through the system, up to, and including, judicial review.

*E. Affected Persons*

These proposed regulations will only apply to employers and newly hired employes in the food service and restaurant industries who voluntarily agree to participate in the Food-Service Employee Incentive Program.

*F. Fiscal Impact*

The proposed regulations will have no impact on local government. Even if a unit of local government, such as a school district, has food-service employes, they are exempt from both the MWA and the WPCL. The Commonwealth and its political subdivisions are not included in either statute's definition of the term "employer." See, *Philipsburg-Osceola Educ. Ass'n. v. Philipsburg-Osceola Area School District*, 633 A.2d 220 (Pa. Cmwlth. 1993) (WPCL); 1976 Op. Atty Gen. No. 29 (MWA). Similarly, these regulations do not affect employers or employes outside the restaurant and food-service industries, or employers or employes in those industries that opt to not participate.

Any costs to the Commonwealth will result from the increased enforcement duties assigned to the Department by Act 168, and not by these regulations. These duties will be undertaken by existing Department staff, and are perceived to be minimal.

No precise estimate can be made as to increased costs, if any, to participating employers and employes, since their actual costs are dependent on several variables, including the number of participating employes and the agreed-upon training and entry-level wages. The objective of Act 168, however, is to create an incentive for new employes in the restaurant and food-service industries to remain at their jobs, and thereby produce mutual benefits that exceed any initial costs. If the costs exceed the benefits in the long run, employers and employes will refrain from participating.

The Department estimates the following average training costs and employer savings when employes leave prior to completing their training:

<i>Job Title</i>	<i>Estimated Training**</i>	<i>Average Savings per Early Separation***</i>
Hosts and Hostesses	\$328.80	\$219.30
Waiters & Waitresses	\$251.16	\$107.07
Food Servers, Outside	\$341.46	\$384.42
Counter Attendants	\$269.64	\$163.83
Cooks, fast food	\$290.88	\$117.39
Cooks, short order	\$352.32	\$282.51

*G. Paperwork Requirements*

These regulations will require written notification and acknowledgment to and from participating employes. One record will suffice for both purposes. Additionally, the Department recommends that the schedule for installment payments from the Employee Incentive Account be

revised if the employe is promoted before completing his training period. These records must be maintained with other payroll records required to be kept by employers under the MWA, and are considered to be important to the protection of both employers and employes who participate in the Program. The Department will develop, and post on its website, a sample form for use by participating employers and employes to further reduce this already minimal burden.

*H. Sunset Date*

Act 168, by its own terms, provides that section 5.1 of the MWA will expire 3 years after the effective date of these regulations. Accordingly, § 231.91(c) proposes that the regulations will expire within 3 years unless section 5.1 of the MWA is renewed by the General Assembly.

*I. Contact Person*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulations to Robert E. Moore, Director, Bureau of Labor Law Compliance, Department of Labor and Industry, Room 1301, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17120 (717) 787-4763; Fax: (717) 787-0517; e-mail: [rmoore@dli.state.pa.us](mailto:rmoore@dli.state.pa.us), within 30 days of publication in the *Pennsylvania Bulletin*. Questions about the proposed regulations can be directed to Richard C. Lengler, Deputy Chief Counsel, Labor Law Compliance Division, Office of Chief Counsel, Department of Labor and Industry, 10th Floor, Labor and Industry Building, Harrisburg, PA 17120 (717) 787-4816; Fax: (717) 783-5027; e-mail: [rlengler@dli.state.pa.us](mailto:rlengler@dli.state.pa.us).

*J. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 27, 2000, the Department submitted a copy of the proposed regulations to the Independent Regulatory Review Commission (IRRC), the Senate Labor and Industry Committee and the House Labor Relations Committee (Committees). In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed regulations, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed regulations to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the amendments, by the Department, the General Assembly and the Governor of objections raised.

JOHNNY J. BUTLER,  
*Secretary*

**Fiscal Note:** 12-55; (1) General Fund; (2) Implementing Year 1999-00 is \$minimal; (3) 1st Succeeding Year 2000-01 is \$minimal; 3rd Succeeding Year 2002-03 is \$minimal; 4th Succeeding Year 2003-04 is \$minimal; 5th Succeeding Year 2004-05 is \$minimal; (4) Fiscal Year 1998-99 \$1.8 million; Fiscal Year 1997-98 \$1.7 million; Fiscal Year 1996-97 \$1.7 million; (7) General Government Operations; (8) recommends adoption.

**Annex A**  
**TITLE 34. LABOR AND INDUSTRY**  
**PART XII.**

**CHAPTER 231. MINIMUM WAGE**

**FOOD-SERVICE EMPLOYEE INCENTIVE PROGRAM**

**§ 231.91. Authority and effective date.**

(a) This section and §§ 231.92—231.99 set forth the rules governing the Food-Service Incentive Employee Program for participating restaurant and food-service operations employers and their employes in this Commonwealth under section 5.1 of The Minimum Wage Act of 1968 (act) (43 P. S. § 333.105a).

(b) This section and §§ 231.92—231.99 will expire, along with section 5.1 of the act on \_\_\_\_\_ (*Editor's Note:* The blank refers to the effective date of adoption of this proposal.) unless section 5.1 is extended by the General Assembly.

(c) Under section 5.1(j) of the act (43 P. S. § 333.105a(j)), a claim arising under the Food-Service Employee Incentive Program provisions shall be brought under the Wage Payment and Collection Law (43 P. S. §§ 260.1—260.12).

**§ 231.92. Eligibility.**

(a) The Food-Service Employee Incentive Program is a voluntary program open to new employes of employers engaged as restaurant and food-service operations in this Commonwealth.

(b) A participating employe shall work a minimum of 20 hours a week.

**§ 231.93. Amount of training wage.**

(a) The amount of the training wage paid to participants in the Food Service Employee Incentive Program shall be established and agreed to in writing by the employe and the employer.

(b) The training wage cannot be less than the minimum wage established by The Minimum Wage Act of 1968 (43 P. S. §§ 333.101—33.115).

(c) The employer may use tip credits toward satisfying the minimum wage for tipped employes, as provided for in section 3(d) of The Minimum Wage Act of 1968 (43 P. S. § 333.103(d)).

**§ 231.94. Length of training period.**

The training periods shall be at least, but not more than, the following:

<i>Job Title</i>	<i>Training Period</i>
Dishwashers	2—4 weeks
Bus Persons	2—4 weeks
Servers	2—12 weeks
Sales Staff	2—6 weeks
Cooks	4—12 weeks
Hostess/Host/Cashier	4—12 weeks

**§ 231.95. Employee incentive account.**

(a) The employer shall maintain at least one escrow or restricted account designated as an Employee Incentive Account (Account) in accordance with section 5.1 of The Minimum Wage Act of 1968 (43 P. S. § 333.105a).

(b) The employer shall deposit sums consisting of the difference between the training wage and the entry-level wage into the Account on each regular payday during the training period. The employer shall credit the deposit in the name of each participating employe.

(c) Funds in the Account shall be the property of the employer until the employer is required to make payments to the employe. Funds in the Account are non-transferable and nonassignable.

(d) The employer shall maintain complete, detailed payroll records. The records shall include a listing of all deposits and withdrawals from the Account.

(e) The employer shall maintain the records at the place of employment or at a central recordkeeping office within or outside this Commonwealth. The employer shall maintain these records for 3 years in accordance with § 231.31 (relating to contents of record).

(f) Access to records maintained by the employer under this section shall be provided to the Department representatives within 7 days following written or verbal notice.

**§ 231.96. Writing required.**

(a) The employer shall provide written notification to the employe prior to the commencement of the training program of the following:

- (1) The training wage and the starting date of training.
- (2) The length of the training period and the position for which the employe is being trained.
- (3) The entry-level wage which the employe will receive upon completion of the training period.
- (4) The financial institution where the employer maintains the Food-Service Employee Incentive Account.

(5) The installment-payment schedule to be followed after the employe completes the training period, provided the employer shall revise this schedule with the employe's written consent when the employe is promoted prior to completion of the training period.

(b) The employer shall obtain a signed acknowledgment that the employe has read and understands the written notification.

(c) The employer shall maintain a copy of the signed acknowledgment for 3 years, along with other records required to be kept under §§ 231.31—231.35.

(d) The Department will prepare a recommended notification and acknowledgment form that an employer may use. The Department will make these forms available on its Internet website and through other means.

**§ 231.97. Training.**

(a) The employer shall provide an employe with the usual and customary training associated with the position for which the employe was hired.

(b) The employer shall be responsible for all training costs, whether incurred by the employer or employe.

**§ 231.98. Completion of training.**

(a) After an employe completes the training period or is promoted, the employer shall pay all funds credited to the employe in the Food-Service Employee Incentive Account (Account). Payment shall be made in equal installments over a period of time equal to the length of the training period. These installment payments shall be paid to the employe, in addition to employe's entry-level wage, until the employe has received the full amount credited to the employe in the Account.

(b) The employer shall pay funds credited to employes in the Account, within 30 days of separation, to employes who are separated from the employer under any of the following conditions:

(1) Involuntary termination prior to completion of the training period for reasons other than willful misconduct.

(2) Voluntary termination of employment after promotion or completion of the training period.

(3) Involuntary separation from employment after promotion or completion of the training period without regard to cause.

**§ 231.99. Forfeiture of escrowed funds.**

(a) An employe who voluntarily terminates employment with the employer prior to completion of the training period forfeits all funds credited to the employe in the Food-Service Employe Incentive Account (Account).

(b) An employe terminated from employment for willful misconduct, as that term is used in the Unemployment Compensation Law (43 P. S. §§ 751—914), prior to completion of the training period forfeits all funds credited to the employe in the Account.

(c) When investigating claims and complaints regarding payments or forfeitures of funds in the Account, the Department may rely upon any final adjudication issued under the Unemployment Compensation Law regarding the nature of the employe's separation or whether the separation was for willful misconduct.

[Pa.B. Doc. No. 00-1721. Filed for public inspection October 6, 2000, 9:00 a.m.]

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