PROPOSED RULEMAKING

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

Minimum Wage

In accordance with sections 4 and 9 of the Minimum Wage Act of 1968 (43 P.S. §§ 333.104(c) and 333.109), the Department of Labor and Industry (Department) is submitting this proposed rulemaking for the purpose of carrying out the Minimum Wage Act of 1968 (act) (43 P.S. §§ 333.101—333.115) and to safeguard the minimum wage rates established thereby.

The Department proposes the following regulations for minimum wages under the act as set forth in Annex A.

Statutory Authority

This proposed rulemaking is issued under the authority provided in section 4(c) of the act, which requires the Secretary to promulgate regulations for overtime, and section 9 of the act which provides:

> The secretary shall enforce this act. The secretary shall make and, from time to time, revise regulations, with the assistance of the board, when requested by the secretary, which shall be deemed appropriate to carry out the purposes of this act and to safeguard the minimum wage rates thereby established. Such regulations may include, but are not limited to, regulations defining and governing bona fide executive, administrative, or professional employes and outside salespersons, learners and apprentices, their number, proportion, length of learning period, and other working conditions; handicapped workers; part-time pay; overtime standards; bonuses; allowances for board, lodging, apparel, or other facilities or services customarily furnished by employers to employes; allowances for gratuities; or allowances for such other special conditions or circumstances which may be incidental to a particular employer-employe relationship.

Background

Tipped Employees

Section 4(a.1) of the act (43 P.S. § 333.104(a.1)), provides that every employer shall pay to each of his or her employees a minimum wage of $7.25 per hour. However, there is a special provision for tipped employees. Section 3 of the act (43 P.S. § 333.103), defines "wage" in the context of tipped employees as follows:

> In determining the hourly wage an employer is required to pay a tipped employe, the amount paid such employe by his or her employer shall be an amount equal to: (i) the cash wage paid the employe which for the purposes of the determination shall be not less than the cash wage required to be paid the employe on the date immediately prior to the effective date of this subparagraph; and (ii) an additional amount on account of the tips received by the employe which is equal to the difference between the wage specified in subparagraph (i) and the wage in effect under section 42 of this act.

Section 3 of the act was a statutory amendment effective December 21, 1998. The day before the effective date of the amendment to the law, the tipped minimum wage was $2.83 per hour. This figure was calculated because at the time of the amendment, the act's language concerning tipped employees read as such, "In determining the hourly wage of a tipped employe, the amount paid such employe by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of forty-five percent of the applicable minimum wage rate." The minimum wage at that time was $5.15 per hour. 43 P.S. § 333.104(a)(6). Thus, an employer can only increase the tipped wage by up to 45% of $5.15 per hour which is $2.32 per hour. If you subtract $2.32 from $5.15 then you get $2.83 which was the lowest base rate to pay an employee. Since the tipped wage is $2.83, that is the minimum wage employers are required to pay tipped employees. Employers may take a tip credit for the difference between the base hourly wage for tipped employees as long as the tips and base wage equal $7.25 per hour. In addition, section 3 of the act provides that tips are the property of the employee, and that tip pooling is allowed amongst all employees that customarily and regularly receive tips.

The existing regulation in § 231.1 (relating to definitions), defines a tipped employee as "an employee engaged in an operation in which the employee customarily and regularly receives more than $30 a month in tips." However, there is no regulation addressing the performance of non-tipped duties by tipped workers, the deduction of credit card service fees from tips, the institution of service charges and tip pooling.

In addition to the act, the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C.A. §§ 201—219) addresses tipped employees. Section 3 of the FLSA (29 U.S.C.A. § 203) defines a tipped employee as an employee engaged in an occupation in which that employee customarily and regularly receives tips. This provision has been in the FLSA since November 1, 1977.

Currently, the Department does not have any regulations addressing whether an employer can pay an employee a tipped wage and have the employee perform any duties that do not directly generate tips.

The United States Department of Labor (USDOL) does not have a regulation addressing this issue. However, USDOL has long enforced the "80/20 rule" which was outlined in a USDOL subregulatory policy. WHD Field Operations Handbook 30d00(e), Revision 563 (Dec. 9, 1988). The 80/20 rule permits employers to take the tip credit for an employee as long as that employee does not spend more than 20% of the employee's workweek performing duties that do not directly generate tips.

On December 30, 2020, USDOL published a final rule revising its regulations concerning tipped employees. See 85 FR 86756, 86771 (December 30, 2020). In its final rule, USDOL announced that it was allowing employers to institute tip pools with employees who do not customarily and regularly receive tips if the employer does not take a tip credit. However, these tips pools may not include managers or supervisors. In addition, these regulations would allow employers to take a tip credit for any time spent performing duties that are related to those that customarily and regularly produce tips and which are done contemporaneously with tipped duties or for a reasonable time immediately before or after tipped duties. This rulemaking would have ended the 80/20 rule. USDOL's tipped employee rule was to be effective on March 1, 2021.

On January 21, 2021, the Commonwealth of Pennsylvania, along with the Commonwealth of Massachusetts, the States of Delaware, Illinois, Maryland, Michigan, New Jersey and New York along with the District of Columbia filed a lawsuit against USDOL charging that USDOL's tip rule was contrary to USDOL's statutory jurisdiction, authority and limitations in violation of section 706(2)(C) of the Federal Administrative Procedures Act (APA) (5 U.S.C. § 706(2)(C)), and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA. This lawsuit is stayed because on February 26, 2021, USDOL decided to reconsider the implementation of this regulation. On March 25, 2021, USDOL postponed the effective date for parts of the final regulation until December 31, 2021. See 86 FR 15811 (March 25, 2021). However, on April 29, 2021, USDOL allowed the part of the regulation regarding tip pooling to go into effect. USDOL's regulation allows employees who traditionally perform tipped work to participate in tip pools with employees who do not typically perform tipped work. See 86 FR 22597 (April 29, 2021). On September 24, 2021, USDOL clarified that managers and supervisors may keep tips provided directly to them but could not receive tips from tip pools. 86 FR 52973 (September 24, 2021).

On October 29, 2021, USDOL published a proposed regulation which would codify the 80/20 rule for the first time. 86 FR 32818 (June 23, 2021). Specifically, the proposed regulation would allow an employer to take a tip credit when an employee performs work that directly generates tips or performs work that directly supports tip-producing work, provided that the directly supporting work "does not (1) exceed, in aggregate, 20 percent of the employee's hours worked during the work week or (2) is performed for a continuous period of time exceeding 30 minutes."

Neither the Department nor USDOL have issued regulations regarding service charges or the deduction of credit card processing fees from employee tips.

Overtime for Salaried Employees

Section 4 of the act requires that "Employes shall be paid for overtime not less than one and one-half times the employe's regular rate as prescribed in regulations promulgated by the secretary." The Department has regulations defining the term "regular rate." See § 231.43 (relating to regular rate). However, these regulations do not address the calculation of the base rate for salaried employees who are entitled to overtime.

The USDOL allows for a fluctuating workweek to determine the regular rate for salaried employees. See 29 CFR 778.114 (relating to Fluctuating Workweek Method of Computing Overtime). Under the fluctuating workweek, an employer pays an employee a flat weekly salary regardless of the regular hours worked in a week, which may vary from week to week. For all hours worked in excess of 40 in a week under the fluctuating workweek, the worker is entitled to overtime at 0.5 their regular rate. Federal law allows for the "regular rate" to be calculated based on either a 40-hour workweek or the total hours worked, including overtime hours. Typically, the "regular rate" in a fluctuating workweek agreement is calculated based on total hours worked, which benefits the employer and disadvantages the employee since it results in a lower "regular rate."

The Pennsylvania Supreme Court has addressed the issue of the overtime for salaried employees and decided that the act requires that a 1.5 multiplier to be applied to determine an employee's overtime rate when the employee works a fluctuating workweek. *Chevalier v. General Nutrition Ctrs., Inc.*, 220 A.3d. 1038 (Pa. 2019).

At issue in *Chevalier* was the provision in section 4(c) of the act that "[e]mploye[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate as prescribed in regulations promulgated by the secretary." The Department's regulations in § 231.41 (relating to rate) provide that "each employee shall be paid for overtime not less than 1 1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek," However, this regulation does not further prescribe how to define the base rate to be used to calculate overtime for salaried employees who work a fluctuating workweek.

In *Chevalier*, Plaintiffs were salaried store managers paid a set weekly salary plus commissions regardless of the hours worked. Thus, their weekly wages compensate them for the hours they work whether they work 30 or 60 hours.

The Pennsylvania Supreme Court noted that for employees paid based on an hourly rate, the overtime formula is simple: 1.5 × hourly rate × number of hours over 40. But this generic overtime formula is ambiguous with respect to employees with different compensation structures that may include salaries, commissions, payment based on the work completed or a combination of these compensation structures. The Pennsylvania Supreme Court, however, did not address the calculation of the "regular rate" for these employees, noting that the "parties now agree with the Superior Court majority that the regular rate should be calculated by using the actual hours worked." Thus, the Superior Court's holding on this point that the "regular rate" was calculated by taking total compensation and dividing it by actual hours worked was not disturbed by the Pennsylvania Supreme Court.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

In December 2020, the Department solicited input about the act's regulations from a wide range of stakeholders, including members of the Minimum Wage Advisory Board, by e-mail. This solicitation included:

- Restaurant Opportunities Centers United—Philadelphia
- Restaurant Opportunities Centers United—Pittsburgh
- National Employment Law Project, Catherine Ruckelshaus
- The Economy League of Greater Pennsylvania, Jeff Hornstein
- Winebrake & Santillo, LLC, Pete Winebrake
- Economic Policy Institute, Heidi Shierholz
- PA AFL-CIO, Rick Bloomingdale
- PA Building Trades, Frank Sirianni
- SEIU Healthcare Pennsylvania, Matt Yarnell

The Minimum Wage Advisory Board is comprised of the following members:

- Knouse Foods Cooperative, Inc., Scott Briggs
- PA Chamber of Business and Industry, Alex Halper
- Keystone Research Center, Stephen Herzenberg
- Community Legal Services, Nadia Hewka

- Hudak & Company, Wayne Hudak
- SEIU State Council, Reesa Kossoff
- United Food and Commercial Workers Union, Local 1776, John Meyerson
- United Food and Commercial Workers Union, Local 1776, Barbara Johnson
- PA AFL-CIO, Samantha Shewmaker

On February 4, 2021, the Department received written comments in the form of a joint letter from the following individuals and organizations:

Justice at Work Pennsylvania
Outten and Golden, LLP
Community Legal Services of Philadelphia
National Employment Law Project
PA AFL-CIO
Lichten & Liss-Riordan
Duquesne Law School, Unemployment Compensation Clinic
Keystone Research Center
PA Budget and Policy Center

On February 5, 2021, the Department received a written comment from the Pennsylvania Chamber of Business and Industry.

The Department has also conducted meetings with private stakeholder groups.

Purpose

This proposed rulemaking amends the Department's existing minimum wage regulations in §§ 231.1, 234.34, 231.43 and 231.101. This rulemaking proposes to add §§ 231.111—231.114.

Summary of Proposed Rulemaking

§ 231.1. Definitions

The Department proposes to amend the definition for "Bureau" to change the definition from "Bureau of Labor Standards" to "Bureau of Labor Law Compliance." This change reflects the current name of the bureau charged with enforcing this chapter.

The Department proposes to add a definition for "tip credit" to provide clarity to its regulations. This definition will make it clear that a tip credit is the difference between the statutory minimum wage outlined in section 4 of the act and the base hourly rate that employers pay to tipped employees.

The Department proposes to amend the definition for "tipped employee" to raise the tipped employee threshold from $30 per month to $135 per month. The tipped salary threshold was set in 1977. When the $30 tip threshold was last updated, a tipped employee had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a tipped employee in this Commonwealth must earn just over four times the minimum wage in tips before their employer can claim a tip credit. By updating this threshold, the regulation will ensure that the monetary threshold found in the definition of tipped workers accounts for 44 years of inflation and that tipped employees' wages reflect current market values.

§ 231.34. Tipped employees

The Department proposes to amend paragraph 3 to align the language of this regulation with the language currently found in section 3 of the act. The language in the current regulation mirrored the language found in section 3 of the act before it was amended by the act of December 21, 1998 (P.L. 1290, No. 168).

The Department proposes to add paragraph (6) which would require employers to keep records of the names and positions of each employee participating in a tip pool and the amount distributed to that person. This paragraph is necessary for the Department to fulfill its duties under section 7 of the act (43 P.S. § 333.107), and ensure that employees are complying with the proposed tip pooling regulations.

§ 231.43. Regular rate

The Department proposes to add "(a)" to indicate the first subsection of the regulation. This subsection currently has no designation.

The Department proposes to amend subsection (a)(1) to replace "at Christmas time" with "during any holiday." This is being done to reflect that sums paid for any holiday should count towards the calculation of the regular rate.

The Department proposes to amend subsection (b) and replace the words "he" and "his" with the words "the" and "the employee." This will make the language of the regulation gender neutral.

The Department proposes to add new subsection (g) which provides, "[t]he regular rate for salaried employees who are not exempt from overtime is determined by totaling all remuneration for employment to or on behalf of the employee received in a workweek, except sums, payments, contributions and compensation enumerated in subsection (a), divided by 40 hours."

The Department's regulation had been silent on how to calculate the regular rate of pay for employees who are paid a salary. This updated regulation addresses the omission in existing regulations and clarifies that the "regular rate" in all cases should be calculated based on a regular, 40-hour workweek and not the total hours worked including overtime, which may be irregular and inconsistent from week to week. This would be consistent with the act's purpose because it would result in more overtime pay for salaried employees who are not exempt from overtime and, as such, be consistent with the act's remedial purpose of protecting these salaried workers from unreasonably low wages.

§ 231.101. Minimum wage increase

The Department proposes to amend subsection (b) and (b)(1) to provide clarity that employers may pay a lower hourly wage to tipped employees and must pay the difference if that hourly wage and the employee's tips do not equal the State minimum wage of $7.25 per hour.

The Department proposes to amend subsection (b)(2) to reflect the proposed increase of the tipped employee threshold to $135 per month.

§ 231.111. Tip credit for non-tipped duties

The Department proposes to add this section to its regulations because, other than record keeping requirements outlined in § 231.34 (relating to tipped employees), the Department has no regulations governing tipped employees. This regulation would eliminate confusion for employers in this Commonwealth that may have resulted from USDOL's frequently changing guidance.

Subsection (a) would provide that an employer can only take a tip credit if that employee spends at least 80% of that employee's workweek performing duties that directly generate tips and if the other duties that the employee performs support the duties that directly generate tips.

This proposed regulation is needed because the Commonwealth law and regulations presently are silent on the amount of time per week an employee can be directed to work on non-tip-generating activities while being paid the tipped minimum wage of at least $2.83 per hour. The proposed regulation will ensure that employees who receive the lower tipped minimum wage are actually performing duties that generate tips. Finally, the Department provides that an employer cannot take a tip credit if an employee spends more than 30 continuous minutes performing duties that do not directly generate tips. The Department's proposed regulation is in accordance with section 4 of the act which requires employees to receive the minimum wage. It also mirrors a final regulation and longstanding guidance from USDOL that to be classified as a tipped employee, an employee must spend 80% of the employee's time performing tipped work and must spend no more than 30 continuous minutes performing duties that do not directly generate tips.

Although the Department's proposed regulation mirrors USDOL's proposed regulation, there are several reasons that make it prudent for the Department to issue its own regulation on the 80/20 rule. First, USDOL has proposed two very different regulatory packages within the past year regarding the 80/20 rule. This creates uncertainly at the Federal level and the Department wishes to remove the uncertainty at the State level. Second, the Department has examined USDOL's current proposal and has concluded that it provides strong protection to workers from being misclassified as a tipped employee while recognizing the employer's right to pay a lower base hourly wage for employees who perform tipped work. Finally, the Courts have criticized the Department for failing to enact regulations which explain whether the Department is complying with or departing from Federal guidance. The Department's proposed regulation provides clarity on its position regarding tipped workers performing non-tipped work.

Subsection (b) provides that employers have to pay the minimum wage for any time where an employer cannot take a tip credit. The Department is proposing this to clarify and reinforce that the lower tipped minimum wage is an exception to the requirement that employers pay employees the minimum wage required by section 4 of the act.

§ 231.112. Tip pooling

The Department proposes this new section because, while the act permits tip pooling, there are no regulations addressing this subject. This regulation will remove any confusion for employers that may have been caused by USDOL's frequently changing guidance.

Subsection (a) would clarify that tip pooling is reserved for employees who customarily and regularly perform tipped duties. The Department proposes this because section 3 of the act allows for tip pooling amongst employees who customarily and regularly perform duties that generate tips. Furthermore, limiting tip pools to employees who customarily and regularly receive tips ensures that lower paid tipped employees keep the tips that they earn.

Subsection (b) would exclude owners, partners, employees who perform any duties that the FLSA classifies as executive duties and employees who do not spend 80% of their workweek performing duties that customarily and regularly generate tips from participating in tip pools. The Department proposes this to ensure that only employees who customarily and regularly perform tipped work can participate in tip pooling and to prohibit higher paid upper-level supervisors from participating in tip pooling. This regulation would allow lower-level supervisors to participate in tip pools provided that they do not have an ownership or partnership interest and spend at least 80% of their shift performing duties that customarily and regularly generate tips.

Subsection (c) would require employers to notify employees of tip pooling arrangements. This notice must be provided at the time of employment or at least one pay period before the tip pooling arrangement takes effect. The Department proposes this to ensure that workers are fully aware of tip pooling arrangements before they are required to participate in them. Notifying employees of tip pooling arrangements furthers the intent of section 1 of the act (43 P.S. § 333.101), because it will help in alleviating the unequal bargaining power between employers and employees.

The Department is declining to adopt USDOL's rule because it does not align with the act's remedial purpose. "It is permissible for a state to enact more beneficial wage and hour laws. Indeed, the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 8 A.3d 866, 883 (Pa. 2010). Tipped workers, such as servers, lose control of their earned tips if forced to participate in tip pooling with non-tipped workers because the tip pooling effectively subsidizes the wages of non-tipped employees. This results in a loss of wages for the tipped worker and creates an incentive for employers to lower the hourly wage for non-tipped workers because those workers would not experience a loss in income.

§ 231.113. Credit card fees

The Department proposes to add this section as there are no regulations addressing whether employers are permitted to deduct credit card processing fees from an employee's tips. The Department proposes to prohibit employers from deducting credit card processing and other fees from employee tips. This is consistent with section 3 of the act, which states that tips are the property of the employee.

The proposed regulation provides greater protection than found in Federal law. The proposed regulation implements and is compelled by the express language of the act. Section 3 of the act states "the gratuity shall become the property of the employee." The FLSA does not contain this language, which evidences an intent for the act to provide greater protection than the FLSA.

§ 231.114. Service charges

The Department proposes to add this section to address service charges that employers may choose to charge patrons. There currently is no regulation which addresses service charges as they affect tipped employees. This is in accordance with section 9 of the act (43 P.S. § 333.109), which grants the Department's authority to issue regulations regarding tipped employees and to protect employees from unreasonably low wages.

Subsection (a) would require employers who charge patrons service fees to provide patrons notice in the contract with the patron and on a menu provided to the patron. The Department proposes this regulation to clarify to patrons that a service charge is different than a tip.

Subsection (b) would require a service charge notice to state that the charge is for the administration of the

banquet, special function or package deal and is not a tip to be distributed to employees. The Department proposes this regulation to clarify to patrons that a service charge is different than a tip.

Subsection (c) would require billing statements to contain separate lines for service charges and tips. The Department proposes this regulation to further clarify to patrons that a service charge is different than a tip.

Affected Persons

This proposed rulemaking will affect all employers in this Commonwealth covered by the act and all individuals who are employed by these entities who performed tipped work or are salaried employees eligible for overtime.

The Department estimates that this regulation will benefit the approximately 199,285 tipped workers in this Commonwealth, as defined by the act's current regulations.

Fiscal Impact

The Department does not anticipate that this regulation change will create a significant impact on its enforcement budget.

The regulation may have a fiscal impact for employers. Costs related to compliance may include costs of becoming familiar with the regulation and costs of adjusting operations to the regulation. Regulatory familiarization and adjustment costs will likely be limited in duration.

Specifically, the regulatory familiarization cost to the regulated community in this Commonwealth in Fiscal Year (FY) 2021-2022 is $1,958,580 (based on an average hourly wage of $33.13 for a human resources specialist in this Commonwealth in May 2020 plus benefits cost equaling 46% base salary plus overhead cost at 17% base salary multiplied by 1 hour multiplied by the total number of establishments that are likely to be required to comply, 36,270). The adjustment cost to the regulated community in this Commonwealth in FY 2021-2022 is up to $15,303,060 (based on an average hourly wage of $33.13 for a human resources specialist in this Commonwealth plus benefits cost equaling 46% base salary plus overhead cost at 17% base salary multiplied by 1.25 hours multiplied by the total number of affected workers in Year 1 who are customarily and regularly tipped—up to 199,285—and who are paid for overtime using a fluctuating workweek method, 27,427).

Reporting, Recordkeeping and Paperwork Requirements

This proposed rulemaking will not require the creation of new forms. However, employers who institute a tip pooling arrangement will have to keep record of the employees who are part of the tip pool and the dates and amounts of tips disbursed to these employees. These employers will have to make these records available to the Department upon request.

Sunset Date

A sunset date is not appropriate for this proposed rulemaking because it is not appropriate to sunset a regulation that protects workers from unreasonably low wages. However, the Department will continue to monitor the impact and effectiveness of the regulations.

Effective Date

This proposed rulemaking will take effect 60 days after publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Bryan M. Smolock, Director, Department of Labor and Industry, Bureau of Labor Law Compliance, 651 Boas Street, Harrisburg, PA 17121 or by e-mail to bsmolock@pa.gov within 30 days of publication in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on November 5, 2021, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Committee on Labor and Industry and the House Committee on Labor and Industry. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations, or objections to the proposed rulemaking to the Department within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking by the Department, the General Assembly and the Governor.

JENNIFER L. BERRIER,
Secretary

Fiscal Note: 12-114. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231. MINIMUM WAGE

GENERAL PROVISIONS

§ 231.1. Definitions.

* * * * *

(b) In addition to the provisions of subsection (a), the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Bona fide training program—One which must involve either formal instruction or on-the-job training during a period when the learner is entrusted with limited responsibility and is under supervision or guidance.

Bureau—The Bureau of Labor **[Standards]** **Law Compliance** of the Department.

Department—The Department of Labor and Industry of the Commonwealth.

* * * * *

Taxicab driver—An individual employed to drive an automobile equipped to carry no more than seven passengers which is used in the business of carrying or transporting passengers for hire on a zone or meter fare basis and which is not operated over fixed routes, between fixed terminals or under contract.

***Tip credit*—The difference between the statutory minimum wage outlined in section 4 of the act (43 P.S. § 333.104) and the hourly wage paid to tipped employees.**

Tipped employee—An employee engaged in an operation in which the employee customarily and regularly receives more than **[$30]** **$135** a month in tips.

Tips—Voluntary monetary contributions received by an employee from a guest, patron**[,]** or customer for services rendered.

* * * * *

EMPLOYER RECORDS

§ 231.34. Tipped employees.

Supplementary to the provisions of any section of this chapter pertaining to the payroll records to be kept with respect to employees, every employer shall also maintain and preserve payroll or other records containing the following additional information with respect to each tipped employee whose wages are determined under section 3(d) of the act (43 P.S. § 333.103(d)):

(1) A symbol or letter placed on the pay records identifying each employee whose wage is determined in part by tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received. This may consist of reports made by the employees to the employer on IRS Form 4070.

(3) Amount by which the wages of each tipped employee have been deemed to be increased by tips, as determined by the employer**[, not in excess of 45% of the applicable statutory minimum wage until January 1, 1980 and thereafter 40% of the applicable statutory minimum wage]**. The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week. An employee failing or refusing to report to the employer the amount of tips received in any workweek shall not be permitted to show that the tips received were less than the amount determined by the employer in the workweek.

(4) Hours worked each workday in any occupation in which the tipped employee does not receive tips and total daily or weekly straight-time payment made by the employer for such hours.

(5) Hours worked each workday in occupations in which the employee received tips and total daily or weekly straight-time earnings for the hours.

(6) For employers who implement tip pools, the names and position of each participant in the tip pool and the amount distributed to each participant in the tip pool.

OVERTIME PAY

§ 231.43. Regular rate.

(a) For purposes of **[these]** §§ 231.41—231.43 (relating to overtime pay), the regular rate at which an employee is employed shall be deemed to include all remuneration for employment paid to or on behalf of the employee, but it shall not be deemed to include the following:

(1) Sums paid as gifts, payments in the nature of gifts made **[at Christmas time]** **during any holiday** or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause, reasonable payments for traveling expenses or other expenses incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer, and other similar payments to an employee which are not made as compensation for the employee's hours of employment.

(3) Sums paid in recognition of services performed during a given period if:

(i) Both the fact that payment is to be made and the amounts of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly.

(ii) The payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan without regard to hours of work, production or efficiency.

(iii) The payments are talent fees paid to performers, including announcers on radio and television programs.

(4) Contributions irrevocably made by an employer to a trustee or third person under a bona fide plan for providing old-age, retirement, life, accident or health insurance or similar benefits for employees.

(5) Extra compensation provided by a premium rate for certain hours worked by the employee in any day or workweek because **[such]** **the** hours are hours worked in excess of 8 in a day or in excess of the maximum workweek applicable to the employee under § 231.41 (relating to rate) or in excess of the normal working hours or regular working hours of the employee, as the case may be.

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek, where **[such]** **the** premium rate is not less than 1 1/2 times the rate established in good faith for like work performed in nonovertime hours on other days.

(7) Extra compensation provided by a premium rate paid to the employee in pursuance of an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday not exceeding 8 hours or workweek not exceeding the maximum workweek applicable to the employee under § 231.41 **[(relating to rate)]**, where the premium rate is not less than 1 1/2 times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek.

(b) If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if **[he]** **the employee** receives no other form of compensation for services, **[his]** **the employee's** regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. **[He]** **The employee** is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek.

(c) No employer may be deemed to have violated **[these]** §§ 231.41—231.43 **[(relating to overtime pay)]** by employing an employee for a workweek in

excess of the maximum workweek applicable to the employee under § 231.41 **[(relating to rate)]** if the employee is employed under a bona fide individual contract or under an agreement made as a result of collective bargaining by representatives of employees, if the duties of the employee necessitate substantially irregular hours of work. For example, where neither the employee nor the employer can either control or anticipate with a degree of certainty the number of hours the employee must work from week to week, where the duties of the employee necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours, or where the substantially irregular hours of work are not attributable to vacation periods, holidays, illness, failure of the employer to provide sufficient work**[,]** or other similar causes, and the contract or agreement:

(1) Specifies a regular rate of pay of not less than the minimum hourly rate and compensation at not less than 1 1/2 times the rate for hours worked in excess of the maximum workweek.

(2) Provides a weekly guaranty of pay for not more than 60 hours based on the rates **[so]** specified.

* * * * *

(e) Extra compensation paid as described in subsection (a)(5)—(7) shall be creditable toward overtime compensation payable under **[these]** §§ 231.41—231.43 **[(relating to overtime pay)]**.

(f) No employer may be deemed to have violated **[these]** §§ 231.41—231.43 by employing an employee of a retail or service establishment for a workweek in excess of 40 hours if:

(1) The regular rate of pay of the employee is in excess of 1 1/2 times the minimum hourly rate applicable.

(2) More than half of the employee's compensation for a representative period, not less than 1 month, represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(g) The regular rate for salaried employees who are not exempt from overtime is determined by totaling all remuneration for employment to or on behalf of the employee received in a workweek, except sums, payments, contributions and compensation enumerated in subsection (a), divided by 40 hours.

MINIMUM WAGE INCREASE AND TRAINING WAGE—STATEMENT OF POLICY

§ 231.101. Minimum wage increase.

(a) Under section 4(a) of the act (43 P.S. § 104(a)), an employer shall pay the following wage rates to all employees for all hours worked subject to exclusions and exemptions contained in the act and this chapter:

(1) Until December 31, 2006, $5.15 an hour.

(2) Beginning January 1, 2007, $6.25 an hour.

(3) Beginning July 1, 2007, $7.15 an hour.

(4) Beginning July 24, 2009, $7.25 an hour.

(b) The minimum wage **[credit]** for tipped employees is $2.83 per hour under section 3(d) of the act (43 P.S. § 333.103(d)) with all of the following conditions:

(1) An employer shall pay the difference when the employee's tips plus the **[credit]** **hourly wage** for tipped employees does not meet the Pennsylvania minimum wage contained in subsection (a).

(2) The tip credit applies only if an employee received over **[$30]** **$135** in tips for a month.

(*Editor's Note*: The following sections are proposed to be added and are printed in regular type to enhance readability.)

TIPPED EMPLOYEES

§ 231.111. Tip credit for non-tipped duties.

(a) An employer may take a tip credit for any time in which an employee performs duties that do not directly generate tips if all of the following conditions are met:

(1) The employee spends at least 80% of the employee's workweek performing duties that directly generate tips.

(2) The duties that do not directly generate tips support the duties that directly generate tips.

(3) The employee spends less than 30 continuous minutes performing duties that do not directly generate tips.

(b) If an employer may not take a tip credit under subsection (a), the employer shall pay the employee at least the minimum wage required under section 4 of the act (43 P.S. § 333.104).

§ 231.112. Tip pooling.

(a) An employer may establish a tip pooling arrangement among tipped employees.

(b) Tip pools may not include the following:

(1) A person with an ownership or partnership interest in the business.

(2) An employee who meets any part of the duties test outlined in 29 CFR 541.100(2)—(4) (relating to the general rule for executive employees).

(3) An employee who does not spend at least 80% of that employee's workweek performing duties that customarily or regularly generate tips.

(c) At or before the time the employer makes an employment offer or at least one pay period before the tip pooling arrangement takes effect, an employer shall provide affected employees written notice of the tip pooling arrangement.

§ 231.113. Credit card fees.

An employer that permits patrons to pay tips by credit card shall pay the tipped employee the full amount of the tip authorized by the patron and may not deduct credit card payment processing fees or costs that the credit card company may charge to the employer.

§ 231.114. Service charges.

(a) An employer that charges for the administration of a banquet, special function or package deal shall notify patrons of this charge by providing notice:

(1) in the statement in a contract or agreement with the patron; or

(2) on any menu provided to the patron.

(b) The notice required under subsection (a) must state that the administrative charge is for administration of the banquet, special function or package deal and does not include a tip to be distributed to the employees who provided service to the guests.

(c) When an employer chooses to charge for the administration of the banquet, special function or package deal, any billing statement must contain separate lines for service charges and tips.

[Pa.B. Doc. No. 21-1921. Filed for public inspection November 19, 2021, 9:00 a.m.]