RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 160]

State Food Purchase Program Regulations

The Department of Agriculture (Department) amends Chapter 160 (relating to State Food Purchase Program) to read as set forth in Annex A.

Statutory Authority

This final-form rulemaking is authorized under the general authority in section 3(a) of the State Food Purchase Program Act (act) (62 P.S. § 4043(a)) and the specific regulatory authority set forth in section 9 of the act (62 P.S. § 4049).

Purpose of the Regulation

This final-form rulemaking increases the income threshold cap for the State Food Purchase Program (Program) from the current 150% of the poverty level established by the United States Department of Agriculture (USDA) to 185%. This final-form rulemaking amends the heading of Part VII from "Bureau of Government Donated Food" to "Bureau of Food Assistance" to align the name change of the Bureau.

Explanation

On October 7, 2020, the Emergency Food Assistance Advisory Committee recommended that the income threshold for the Program be increased from the current 150% to 185% of the poverty level established by the USDA. Specifically, § 160.5(b) (relating to eligibility of persons to participate) presently provides that "persons shall be eligible to be Program participants if their incomes do not exceed 150% of the poverty levels established by the USDA." Presently, 66 out of 67 counties in this Commonwealth do not have procedures and guidelines for determining the eligibility level for Program participants. Those counties, therefore, rely upon the Department's existing regulations. (Montgomery County has established its own poverty income level at 185%.) These regulations were adopted on October 28, 1994, and have been effective since October 29, 1994. The Department believes for the following reasons, it is appropriate to amend this regulation.

Increasing the threshold to 185% allows the charitable feeding network to feed more food insecure Pennsylvanians who make just above the current income limit and would bring the Program in line with the eligibility limits set for several other food assistance programs, including the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (7 CFR 246.7(d)(1) (relating to certification of participants)), reduced-price school breakfasts and school lunches provided through the National School Lunch and Breakfast Programs (7 CFR 245(3) (relating to determining eligibility for free and reduced price meals and free milk in schools)), the WIC Farmers' Market Nutrition Program (7 CFR 248.6(a) (relating to recipient eligibility)) and the Senior Farmers' Market Nutrition Program (7 CFR 249.6(a)(3) (relating to participant eligibility)) within this Commonwealth.

Increasing the income eligibility threshold for the Program allows the Department to administratively raise this Commonwealth's income eligibility threshold for The Emergency Food Assistance Program (TEFAP). Under the USDA's regulations in 7 CFR 251.5(b) (relating to eligibility determinations), state agencies must set income-based standards for TEFAP eligibility and determine the methods by which households may demonstrate eligibility under these standards. Currently, the income limit for TEFAP in this Commonwealth is kept commensurate with the Program and increasing it to 185% would bring this Commonwealth in line with the TEFAP income limit of 20 other states, including Delaware, the District of Columbia, New Jersey and West Virginia. Currently, only 17 states (including Pennsylvania) have an income threshold set at or below 150%.

According to 2019 food insecurity data provided by Feeding America, 10.6% of all residents in this Commonwealth—1,353,730 people—did not always know where their next meal was coming from. That number included 383,500—or 14.6%—of all children in this Commonwealth. In 2020, as a result of the novel coronavirus (COVID-19) pandemic, these numbers grew substantially. According to a series of data analysis reports compiled by Feeding America looking at the impact of COVID-19 on food insecurity, the number of Pennsylvanians facing food insecurity is projected to have grown to 13.8% in 2020, an increase of 30%. Even more startling, Feeding America projects that the percentage of children in our State facing food insecurity rose to 20.4%, an increase of 40% in just 1 year. (See 2019 and 2020 data looking at impact of coronavirus on food insecurity at https://feedingamericaaction.org/resources/state-by-state-resource-the-impact-of-coronavirus-on-food-insecurity/).

With a growing number of food insecure Pennsylvanians, and a decreasing supply of food that is not tied to an income test, there are fewer and fewer food resources currently available to those who are food insecure but make just too much to qualify. Increasing the income threshold to 185% of the poverty level for the Program—and by administrative extension to TEFAP—allows food banks to more easily and efficiently serve the increasing numbers of people who are seeking out their services. Lastly, this final-from rulemaking brings this Commonwealth more in line with the income eligibility thresholds of several other Federal food assistance programs and with many of our neighboring states in the Mid-Atlantic Region.

This final-form rulemaking formally amends the name "Bureau of Government Donated Food" as presently set forth in the heading of Part VII and in § 160.13 (relating to filing the grant agreement) to the "Bureau of Food Assistance." On May 15, 2019, the Executive Board, by Resolution No. OR-19-007, approved the change to the Bureau's name as requested by the Secretary of Agriculture under sections 212 and 709(b) of The Administrative Code of 1929 (71 P.S. §§ 72 and 249(b)).

Comments to the Proposed Rulemaking

The Department published a notice of proposed rulemaking at 51 Pa.B. 6399 (October 9, 2021), for 30 days of public comment. The Department did not receive any public comments relating to the proposed rulemaking. The Independent Regulatory Review Commission (IRRC) reviewed the proposed rulemaking and informed the Department that it had no objections, comments or recommendations to offer on the proposed rulemaking. The Department did not receive any comments from the House Agriculture and Rural Affairs Committee or the

Senate Agriculture and Rural Affair Committee as part of their review of the proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1—745.14).

Fiscal Impact

Commonwealth. The Department does not expect that this final-form rulemaking will have a fiscal impact on the Department or other Commonwealth agencies.

Political subdivisions. This final-form rulemaking will have no appreciable fiscal impact on political subdivisions of this Commonwealth.

Private sector. This final-form rulemaking will not have a fiscal impact on the private sector other than for those who elect to participate in the Program as previously set forth.

General public. This final-form rulemaking will have no fiscal impact on the general public.

Paperwork Requirements

This final-form rulemaking will have no impact on the paperwork handled by the Department.

Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

Additional Information

Additional information may be obtained from Caryn Long Earl, Director, Bureau of Food Assistance, Department of Agriculture, 2301 North Cameron Street, Harrisburg, PA 17110-9408, (717) 772-2688, cearl@pa.gov.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 29, 2021, the Department submitted a copy of the proposed rulemaking, published at 51 Pa.B. 6399, to IRRC and to the Chairpersons of the House and Senate Agriculture and Rural Affairs Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department shall submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. No comments were received.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on February 18, 2022, the final-form rulemaking was deemed approved by the House and Senate Agriculture and Rural Affairs Committees. Under section 5.1(e) of the Regulatory Review Act, on March 20, 2022, because it had no comments on the proposed rulemaking and the Department did not amend the rulemaking, IRRC deemed the final-form rulemaking approved under section 5(g) of the Regulatory Review Act.

Findings

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law and no comments were received.

(3) This final-form rulemaking does not include any amendments that would enlarge the scope of the proposed rulemaking published at 51 Pa.B. 6399.

(4) These regulations are necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under its authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 160, are amended by amending §§ 160.5(b) and 160.13 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Department shall submit this final-form rulemaking to the Office of the Attorney General and the Office of General Counsel for approval as required by law.

(c) The Department shall submit this final-form rulemaking to IRRC and the applicable standing committees as required by law.

(d) The Department shall certify this final-form rulemaking and deposit it with the Legislative Reference Bureau as required by law.

(e) This final-form rulemaking shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

RUSSELL C. REDDING,
Secretary

(*Editor's Note*: See 52 Pa.B. 2087 (April 2, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 2-195 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART VII. BUREAU OF FOOD ASSISTANCE

CHAPTER 160. STATE FOOD PURCHASE PROGRAM

§ 160.5. Eligibility of persons to participate.

(a) *Primary determinant.* If the county government, lead agency or emergency food provider administering the Program within a particular county has established procedures and guidelines for determining whether persons are eligible to participate in the Program, these procedures and guidelines shall be the sole determinant of eligibility.

(b) *Department guidelines.* In counties where the county government, lead agency or emergency food provider administering the Program does not have procedures and guidelines for determining the eligibility of persons to be Program participants, persons shall be eligible to be Program participants if their incomes do not exceed 185% of the poverty levels established by the USDA.

§ 160.13. Filing the grant agreement.

(a) *Place and time.* The grant agreement shall be completed by the county government, the lead agency or the appropriate emergency food provider and returned to the Department of Agriculture, Bureau of Food Assistance, 2301 North Cameron Street, Room 401, Harrisburg, PA 17110-9408 by June 1 immediately preceding the start of the fiscal year, or 30 days prior to the commencement of the grant agreement if the grant agreement is to commence on a date other than the start of the fiscal year.

* * * * *

[Pa.B. Doc. No. 22-660. Filed for public inspection May 6, 2022, 9:00 a.m.]

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

Minimum Wage

The Department of Labor and Industry (Department) amends Chapter 231 (relating to regulations for minimum wage). The amendments are submitted in accordance with the Minimum Wage Act of 1968 (act) (43 P.S. §§ 333.101—333.115), for the purpose of carrying out the act and to safeguard the minimum wage rates established thereby.

Statutory Authority

This final-form rulemaking is issued under the authority provided in section 4(c) of the act (43 P.S. § 333.104(c)), which requires the Secretary to promulgate regulations for overtime, and section 9 of the act (43 P.S. § 333.109) 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."

Purpose

This final-form rulemaking amends the Department's existing minimum wage regulations in §§ 231.1, 231.34 and 231.43 (relating to definitions; tipped employees; and regular rate). This final-form rulemaking also adds §§ 231.101a and 231.111—231.114 (relating to minimum wage increase and training wage; and tipped employees).

This final-form rulemaking provides a long overdue update of the Department's regulations concerning tipped employees, including raising the salary threshold for tipped employees, adopting a rule regarding when employers can take a tip credit for employees who perform non-tipped producing work, adopting a rule regarding tip pools, adopting a rule prohibiting employers from deducting credit card and other processing fees from tips and adopting a rule requiring employers who charge a service fee for banquets, special function or other package deal to notify patrons that these service fees are not tips.

This final-form rulemaking is consistent with the stated purpose of the act: to protect employees from unreasonably low wages not fairly commensurate with the value of the services rendered. See 43 P.S. § 333.101. This final-form rulemaking protects tipped employees in several ways. First, this final-form rulemaking raises the tip threshold to account for 44 years of growth and inflation since this rule was implemented. Second, this final-form rulemaking protects tipped workers by limiting the amount of time they can spend performing duties that do not generate tips or that directly support duties that generate tips. Third, this final-form rulemaking protects tipped workers by limiting tip pools to either employees who perform tipped work or by requiring employers to pay the higher minimum wage if tip pools include non-managerial workers who do not perform tipped duties. Fourth, this final-form rulemaking prohibits employers from deducting credit card and other processing fees from tips. Finally, this final-form rulemaking protects tipped workers by ensuring that patrons do not assume that paying a service charge includes a tip.

As discussed in the Regulatory Analysis Form (RAF) this final-form rulemaking enacts bright line rules for employers in this Commonwealth who over the last 2 years have been subject to constantly changing rules regarding tipped employees from the United States Department of Labor (USDOL). In addition, the tipped regulations completely align with USDOL regulations regarding tip pools and mostly align with USDOL regulations regarding when an employer can take a tip credit for employees who perform non-tipped work.

In addition to the new protections for tipped employees, this final-form rulemaking establishes a regular rate for non-exempt salaried employees. By requiring employers to divide salaried earnings by 40 hours, the Department ensures a higher hourly rate for salaried employees who work overtime and protects them from unreasonably low wages.

Ensuring that workers are fairly compensated and paid a living wage will have an overall positive economic impact for this Commonwealth. In addition, the increased competitiveness of employers in this Commonwealth to attract skilled labor and the increased spending by affected workers will benefit the Commonwealth.

This final-form rulemaking is in the public interest, is within the Department's statutory authority and is consistent with the legislative intent expressed in the act. This clear, feasible and reasonable regulatory scheme considers the concerns of the various stakeholders and will have a positive economic impact on the Commonwealth without overly onerous requirements on businesses.

Background

1. *Tipped employees*

Section 4(a.1) of the act 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 (P.L. 1290, No. 168). 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 $2.32 is subtracted from $5.15, the amount of $2.83 remains which was the lowest base rate to pay an employee. The tipped wage of $2.83 is the minimum base hourly wage that employers must 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 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 or other processing 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) also addresses tipped employees. The FLSA defines a tipped employee as an employee engaged in an occupation in which that employee customarily and regularly receives tips. 29 U.S.C.A. § 203. 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.

Until recently, the USDOL also did 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 (FOH) 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. 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 tip 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 final-form 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, 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 the Federal Administrative Procedures Act (APA) (5 U.S.C.A. § 706(2)(C)), and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under the APA (5 U.S.C.A. § 706(2)(A)). 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. 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. 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 60114 (October 29, 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.

2. *Overtime for salaried employees*

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." 43 P.S. § 333.104(c). The Department has a regulation defining the term "regular rate." See § 231.43. However, this regulation does not address the calculation of the base rate for salaried employees who are entitled to overtime.

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 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." 43 P.S. § 333.104(c). The Department's regulations 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," See § 231.41 (relating to rate). 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 hours 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 such 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.

After the proposed rulemaking, the Department received comments including from members of the General Assembly, groups representing workers, groups representing business, legal organization and the general public. The Independent Regulatory Review Commission (IRRC) also submitted significant comments on the Department's proposed rulemaking. A summary of the Department's response to IRRC's comments follow.

Summary of Comments and Responses to the Proposed Rulemaking

The proposed rulemaking was published at 51 Pa.B. 7239 (November 20, 2021). Public comments were accepted through December 20, 2021. The Department received 273 comments during the public comment period, including 3 legislative comments. In addition, the Department received a comment from IRRC. A summary of IRRC's comments, legislative comments and the Department's responses are set forth as follows. The remaining comments are addressed in the comment and response document attached to this final-form rulemaking.

IRRC Comments

1. Consistency with General Assembly's intent

IRRC and the Chair of the House Labor and Industry questioned whether the Department's proposed rulemaking was consistent with the intent of the General Assembly in two aspects. First, IRRC noted that the Department enacted rules which were inconsistent with regulations promulgated by the Federal government. IRRC noted that the Department's proposed rulemaking pledged to alleviate confusion caused by changing Federal rulemaking regarding tipped employees. IRRC questioned whether the Department would increase this confusion by enacting regulations that differ from the Federal government. Based on this and other commentators who raised this issue, the Department has made some changes to its proposed rulemaking to align with the Federal rulemaking. In areas where the Department has declined to make changes, the Department adds further explanation in this preamble to show why these provisions are in the public's best interest even though they differ from the Federal standards.

Tip pooling has changed from proposed rulemaking to final-form rulemaking. First, the Department modified its proposed regulation to incorporate by reference 29 CFR 531.54 (relating to tip pooling), which is USDOL's regulation regarding tip pooling. The Department's regulation now only limits tip pooling to non-tipped employees in situations where the employer takes a tip credit. In addition, the Department's tip pooling regulation, like USDOL's regulation, prohibits managers and supervisors from participating in tip pools regardless of whether the employer takes a tip credit. As such, the business community will easily be able to navigate the Federal and state regulations regarding tip pooling in this Commonwealth.

Tip credits for non-tipped work have changed from proposed rulemaking to final-form rulemaking. The Department's final-form rulemaking also amends the proposed rule regarding the taking of a tip credit when a tipped employee performs non-tipped work. The Department incorporated by reference 29 CFR 531.56 (relating to "more than $30 a month in tips"), which is the Federal regulation regarding the 80/20 rule, with one exception; the Department chose not to incorporate subsection (f)(4)(ii), which is the portion of the Federal government's 80/20 rule which prohibits employers from taking a tip credit if an employee performs non-tipped producing work for 30 continuous minutes. However, the Department does not believe this will cause confusion. Unlike the 80/20 rule as a whole, the requirement to limit non-tip producing work to 30 continuous minutes is a new concept and employers in this Commonwealth are likely not familiar with it. Further, the 30-minute threshold included in the USDOL rule is a more stringent standard than the 80/20 rule the Department has included in this final-form rulemaking; therefore, if employers are following the Federal standard, they will also be following the Department's regulations. Moreover, the Department plans to eliminate confusion with an outreach program.

In addition to incorporating the 80/20 rule, the Department's final-form rulemaking adopts Federal language to create a definition for "customarily and regularly," which will clarify the Department's final-form rulemaking. See 29 CFR 531.57 (receiving the minimum amount "customarily and regularly"). The Department is confident that these changes will remove any possibility of confusion for the regulated community while simultaneously fulfilling the act's intent of protecting tipped employees from unreasonably low wages.

Credit card fees, processing fees and service charges have changed from proposed rulemaking to final-form rulemaking. The Department updates the sections related to credit card and other processing fees, and service charges. For credit card and other processing fees, the Department addresses areas not addressed by Federal regulation. As such, the Department does not believe these sections will generate any confusion. Federal regulation also does not address the issue of service charges so the Department does not believe its regulation will cause any confusion.

The Department also clarifies its regulations regarding service charges by stating that if employers choose to remit service charges to employees, it can use the charges to satisfy its obligations to pay the minimum wage or

overtime, but service charges cannot constitute a tip. This is consistent with USDOL guidance found in Chapter 30 of the *Field Operations Guide* at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-30#B30d03.

The Department also adds a definition for "service charge" indicating that a service charge is a mandatory fee for services rendered. This distinguishes a service charge from a gratuity which the act defines as a voluntary contribution for services rendered. 43 P.S. § 333.103.

The tipped employee threshold has remained the same from proposed rulemaking to final-form rulemaking. The Department has retained different standards than the USDOL with regards to the tipped employee threshold and the regular rate. The Department's increase in the tip threshold merely accounts for inflation between 1977 and 2021. USDOL cannot raise its tipped employee threshold because, unlike the act, the FLSA sets the Federal tipped employee threshold at $30 per month. See 29 U.S.C.A. § 203. However, there were very few commentators who raised a concern regarding the raising of the employee threshold. As such, the Department does not believe it will cause compliance issues to have a different tipped employee threshold than found in Federal law.

The standard for determining the rate for salaried employees has changed from proposed rulemaking to final-form rulemaking. The Department revises § 231.43(g) to address the concerns shared during the public comment period. The Department does have a different standard regarding the regular rate for salaried employees. However, since 2019 employers in this Commonwealth have already had a different standard to determine the regular rate for salaried employees due to the Pennsylvania Supreme Court's decision in *Chevalier* which held that, unlike USDOL regulations, salaried employees who work overtime are entitled to a 1.5 multiplier on their overtime earnings rather than a 0.5 multiplier. This final-form rulemaking merely fulfills the act's intent of providing extra protection to salaried workers by calculating the regular rate by dividing it by 40 instead of the hours worked. The Department is confident that it can educate employers, who are already accustomed to a different standard, about how to calculate the hourly rate for salaried employees eligible for overtime. It is important to note that the Department has chosen to make the effective date of this final-form rulemaking 90 days from publication in the *Pennsylvania Bulletin*, which will provide the Department with the necessary time to prepare employers.

IRRC noted that the proposed rulemaking enacted higher standards than found in Federal law and wondered whether only the General Assembly should make a choice to enact a higher standard. The Department's final-form rulemaking regarding tipped employees is not higher than the Federal standards with the exception of the tipped employee threshold, credit card and other processing fees and service charges. The act contains very few provisions regarding tipped employees other than setting the tip employee rate, providing that tips are the property of the employee and defining gratuities. See 43 P.S. § 333.103. Rather, the General Assembly specifically granted the Department to, "make and, from time to time, revise regulations, ... Such regulations may include, but are not limited to. . .allowances for gratuities." See 43 P.S. § 333.109. Moreover, the act specifically states, "the secretary shall promulgate regulations with respect to overtime subject to the limitations that no pay for overtime in addition to the regular rate shall be required except for hours in excess of forty hours in a workweek." See 43 P.S. § 333.104(c). The Department has not updated its regulations regarding tipped employees since 1979 and for the regular rate since 1977. As such, it is long past time for the Department to follow the duty the act imposes and update regulations regarding tipped employees and the regular rate without waiting for the General Assembly.

2. Implementation of proposed change to § 231.1

IRRC commented that although most commentators agreed with the raising of the Department's tip threshold to $135 per month, they expressed concern about confusion between this threshold and the Federal tip threshold of $30 per month. IRRC asked the Department to explain its plan of informing the regulated community of this difference and other differences between State and Federal regulations governing tipped employees and the regular rate.

The Department will conduct outreach and educational sessions after publication of this final-form rulemaking in the *Pennsylvania Bulletin* and before its effective date. During these outreach and educational sessions, the Department will solicit comments on this final-form rulemaking and keep track of common themes or issues. The Department will also develop and provide wide circulation to written materials available in print and digital formats to assist employers comply with the requirements of this regulation. Finally, the Department is extending the period between publication in the *Pennsylvania Bulletin* and the effective date of this regulation from 60 days to 90 days to ensure that the regulated community has ample opportunity for education and assistance with compliance planning.

3. Concerns with the proposed change to § 231.43

IRRC expressed various concerns with the Department's proposed change to this section with the first being the Department's proposed change to subsection (a). In its proposed rulemaking, the Department amended language excluding pay at Christmas time from the regular rate to excluding pay for any holiday from the regular rate. However, as IRRC appropriately noted, the preamble and RAF for the proposed rulemaking stated holiday pay would be included in the regular rate. The Department regrets the grammatical errors in the proposed rulemaking packet and emphasizes that payments in the nature of gifts, the amounts of which are not measured by or dependent on hours worked, production or efficiency, during any holiday are excluded from the regular rate.

IRRC also expressed concerns with the Department's proposed addition of subsection (g) which would require that the regular rate for salaried employees by taking all renumeration outlined in subsection (a) divided by 40 hours. IRRC's first comment concerned subsection (b) which governs overtime for workers who are paid a flat sum for a day's work. The regular rate for these day workers is determined by adding all compensation in a workweek and then dividing it by total hours actually worked. The regular rate would then be multiped by 0.5 for all hours worked over 40 hours to determine overtime pay. IRRC noted the discrepancy between these two sections and suggested that the Department consider amending subsection (b).

The Department thanks IRRC for bringing this issue to its attention. The Department notes that subsection (b) is an outlier from the other subsections in § 231.43 in that

it is the only subsection to use a 0.5 multiplier than a 1.5 multiplier on overtime hours.

After careful consideration, the Department has decided to make no changes to subsection (b) at this time for two reasons. First, the Department cannot be certain that its outreach for the proposed rulemaking adequately targeted groups that either employ or advocate for day workers. Second, in the last 5 years, the Department is not aware of any complaints from day workers that their employers have violated the act. As such, the Department cannot say for certain if there is a sound reason to calculate the regular rate for day workers by dividing compensation by hours worked. There could be a logical reason for calculating the regular rate for day workers differently since unlike with salaried employees, day workers' earnings will fluctuate from week to week and, unlike with salaried employees, day workers may have multiple employers throughout a week. Therefore, unlike with salaried employees, the Department had not identified a need to address this issue and so has not yet obtained the necessary stakeholder input and determined the ultimate impact of such a change. The Pennsylvania Supreme Court noted in *Chevalier* that it was permissible to have different rules for day workers and salaried employees. *Chevalier*, 220 A.3d. at 1058. However, the Department will consider updating subsection (b) in a future rulemaking should the Department determine it is necessary to protect the rights of day workers or is otherwise in the public interest.

IRRC also commented that for employees who are paid less frequently than weekly it would require employers to calculate overtime on a weekly basis. While it is understood that some employers may pay their salaried employees less frequently, the Department notes that this is not a change and is consistent with already-existing regulations. Section 231.42 (relating to workweek) currently provides, "The term workweek shall mean a period of 7 consecutive days starting on any day selected by the employer. Overtime shall be compensated on a workweek basis regardless of whether the employee is compensated on an hourly wage, monthly salary, piece rate or other basis." This final-form rulemaking provides that the regular rate for salaried employees is taken by adding up compensation in a workweek and dividing it by 40. It makes no change to how employers are to calculate incentive compensation which according to the current regulation is to be counted during the workweek it is received. To remain as consistent as possible with the regulatory scheme already set forth in Chapter 231, the Department declines to make this change.

IRRC also noted that commentators stated the Department's proposed subsection (g) "complicates other compensation questions," including calculation of overtime on commissions and bonuses for hourly employees. IRRC asked the Department to clarify how its rulemaking clarifies the regular rate in "all cases," and asked the Department to explain how this subsection achieves that purpose and how overtime is calculated for all remuneration for hourly employees.

The Department concedes that this new subject only clarifies the regular rate for salaried employees eligible for overtime. In this final-form rulemaking, the Department amends the language in subsection (g) to clarify that the regular rate includes all compensation with the exceptions outlined in (a)(1)—(7). The Department hopes that this amendment will eliminate any confusion to clarify that certain types of income, such as bonuses and other compensation, are treated no differently for overtime-eligible salaried employees than for hourly employees when determining overtime.

IRRC noted that commentators have suggested that § 231.43(g) be amended to mirror Federal regulations or to adopt the Federal regulations by reference. This suggestion has also been made for §§ 231.111 and 231.112 (relating to tip credit for non-tipped duties; and tip pooling). A cornerstone of the Regulatory Review Act (71 P.S. §§ 745.1—745.14) is to "encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." The Department declines to incorporate USDOL regulations regarding the regular rate for salaried employees who are eligible for overtime. See 29 CFR 778.114. Federal regulations permit employers to calculate the regular rate for salaried employees by dividing compensation by hours week, a practice more commonly known as the "fluctuating workweek." The Department declines to this regulation because it would result in a lower base rate for salaried employees. The notion that an employee could work more and earn less—in other words, work longer hours and earn a lower regular rate—is contrary to the purpose of the act and the obligation of the Department to protect workers.

The Department notes that IRRC did caution the Department against directly incorporating Federal rules by reference due to a concern that Federal rules will change and that the Department rules would change with them without going through the regulatory review process. However, the Department addressed this concern by only incorporating Federal regulations as they exist on the date of publication in the *Pennsylvania Bulletin*. Thus, if Federal regulations regarding the 80/20 rule or tip pooling change, it would require the Department to engage in a subsequent rulemaking if it wished to amend its regulations on these subjects.

The Department acknowledges and appreciates IRRC's comment that emphasized that the intention of this regulatory process is to achieve consensus through compromise. The Department has endeavored to find the common ground through the public comment and consultation process; the changes to this final-form rulemaking, as compared to the proposed rulemaking, stand as evidence of this. The Department also notes, however, that with certain issues pertinent to the public interest, perfect consensus between parties with opposing perspectives and interests is not necessarily possible. This is especially true in issues where a significant power dynamic exists, like the one between employers and employees, or when an issue has proven intractable for over a decade to the General Assembly, like the minimum wage in this Commonwealth. While consensus is desirable where it is possible, the Department also contends that on certain issues it must take a position that may not be preferable to all parties but is in the public interest. The Department did so in the fluctuating workweek section of this regulation. It did so because the notion that an employee could work more and earn less—in other words, work longer hours and earn a lower regular rate—is contrary to the purpose of the act and the obligation of the Department to protect workers.

4. Implementation of § 231.101

IRRC noted that the Department's proposed rulemaking included an amendment to § 231.101, a statement of policy. IRRC suggested that the Department delete this statement of policy if it wishes to make the statement binding on the regulated community.

The Department thanks IRRC for this recommendation and, in response, the Department will delete the statement of policy when it publishes this final-form rulemaking in the *Pennsylvania Bulletin*. The Department also adopts § 231.101a (relating to minimum wage increase), which contains the language that the Department proposed to the statement of policy found in § 231.101.

Specifically, this new regulation clarifies that the minimum wage in this Commonwealth is $7.25 per hour. Section 4(a.1) of the act states that the minimum wage in this Commonwealth is equal to the minimum wage set by the FLSA if that minimum wage is higher than the rate set forth in section 4(a)(8) of the act. Since the current Federal minimum wage is $7.25 the Department enacts this subsection to provide clarity to the regulated community.

The new regulation also clarifies the tipped minimum wage is $2.83 per hour. Although the act sets the base minimum wage for tipped employees, it does so in language that is confusing to the general public. The Department's final-form rulemaking provides clarity on this issue. It further clarifies that employers must make up the difference if tips plus the base rate do not equal the minimum wage and the employers may only take a tip credit if tips for an employee equal $135 per month.

When the Department proposed amending § 231.101, it received no comments on this section other than IRRC's comments.

5. Closer alignment with the Federal 80/20 rule

IRRC noted that many commentators pointed out that the Department's proposed rule regarding the taking of a tip credit for non-tipped work differed from USDOL's recent final rule on the same subject. The commentators correctly noted that the Department's proposed rule lacked definitions and examples included in the Federal 80/20 rule that are central to its implementation, including "work that is part of the tipped occupation," "tip producing work," "directly supporting work," "substantial amount of time" and "work that is not part of the tipped occupation." IRRC agreed that the regulation would be improved if the Department more closely aligned it with USDOL's rule.

In response, the Department incorporates USDOL's final rule at 29 CFR 531.56 into this final-form rulemaking including the definitions and examples suggested by the commentators. The Department determines that this action will provide clear guidance for employers to determine when they can take a tip credit while at the same time protecting employees from receiving a tipped wage when they do not primarily perform tipped work.

The Department declines to adopt one aspect of USDOL's final rule regarding the 80/20 rule; namely subsection (f)(4)(ii), which contains the requirement that an employer cannot take a tip credit if employees work more than 30 consecutive minutes performing non-tip producing work. The Department declines to adopt this, as described previously, more fully in response to IRRC's Comment 1, because it determined that this provision is too new, too difficult for employers to track and too difficult for the Department to enforce.

However, most businesses in this Commonwealth will still be required to follow USDOL's rule and cannot take a tip credit for non-tipped work of over 30 consecutive minutes. When, the FLSA and the act contradict, employers are required to follow the provisions the most protective to employees.

6. Closer alignment with the Federal tip pooling regulations

IRRC noted that many commentators expressed concern that the Department's tip pooling regulations did not fully align with USDOL's regulations regarding tip pooling. The commentators expressed concern that this would cause confusion and most specifically noted that the Federal regulation provides for tip pooling among all workers when the employer does not take the tip credit, thereby paying tipped employees at least the full minimum wage.

IRRC asked the Department to explain why the Department's proposed rulemaking was needed in light of the Federal regulation. IRRC also asked the Department to explain why it did not include the option for employers to establish a tip pooling system for all employees when the tip credit is not utilized by employers.

After careful consideration, the Department incorporates 29 CFR 531.54 including allowing tip pooling for all non-management or supervisory employees when the employer decides not to take a tip credit.

The Department did choose to retain the requirement that employers notify employees of the tip pooling regulation as this is a matter of basic fairness. Employees deserve to be fully aware of any tip pooling arrangement when they decide to accept employment or before their employer implements a tip pool.

While the Department's proposed tip pooling regulation did not differ from USDOL's regulation, the Department has adopted language from the Federal regulation to avoid any uncertainty and to provide clarity to employers and employees.

7. Implementation and clarity for credit card fees

IRRC also expressed concern that the Department's proposed rulemaking did not address the deduction of credit fees for employers who institute tip pooling. In response, the Department amends this final-form rulemaking to also provide that employers cannot deduct credit card or other processing fees in the event that the tip is part of a tip pool.

IRRC also questioned the need for this regulation considering the act provides that tips are the property of the employee. In response, the Department retains § 231.113 (relating to credit card and other processing fees) for the following reasons. First, USDOL does permit the deduction of credit card or other processing fees under its interpretation of the FLSA. Because of the discrepancy between the Federal regulation and State law, the Department was concerned that there could be is confusion over this issue. The comments to the Department's proposed rulemaking validated the Department's concerns as both employers and employees reported this practice. As such, the Department keeps this section in this final-form rulemaking.

Finally, IRRC requested the Department address the House Labor and Industry Committee's comment that this regulation include other types of processing fees. In response, the Department adds other non-cash forms of payment to this section to disallow any type of processing fee to be deducted from a tip prior to its distribution to the employee or tip pool.

8. Statutory authority to regulate service charges

In the proposed rulemaking, the Department required employers who charge services fees for the administration of banquets, special functions or package deals to provide

notice to patrons of the service charge. IRRC questioned the Department's statutory authority to promulgate this regulation due to the Office of Attorney General's authority under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) (73 P.S. §§ 201-1—201-10) and asked the Department to make any necessary amendments. However, after further review, the Department determines that the act grants the Department authority to regulate service fees in this manner to protect tipped employees.

The act permits the Department to issue regulations regarding "allowances for gratuities." 43 P.S. § 333.109. This includes this final-form rulemaking which has the purpose of ensuring that patrons do not wrongfully assume that a service charge includes a gratuity.

Moreover, the UTPCPL does not prohibit the Department from promulgating this final-form rulemaking. The Department met with staff in the Office of Attorney General's (OAG) Consumer Protection Bureau, and they opined that the UTPCPL allows for dual authority as the purpose behind the UTPCPL and act are different. The UTPCPL protects consumers from deceptive practices and the act protects workers from unreasonably low wages. Numerous cases have held that conduct which is governed by other statutes is also within the purview of the UTPCPL unless it is expressly excluded. See, for example, *Commonwealth v. National Apartment Leasing Co.*, 529 A.2d 1157 (Pa. Cmwlth. 1987); *Pekular v. Eich*, 513 A.2d 427 (Pa. Super. 1986); *Pennsylvania Bankers Association v. Commonwealth*, 427 A.2d 730 (Pa. Cmwlth. 1981); *Safeguard Investment Corp. v. Commonwealth*, 404 A.2d 720 (Pa. Cmwlth. 1979). The purpose of this final-form rulemaking is not to protect consumers but rather is to protect workers by ensuring the patrons who intend to leave tips realize they are not leaving a tip simply by paying a service charge. As such, the UTPCPL does not abrogate the Department's statutory authority under the act, which permits the Department to enact regulations to protect tipped employees.

The Department did, however, clarify that if an employer remits any portion of a service charge that would not make the service charge a tip since service charges are mandatory and tips are voluntary. However, the amount remitted would qualify as remuneration under § 231.43 and could satisfy the employer's obligation to pay the minimum wage or overtime.

9. Economic impacts

IRRC noted that according to the Department, employers who take the tip credit and opt to pay the State minimum wage or are required to do so under the increased tip threshold, will incur an added cost of labor. The shift of credit card fees and the regular rate for salaried employees may also result in a fiscal impact to employers. However, the Department's fiscal impact statement did not estimate these costs. As such, IRRC asked the Department to provide an estimate of costs for implementing this regulation by updating its responses to the RAF and the fiscal impact section of the preamble.

The Department acknowledges that employers may bear certain ongoing costs related to compliance with this regulation. Because of limited data on business decision making and the inability to model human behavior as it pertains to employment decisions, the Department cannot anticipate which of the varied operational options available to employers to comply with this regulation they will select and thus cannot estimate the ongoing costs of compliance. For example, to adjust to costs related to the definition of regular rate, employers could choose to hire more employees to offset the need for overtime, restrict the use of overtime by current employees by making scheduling adjustments, or change the method of compensation for employees to reallocate labor costs, among other options. The Department does expect that most businesses will select the option that limits new costs.

However, despite limited fiscal information, this final-form rulemaking is in the public interest because it benefits workers. The Department estimates that this final-form rulemaking will benefit up to 434,712 workers in this Commonwealth. These affected workers include the approximately 199,285 tipped workers, as defined by the act's current regulations; the approximately 47,250 food service managers and supervisors who will gain a bright line test as to when they may keep tips received from a customer for services they directly and solely provide; the approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a non-traditional tip pool; and the approximately 27,427 Pennsylvanians who are paid overtime using the fluctuating workweek method.

The benefit to workers is critical because the act recognizes that, "the evils of unreasonable and unfair wages as they affect some employees employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employes employed therein and of the public interest of the community at large." 43 P.S. § 333.101. That is what this final-form rulemaking does, protect tipped workers and overtime-eligible salaried employees from the evils of unreasonable and unfair work. As such, this final-form rulemaking is in the public interest.

Additional Legislative Comments

The Department received three legislative comments. The first is a comment from the Democratic Chair of the House Labor and Industry Committee, the Honorable Gerald J. Mullery. The second is a comment from the Democratic Chair of the Senate Labor and Industry Committee, the Honorable Christine Tartaglione and cosigned by the Honorable Jay Costa, the Honorable Nikil Saval, the Honorable Sharif Street, the Honorable Art Haywood, the Honorable John Sabatina, the Honorable Vincent Hughes, the Honorable Anthony Williams, the Honorable John Kane, the Honorable Steven Santarsiero, the Honorable Judy Schwank, the Honorable Maria Collett, the Honorable Amanda Cappelletti, the Honorable Lisa Boscola, the Honorable Carolyn Comitta, the Honorable Marty Flynn, the Honorable Timothy Kearney, the Honorable Lindsey Williams, the Honorable Wayne Fontana, the Honorable Katie Muth and the Honorable James Brewster (collectively referred to as the Honorable Senator Tartaglione). The last is a comment by the Chair of the House Labor and Industry Committee, the Honorable Jim Cox and cosigned by the Honorable David Maloney, the Honorable Torren Ecker, the Honorable Eric Nelson, the Honorable James Gregory, the Honorable Mike Puskaric, the Honorable Mike Jones, the Honorable Dawn Keefer and the Honorable Kate Klunk (collectively referred to as the Honorable Chairperson Cox). In addition to the comments that were referenced or adopted by IRRC, the Department addresses the other unique comments from these State lawmakers as follows.

The Honorable Chairperson Cox noted that the novel coronavirus (COVID-19) pandemic was difficult for the hospitality industry and that that, considering the severe impact of the COVID-19 pandemic on so many of the

businesses in the hospitality industry, it is not in the public interest to promulgate additional regulations at this time. The Honorable Chairperson Cox opined that the appropriate course of action for the Department would seem to be a delay—until the impact of the COVID-19 pandemic to the hospitality industry has fully stabilized—before additional regulations are proposed.

The Department recognizes that the COVID-19 pandemic presented significant challenges to the hospitality industry which does employ the vast majority of employees who customarily and regularly receive tips. However, hospitality workers were equally negatively affected by the COVID-19 pandemic. The purpose of the act is to protect workers from unreasonably low wages. This final-form rulemaking accomplishes this mandate by: 1) increasing the tip threshold more than four times the current amount ensuring that only employees who are truly tipped employees receive the lower tipped wage; 2) limiting the amount of non-tipped work a tipped employee can perform; 3) limiting the type of employees who may participate in tip pooling; 4) prohibiting the deduction of processing fees from employee tips; and 5) ensuring that patrons do not assume that service charges include tips. The Department did not ignore employer concerns, as it made significant changes to incorporate current Federal regulations that employers already are required to follow. However, the COVID-19 pandemic does not nullify the act's mandate to protect workers. That is what the Department's final-form rulemaking accomplishes, it protects hospitality workers from unreasonably low wages.

The Honorable Chairperson Cox noted that raising the tip threshold to $135 per month will create a disparity with the tip threshold set forth in the FLSA. In addition to requesting an extensive public outreach campaign, the Honorable Chairperson Cox requests the Department use a "light touch" when it discovers violations of this portion of the regulation.

In response, the Department determines that failing to include the tipped employee threshold after accounting for inflation will mean that tips could constitute a far larger percentage of employees' earnings than when the Federal regulation was adopted in 1977. Therefore, adopting a higher threshold than the outdated Federal regulation is in the interest of Pennsylvanians.

The Department notes that it is able to resolve the vast majority of complaints under the act without having to bring an enforcement action. The Department will continue to consider whether an employer's violation of the act is willful or negligent and will work with employers who show good faith in trying to rectify violations

Finally, in addition to the issue of whether the Department has the authority to regulate service charges, the Honorable Chairperson Cox raises the issue of whether service charges which are distributed to employees can be used to satisfy an employer's minimum wage and overtime obligations. The Honorable Chairperson Cox urges the Department to amend its proposed regulation to clarify that point.

After reviewing this comment, the Department did amend its regulation to clarify that service charges, which are mandatory fees for services rendered, are distinguished from tips which are voluntary contributions for services rendered. As such, the Department clarified that service charges which are remitted to employees may be used to satisfy the employer's minimum wage and overtime obligations but could not constitute a tip.

The Honorable Chairperson Cox also provided several supportive comments. The Honorable Chairperson Cox praised the Department for the reasonable level for its increase to the tipped employee threshold. The Honorable Chairperson Cox also noted that the prohibiting of credit card processing fees did not violate the act and suggested that the Department include a prohibition of other processing fees, a suggestion the Department followed. The Department acknowledges these supportive comments.

In addition to the Honorable Chairperson Cox's comments, the Department received two legislative comments in support of the Department's regulation. The Department acknowledges these supportive comments.

Specifically, the Honorable Representative Mullery noted that the Department's proposed rulemaking was consistent with the act's purpose of protecting workers from the evils of unreasonably low wages. Specifically, the Honorable Representative Mullery urged the Department to: raise the tip employee threshold because it would benefit 200,000 workers; adopt an 80/20 rule due to uncertainty at the Federal level; adopt a tip pooling rule that differs from the Federal rule in prohibiting "back of the house" employees; and calculate the regular rate for salaried employees by dividing remuneration received in a workweek by 40.

The Department notes that it has decided to change its tip pooling regulations and align with Federal regulations to allow employers who do not take a tip credit to include non-supervisory and non-management employees to participate in tip pools. The Department estimates that an additional 160,750 traditionally non-tipped workers may be affected by the tip pooling provision of this final-form rulemaking.

The Honorable Senator Tartaglione also submitted a comment in favor of the regulation noting that "updates are long overdue, as the power of the minimum wage and its many protections have waned due to inflation and non-compliance." Specifically, the Honorable Senator Tartaglione praised the Department for raising the tip threshold amount, codifying the 80/20 rule, limiting tip pooling to tipped employees, prohibiting employers from deducting credit card fees and proposing regulations regarding service charges.

As noted previously, the Department did decide to amend its proposed rulemaking regarding tipped pooling. However, the Department still believes that the Department's proposal will protect workers as non-tipped employees can only participate in tip pools if the employer pays everyone at least the minimum wage and because it continues to prohibit supervisors, managers and owners from participating in tip pools.

§ 231.1. Definitions

This final-form rulemaking amends 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. No commentator objected to this amendment and, as such, the Department has kept this amendment in this final-form rulemaking.

This final-form rulemaking adds a definition for "tip credit" to provide clarity to the Department's regulations. This definition makes 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. No commentator objected to this addition and, as such, the Department has kept the definition in this final-form rulemaking.

This final-form rulemaking also amends the definition for "tipped employee" to raise the tipped employee thresh-

old 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.

Very few commentators objected to the raising of the tipped threshold, including many commentators who objected to other aspects of the Department's proposed rulemaking. The Honorable Chairperson Cox commended the Department for the reasonable level of its increase to the tip threshold. As such, the Department decides to keep the proposed increase in this final-form rulemaking.

This final-form rulemaking also adds a definition for the phrase "customarily and regularly." This definition clarifies language found in the Department's definition of "tipped employee." This language is consistent with language found in 29 CFR 531.57.

This final-form rulemaking adds a definition for "service charge" which provides that a service charge is a mandatory fee that the employer charges for service rendered which distinguishes service charges from section 3 of the act which provides that gratuities or tips are voluntary contributions for services rendered. 43 P.S. § 333.103.

This final-form rulemaking adds a definition for "USDOL" which stands for "The United States Department of Labor." The Department adds this definition because this final-form rulemaking incorporates USDOL regulations regarding tip pooling and the 80/20 rule.

§ 231.34. Tipped employees

This final-form rulemaking amends 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). Commentators did not object to this proposed amendment and, as such, the Department has kept this amendment in this final-form rulemaking.

The Department adds paragraph (6) which requires 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 employers are complying with the final-form tip pooling regulations.

While no commentator specifically objected to this proposed amendment, concern was generally expressed over the burden of increased recordkeeping. Nevertheless, the Department will be unable to determine whether an employer has complied with a tip pooling arrangement without proper documentation. As such, the Department determines that its proposed amendment is necessary and has kept this amendment in this final-form rulemaking.

§ 231.43. Regular rate

The Department adds "(a)" to indicate the first subsection of the regulation. This subsection currently has no designation. Commentators did not object to this stylistic change and, as such the Department keeps this amendment in this final-form rulemaking.

The Department amends subsection (a)(1) to replace "at Christmas time" with "during any holiday." As discussed previously in IRRC's comment 3 and response, commentators noted that the Department's preamble mistakenly stated this change was done to "reflect that sums paid for any holiday should count towards the calculation of the regular rate." The Department concedes that the Department's explanation of the proposed language was incorrect.

However, the Department makes this change to clarify that payments made during any holiday is an exception to the general rule that all remuneration should count to the calculation of the regular rate. The Department continues to believe that payments made for all holidays should not count as remuneration to calculate the regular rate. As such, the Department keeps this amendment in this final-form rulemaking.

The Department amends subsection (b) and replaces the words "he" and "his" with the words "the" and "the employee." This makes the language of the regulation gender neutral. Commentators did not object to the Department's amendment and, as such, the Department keeps this amendment in this final-form rulemaking. Moreover, the Department also changes language in subsections (a)(2) and (d) by replacing "his" with gender neutral language.

As discussed previously in response to IRRC's comment 3, this final-form rulemaking adds subsection (g) which provides, "the regular rate for salaried employees is the amount of remuneration determined under 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 for salaried workers 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.

Despite objections from commentators, the Department keeps a definition for regular rate for salaried employees in this final-form rulemaking. This regulation is in the public interest because it will assure that employees who are compensated under the fluctuating workweek method are not paid less because they work more hours. This regulation is in accordance with the purpose of the act which is to protect workers from unreasonably low wages.

However, the Department amends the regulation to clarify that the Department intends to count all remuneration paid to salaried employees the same as remuneration given to employees who are paid by the hour, monthly, piece rate or other basis.

§ 231.101a. Minimum wage increase

The Department proposed to amend subsection (b) and (b)(1) of § 231.101 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. In addition, the Department proposed to amend

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

However, IRRC accurately stated that the Department proposed to amend language in a statement of policy and this procedure is improper. As such, the Department is following IRRC's suggestion and adopts the amended language the Department proposed to the statement of policy and creates § 231.101a. The Department will rescind the statement of policy in a separate document.

Subsection (a) clarifies that the minimum wage in this Commonwealth is $7.25 per hour. Section 4(a.1) of the act, states that the minimum wage in this Commonwealth is equal to the minimum wage set by the FLSA if that minimum wage is higher than the rate set forth in section 4(a)(8) of the act. Since the current Federal minimum wage is $7.25, which is higher than the minimum wage set form in section 4(a)(8) of the act, the Department enacts this subsection to provide clarity to the regulated community.

Subsection (b) clarifies the tipped minimum wage is $2.83 per hour. Although the act sets the base minimum wage for tipped employees, it does so in language that is confusing to the general public. The Department's final-form rulemaking provides clarity on this issue. It further clarifies that employers must make up the difference if tips plus the base rate do not equal the minimum wage and the employers may only take a tip credit if tips for an employee equal $135 per month.

§ 231.111. Tip credit for non-tipped duties

The Department adds this section to its regulations because, other than record keeping requirements outlined in § 231.34, the Department has no regulations governing tipped employees.

The Department's language in subsection (a) provides 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.

The Department's language in subsection (b), provides that employers have to pay the minimum wage for any time where an employer cannot take a tip credit. The Department clarifies and reinforces 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.

Many commentators including IRRC, the Honorable Chairperson Cox, the Chamber of Business and Industry and Littler Mendelson objected to this regulation because there were differences in language between the Department's proposed regulation and Federal regulation regarding the taking of a tip credit for non-tipped work. As such, the Department adopted verbatim language found in 29 CFR 531.56. This change allows the Department to protect employees from unreasonably low wages by prohibiting employers from taking of a tip credit when a tipped employee performs non-tipped work and limiting the amount of time an employer can assign a tipped employee work that directly supports tip-producing work.

The only Federal language the Department chose not to adopt is language in 29 U.S.C.A. § 531.56(f)(4)(ii) prohibiting employers from taking a tip credit if employees perform more than 30 consecutive minutes performing non-tipped work. The Department felt this requirement would be too difficult for either the Department or employers to enforce.

§ 231.112. Tip pooling

The Department adds this section because, while the act permits tip pooling, there are no regulations addressing this subject.

The Department's language in subsection (a) clarifies that tip pooling is reserved for employees who customarily and regularly perform tipped duties.

The Department's language in subsection (b) excludes 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's language in subsection (c) requires 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 proposed this to ensure that workers are fully aware of tip pooling arrangements before they are required to participate in them.

Similar to the Department's proposed regulation regarding the 80/20 rule, many commentators including IRRC, the Honorable Representative Cox, the Chamber of Business and Industry and Littler Mendelson objected to this regulation because there were differences in language between the Department's proposed regulation and Federal regulation regarding tip pooling.

After careful consideration, the Department amends its proposed regulation to incorporate language from USDOL's regulation in 29 CFR 531.54. The Department concluded that incorporating language from the Federal regulation will provide a uniform set of rules for employers while at the same time protecting employees who participate in tip pools from unreasonably low wages.

The Department retains the notice requirement as subsection (c) as new subsection (b). The Department retains this language because it is important for employees to be aware of tip pools before they are required to participate in them.

§ 231.113. Credit card fees

The Department adds 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's regulation prohibits 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.

Some commentators including IRRC, and the Honorable Chairperson Cox questioned the necessity of this section given that section 3 of the act specifically states that tips are the property of the employee. However, it is clear from comments that the Department received that there are businesses that do deduct credit card processing fees from employee tips. Given this practice, the Department has decided to keep this section in this final-form rulemaking to provide clear guidance that this practice is not permitted in this Commonwealth.

The Department amends language in this final-form rulemaking. First, the Department heeded the suggestion of the Honorable Chairperson Cox and adds a prohibition of deducting any type of processing fees from tips not just credit card processing fees. The Department also adds language to clarify that employers cannot deduct credit card processing fees even if an employee participates in a

tip pool. The Department is confident that these amendments will provide greater protection to tipped employees.

§ 231.114. Service charges

The Department adds 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, which grants the Department's authority to issue regulations regarding tipped employees and to protect employees from unreasonably low wages.

Subsection (a) requires employers who charge patrons service fees to provide patrons notice in the contract with the patron and on a menu provided to the patron. This regulation clarifies to patrons that a service charge is different than a tip.

Subsection (b) requires 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. This regulation clarifies to patrons that a service charge is different than a tip.

Subsection (c) requires billing statements to contain separate lines for service charges and tips. This final-form rulemaking further clarifies to patrons that a service charge is different than a tip.

IRRC, the Honorable Chairperson Cox and other commentators expressed concern that the Department's regulation usurped the Attorney General's authority to enforce the UTPCPL. However, after consulting with the Attorney General and researching the subject, the Department is satisfied that it does possess the authority to issue this regulation. As such, the Department has decided to keep the proposed language in this final-form rulemaking.

The Department addressed the Honorable Chairperson Cox's concern regarding whether an employer can use service charges to satisfy its obligation to pay the minimum wage and overtime to employees. In response, the Department adds subsection (d) which provides that if an employer distributes service charges to employees, those sums may satisfy the employers obligation to pay the minimum wage and overtime but may not count as tips.

Affected Persons

This final-form rulemaking affects 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 final-form rulemaking benefits up to 434,712 workers in this Commonwealth. These affected workers include the approximately 199,285 tipped workers, as defined by the act's current regulations; the approximately 47,250 food service managers and supervisors who will gain a bright line test as to when they may keep tips received from a customer for services they directly and solely provide; the approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a nontraditional tip pool; and the approximately 27,427 Pennsylvanians who are paid overtime using the fluctuating workweek method.

Fiscal Impact

The Department does not anticipate that this final-form rulemaking will create a significant impact on its enforcement budget.

This final-form rulemaking 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) 2022-2023 is $1,958,418 (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, 36,267). The adjustment cost to the regulated community in this Commonwealth in FY 2022-2023 is up to $1,958,418 (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 the total number of establishments that are likely to be required to comply, 36,267).

The Department acknowledges that employers may bear certain ongoing costs related to compliance with this final-form rulemaking. Because of limited data on business decision making and the inability to model human behavior as it pertains to employment decisions, the Department cannot anticipate which of the varied operational options available to employers to comply with this final-form rulemaking they will select and thus cannot estimate the ongoing costs of compliance. For example, to adjust to costs related to the definition of regular rate, employers could choose to hire more employees to offset the need for overtime, restrict the use of overtime by current employees by making scheduling adjustments, or change the method of compensation for employees to reallocate labor costs, among other options. The Department expects that most businesses will select the option that limits new costs.

More data, though still limited, is available to estimate the ongoing transfer costs employers are likely to bear as a result of the prohibition on deducting credit card and other payment processing fees from employees' tips. Based on 2018 data on reported tips in the United States and wages and salaries in this Commonwealth and considering method of payment trends over the past 2 decades, the Department estimates that employers may bear up to $20,366,675.30 in costs related to credit card and other payment processing fees annually that previously they deducted from employees' tips. The method of calculating this estimate is described in the RAF.

Reporting, Recordkeeping and Paperwork Requirements

This final-form rulemaking will not require the creation of new forms. However, employers who institute a tip pooling arrangement will have to keep records 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 final-form 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 this final-form rulemaking.

Effective Date

This final-form rulemaking will take effect 90 days after publication in the *Pennsylvania Bulletin*.

Contact Person

Interested persons who require further information about this final-form rulemaking may submit inquiries to Bryan M. Smolock, Director, Department of Labor and Industry, Bureau of Labor Law Compliance, 651 Boas Street, Harrisburg, PA 17121 or bsmolock@pa.gov.

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 the notice of proposed rulemaking, published at 51 Pa.B. 7239, to IRRC and the Chairpersons of the House and Senate Labor and Industry Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

On February 17, 2022, the Department delivered the final-form rulemaking to IRRC, and the Chairpersons of the House and Senate Labor and Industry Committees. Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on March 20, 2022, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 21, 2022, and approved the final-form rulemaking.

Findings

The Department finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law, and all comments received were considered.

(3) The amendments to this final-form rulemaking do not enlarge the purpose of the proposed rulemaking published at 51 Pa.B. 7239.

(4) This final-form rulemaking is necessary and suitable for the administration of the act.

Order

The Department, acting under its authorizing statute, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 231, are amended by amending §§ 231.1, 231.34 and 231.43, and adding §§ 231.101a, 231.111—231.114 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Department shall submit this order, and Annex A to the OAG and the Office of General Counsel for approval, as required by law.

(c) The Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(d) This final-form rulemaking shall take effect 90 days after publication in the *Pennsylvania Bulletin*.

JENNIFER BERRIER,
Secretary

(*Editor's Note*: See 52 Pa.B. 2087 (April 2, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 12-114 remains valid for the final adoption of the subject regulations.

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 Law Compliance of the Department.

Customarily and regularly—A frequency which must be greater than occasional, but which may be less than constant.

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

* * * * *

Secretary—The Secretary of Labor and Industry of the Commonwealth. The term Secretary includes the authorized representative of the Secretary.

Service charge—A mandatory fee an employer may charge to a patron for services that an employee renders.

Student—An individual who is enrolled in and regularly attends, on a full-time basis during the daytime, an institution of learning offering a course of instruction leading to a degree, certificate or diploma, or who is completing residence requirements for a degree. A person is deemed to be a student during the time that school is not in session if that person was a student during the preceding semester, trisemester or similar term of instruction; provided however, that no person may be deemed a student for a period after the date of receipt of a degree, certificate or diploma.

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 $135 a month in tips.

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

USDOL—The United States Department of Labor.

Week—A period of 7 consecutive days starting on any day selected by the employer.

* * * * *

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)):

* * * * *

(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. 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 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 the 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 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 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 the employee receives no other form of compensation for services, 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. 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.

(d) No employer may be deemed to have violated these §§ 231.41—231.43 by employing an employee for a workweek in excess of the maximum workweek applicable to the employee under § 231.41 if, under an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by the employee in the workweek in excess of the maximum workweek applicable to the employee under § 231.41:

(1) In the case of an employee employed at piece rates, is computed at piece rates not less than 1 1/2 times the bona fide piece rates applicable to the same work when performed during nonovertime hours.

(2) In the case of an employee's performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than 1 1/2 times the bona fide rate applicable to the same work when performed during nonovertime hours.

(3) Is computed at a rate not less than 1 1/2 times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder; and if the average hourly earnings of the employee for the workweek, exclusive of payments described in subsection (a)(1)—(7), are not less than the minimum hourly rate required by applicable law and if extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(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 the amount of remuneration determined under subsection (a) divided by 40 hours.

MINIMUM WAGE INCREASE AND TRAINING WAGE

§ 231.101a. Minimum wage increase.

(a) Under section 4(a.1) of the act (43 P.S. § 333.104(a.1)), an employer shall pay at least $7.25 an hour to all employees for all hours worked subject to exclusions and exemptions contained in the act and this chapter.

(b) The minimum wage 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 hourly wage for tipped employees does not meet the minimum wage contained in subsection (a) in this Commonwealth.

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

TIPPED EMPLOYEES

§ 231.111. Tip credit for non-tipped duties.

The USDOL standards for tipped employees at 29 CFR 531.56 (relating to "more than $30 a month in tips") in effect as of May 7, 2022, are incorporated by reference with the exception of subsection (f)(4)(ii).

§ 231.112. Tip pooling.

(a) The USDOL standards for tipped employees at 29 CFR 531.54 (relating to tip pooling) in effect as of May 7, 2022, are incorporated by reference.

(b) 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 and other processing fees.

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

(b) An employer that permits patrons to pay tips by credit card or other non-cash forms of payment may not deduct credit card payment or other processing fees or costs before distributing tips under a tip pooling arrangement allowed under § 231.112 (relating to tip pooling).

§ 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; and

(2) On any menu provided to the patron.

(b) The notice required by 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.

(d) An employer may distribute a service charge to its employees. The amount distributed to employees must count as remuneration in accordance with § 231.43(a) (relating to regular rate) but may not count as a tip in accordance with § 231.1 (relating to definitions).

[Pa.B. Doc. No. 22-661. Filed for public inspection May 6, 2022, 9:00 a.m.]