

Regulatory Analysis Form

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INDEPENDENT REGULATORY
REVIEW COMMISSION

IRRC Number:

2151

(1) Agency
Department of Labor & Industry

(2) I.D. Number (Governor's Office Use)
12-55

(3) Short Title
Minimum Wage Regulations (Food-Service Employee Incentive Program)

(4) PA Code Cite
34 Pa. Code,
Chapter 231

(5) Agency Contacts & Telephone Numbers

Primary Contact
Robert E. Moore (717) 787-4763
Secondary Contact
Richard C. Lengler (717) 787-4186

(6) Type of Rulemaking (Check One)

☒ Proposed Rulemaking

☐ Final Order Adopting Regulation

☐ Final Order Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

☒ No

☐ Yes: By the Attorney General

☐ Yes: By the Governor

(8) Briefly explain the regulation in clear and non-technical language.

These regulations are a result of a 1998 amendment to Pennsylvania's Minimum Wage Act (MWA), 43 P.S. § 333.105a, which established the Food-Service Employee Incentive Program. The proposed regulations will activate this training program for both employees and employers engaged in restaurant or food service operations whereby newly-hired dishwashers, bus-persons, servers, sales staff, cooks, hostesses/hosts and cashiers, receive a training wage. Upon completion of the program, the employer has a trained employee, and the employee earns an increased wage. The proposed regulations also define the length of training periods for particular jobs; require that participating employers maintain employee incentive accounts; require that employers provide eligible employees with written notification of the training terms; and explain how a participating employer compensates its employees upon completion of the training.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Section 3 of the act of December 21, 1998, P.L. 1290, No. 168, 43 P.S. § 333.105a note ("Act 168").

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. Act 168 requires the Department of Labor and Industry (L&I) to promulgate regulations to enforce and carry out the newly-established Food-Service Employee Incentive Program. 43 P.S. § 333.105a note.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

These regulations are required by statute. Both Act 168 and the regulations are designed to reduce employee turnover in the restaurant and food-service industries.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Not applicable.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible, and approximate the number of people who will benefit.)

Restaurant and food-service operation employers and employees will benefit from these regulations. The Pennsylvania Restaurant Association estimates that there are approximately 19,000 restaurant and food-service operation employers currently conducting business in the Commonwealth. L&I's Center for Workforce Information and Analysis reports 313,000 employees in this industry in Pennsylvania. The regulations are intended to reduce turnover in this industry by creating incentives in the form of a promise of higher pay and the opportunity to receive additional wages escrowed during training, if the employees remain in their jobs for the prescribed training period.

Attached is an analysis by L&I's Center for Workforce Information and Analysis estimating average employer savings over training costs of \$107.07 to \$384.42 where employees leave prior to completing their training. The objective of the legislation, however, is to eliminate the training cost altogether for new hires by enticing them to stay with their jobs.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible, and approximate the number of people who will be adversely affected.)

These regulations address the implementation of a program that is strictly voluntary. Accordingly, there does not appear to be anyone who will be adversely affected by the regulations.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Restaurant and food service operation employers participate on a voluntary basis. L&I has no way of estimating how many of the 19,000 employers in these industries will choose to participate in the program.

(16) Describe the communications with, and input from, the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

L&I identified 12 potential interested stakeholders and/or stakeholder groups consisting of the Pennsylvania Restaurant Association, the Pennsylvania AFL-CIO, the Pennsylvania Business Roundtable, the Harrisburg Travel Council, the Greater Philadelphia Chamber of Commerce, the Greater Pittsburgh Chamber of Commerce, the Pittsburgh District Office of the U.S. Small Business Administration, the Scranton Small Business Development Center, Gibson E. Armstrong, Senator; Albert V. Belan, Senator; Joseph M. Gladeck, Representative; and Robert E. Belfanti, Representative. A number of additional potential stakeholders and/or stakeholder groups were identified and contacted, but chose not to participate in the process at all. The Pennsylvania Restaurant Association and Representative Belfanti's office offered written comments and suggestions, which were taken into account in the proposed regulations.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Employers must bear the costs of on-the-job training. Participating employers are required to establish and maintain escrow or restricted accounts for any participating employees. The cost of establishing and maintaining this account likely will vary depending on whether the employer uses its regular bank. The amount of monies deposited into this account similarly will vary depending on the agreed-upon training and post-training wages, and the length of the training period. The employer will recoup escrowed moneys if the worker quits or is fired for willful misconduct during the training period. Average employer savings over training costs range from \$107.07 to \$384.42 according to the attached model. The intent of the program, however, is to reduce employee turnover costs, and, therefore, produce benefits and savings to the regulated community.

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Not applicable.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulations, including any legal, accounting, or consulting procedures which may be required.

Act 168 requires that L&I maintain records of participating employers. Within 30 months of section 5.1 becoming effective, L&I must prepare and submit an impact report to the Senate Labor and Industry Committee and the House Labor Relations Committee. The estimated cost of these directives is minimal because current employees of L&I's Bureau of Labor Law Compliance will handle these functions. There also may be an increase in wage complaints to L&I because of the forfeiture provisions for the escrowed funds. Again, this is something that will be handled by current staff – therefore, any increase in costs probably will be minimal. No increase in actual inspections is envisioned, since compliance will be monitored through existing complaint and auditing procedures.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$N/A*	\$N/A*	\$N/A*
Regulated Community	See Attached	Model		N/A*	N/A*	
Local Government	None	None	None		N/A*	
State Government	None	None	None			
Total Savings	See Attached	Model				
COSTS:						
Regulated Community	Minimal	Minimal	Minimal			
Local Government	None	None	None			
State Government	Minimal	Minimal	Minimal			
Total Costs	Minimal	Minimal	Minimal			
REVENUE LOSSES:						
Regulated Community	None	None	None			
Local Government	None	None	None			
State Government	None	None	None			
Total Revenue Losses	None	None	None			

*Section 5.1(k) of Act 168 specifies that section 5.1 shall expire three years after the date on which it takes effect. Accordingly, there are no costs or savings beyond this three-year period.

(20a) Explain how the cost estimates listed above were derived

L&I's Center for Workforce Information and Analysis used employment data from 1998 for the relevant industries to estimate employee turnover and derive an average duration of 4.3 weeks for workers terminating employment after less than 12 weeks. Training costs were estimated at 20 % of the total wage for the training period using statewide average wages for various occupations in the industries. The escrowed payments were assumed to be the difference between the average wage and the statutory minimum wage of \$5.15 per hour. The training costs were then compared against the escrowed payments for full-time work in the various occupations using 4.3 weeks as the duration of employment.

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(20b) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Bureau of Labor Law	96/97	97/98	98/99	99/00
Compliance	\$1,715,749	\$1,698,750	\$1,794,735	\$2,169,947

These figures represent the total expenditures for the Bureau of Labor Law Compliance, which actually administers and enforces approximately 10 labor standards/ wage & hour laws. The proposed regulations are not expected to have any appreciable effect on the Bureau's expenditures.

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

The objective is to reduce employee turnover in the restaurant and food-service industry, and thereby reduce future training costs. Short of achieving that goal, the employer should be able to recoup training costs from the Employee Incentive Account when employees prematurely quit during training.

(22) Describe the non-regulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Act 168 mandates regulations for implementation; no non-regulatory alternatives are available.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Act 168 largely dictates the regulatory scheme. L&I initially considered regulating the precise methods of calculating escrow payments to employees upon completion of training, but this proved too burdensome because of variations in training periods and hours worked, and the different pay periods and pay schedules used by employers.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

There are no federal standards regarding a food-service employee incentive program.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Pennsylvania appears to be the first state to adopt a program like this. The regulations are intended to reduce employee-turnover costs in the restaurant and food-service industry, allowing Pennsylvania to gain a competitive advantage.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No public hearings or informational meetings are planned.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record-keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports, which will be required as a result of implementation, if available.

These regulations require that participating employers provide written notification of the training wage, the entry-level wage and the name of the financial institution where the food-service employee incentive account is located. They also require that employers obtain signed acknowledgements from the employees. Attached is a proposed form for use by participating employers.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

There are no special provisions; however, section 5.1(b) does specifically identify that persons on public assistance may be hired to participate in the Food-Service Employee Incentive Program.

(30) What is the anticipated effective date of the regulation, the date by which compliance with the regulation will be required, and the date by which any required permits, licenses or other approvals must be obtained?

L&I anticipates publishing of final regulations by the third quarter of 2000. Participation in the Program is voluntary, but can begin immediately upon publication of the final regulations. There are no requirements for permits, licenses, or other approvals.

(31) Provide the schedule for continual review of the regulation.

Act 168 expires after three years. The Department is required to prepare and submit a report to the Senate Labor and Industry Committee and the House Labor Relations Committee within 30 months after section 2 of Act 168 takes effect.

DRAFT
EMPLOYEE NOTIFICATION

_____ and _____
(Name of Employer) (Name of Employee)

voluntary agree to participate in the Food-Service Employee Incentive Program. This is a voluntary program open to new employees of Pennsylvania employers in the restaurant and food-service industries.

The employee will begin employment and training as a _____
(list position)
on _____ at a training wage of _____.
(start date) (not less than \$5.15/hour)

The training period will last a maximum of _____ weeks. Upon completion of
(number)
the training period, or promotion prior to the completion of the training period, the employee will be paid an entry-level wage of _____.
(dollar amount/hour)

The difference between the training wage and the entry-level wage will be placed into a Food-Service Employee Incentive Account maintained at

(Name & Address of Financial Institution)

Upon completion of the training period, or promotion prior to completion of the training period, the employee will be paid all funds credited to them in the Food-Service Employee Incentive Account, in equal installments over a period equal to the period of training, to be paid on or at the following dates or intervals:

(This schedule should be revised in writing if the employee is promoted prior to completion of the training. The employee must sign the revision.)

The employee will forfeit his or her funds in the Food-Service Employee Incentive Account if he or she quits or is fired for willful misconduct before the end of the training period.

A copy of this agreement must be given to the employee.

The above terms are understood and agreed to. By signing this document, the employee further acknowledges that he or she has received a copy.

Authorized Employer Rep.

(Date)

Employee

(Date)

Further information about the laws that apply to this program can be obtained by calling the Bureau of Labor Law Compliance at 1-800-932-0665 or by clicking on the Bureau's Internet Web site at www.dli.state.pa.us and going to "Labor Laws".

Center for Workforce Information and Analysis

February 14, 2000

Estimated Industry Employee Turnover Data - Pennsylvania
Eating and Drinking Places Industry

Total Employment - 1998	308,300
Estimated Employee Turnover	57.20%
New Employees That Stay Less Than 12 Weeks	30%
Average Duration with Employer	4.3 weeks

Analysis for Food Service Incentive Program

<i>Job Title</i>	<i>Employment (1997)</i>	<i>Average Training Time</i>	<i>Average Wage</i>	<i>Minimum Wage Differential</i>	<i>Average Total Escrow Amount per Employee</i>	<i>Estimated Training Cost **</i>	<i>Average Savings per Early Separation ***</i>
Hosts and Hostesses	11,110	8 Weeks or 240 Hours *	\$6.85	\$1.70	\$408.00	\$328.80	\$219.30
Waiters & Waitresses	91,590	7 Weeks or 210 Hours	5.98	\$0.83	\$199.20	\$251.16	\$107.07
Food Servers, Outside	4,120	7 Weeks or 210 Hours	8.13	\$2.98	\$715.20	\$341.46	\$384.42
Counter Attendants	17,310	7 Weeks or 210 Hours	6.42	\$1.27	\$304.80	\$269.64	\$163.83
Cooks, fast food	21,410	8 Weeks or 240 Hours	6.06	\$0.91	\$218.40	\$290.88	\$117.39
Cooks, short order	9,550	8 Weeks or 240 Hours	7.34	\$2.19	\$525.60	\$352.32	\$282.51

* Based on 30 hours per week and training duration as described in chapter 231 of Title 34.

** Estimated at 20 percent of total wage cost for training period.

*** Based on average duration with employer of 4.3 weeks.

CDL-1 FACE SHEET FOR FILING DOCUMENTS WITH THE LEGISLATIVE REFERENCE BUREAU (Pursuant to Commonwealth Documents Law)		RECEIVED 2000 SEP 27 PM 3:16 REGULATORY REVIEW COMMISSION
#2151		Do Not Write In This Space
Copy below is hereby approved as to Form and legality. Attorney General. By: <u>[Signature]</u> DEPUTY ATTORNEY GENERAL SEP 08 2000 DATE OF APPROVAL <input type="checkbox"/> Check if applicable. Copy not approved. Objections attached.	Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by: DEPARTMENT OF LABOR & INDUSTRY (AGENCY) Document/Fiscal Note No. <u>12-55</u> Date of Adoption: <u>8</u> By: <u>[Signature]</u> JOHNNY J. BUTLER Title: <u>Secretary of Labor & Industry</u> (Executive Officer, Chairman or Secretary)	Copy below is hereby approved as to form and legality. Executive or independent Agencies. By: <u>[Signature]</u> 5/19/00 DATE OF APPROVAL (Deputy Attorney General) (Chief Counsel, Independent Agency) (Strike inapplicable title) <input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.

NOTICE OF
PROPOSED RULEMAKING

TITLE 34. LABOR AND INDUSTRY.

PART XII.

CHAPTER 231. MINIMUM WAGE.

FOOD-SERVICE EMPLOYE INCENTIVE PROGRAM

PREAMBLE

TITLE 34. LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE, CHAPTER 231]

MINIMUM WAGE.

FOOD-SERVICE EMPLOYE INCENTIVE PROGRAM.

The Department of Labor and Industry ("Department") proposes to amend Chapter 231 of Title 34 by adding sections 231.91-231.99, as set forth in Annex "A".

A. *Effective Date.*

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

B. *Statutory Authority.*

These amendments are proposed under section 3 of the act of December 21, 1998, P.L. 1290, No. 168, 43 P.S. § 333.105a note ("Act 168"), which requires the Department to adopt regulations to enforce and carry out the newly-added provisions of section 5.1 of the Minimum Wage Act of 1968 ("MWA"), 43 P.S. § 333.105a.

C. *Background and Purpose.*

Section 2 of Act 168 amended the MWA by establishing a Food-Service Employee Incentive Program for new employees hired by restaurant and food-service employers. Section 3 of Act 168, in turn, requires the Department to develop regulations to implement this program, and postpones the effective date of section 2 until that time. This program will be in effect for three years following the Department's promulgation of regulations; at which time, section 2 will expire under its own terms unless renewed by the General Assembly. The Department is required to prepare and submit a report to the Senate Labor and Industry Committee and the House Labor Relations Committee within 30 months after section 2 of Act 168 takes effect. 43 P.S. § 333.105a note.

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

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

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

D. *Summary of Proposed Rulemaking.*

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

Section 231.91 generally sets forth the authority and effective dates of the proposed regulations. Section 231.91(d) prominently reiterates an important rule governing claims under Act 168. Although this act amended the MWA, it requires claims arising under its provisions to be brought under the Pennsylvania Wage Payment and Collection Law ("WPCL"), act of July 14, 1961, P.L. 637, *as amended*, 43 P.S. §§ 260.1 - 260.12, rather than the MWA. Significantly, this means that employers are potentially subject to statutory liquidated damages of \$500 or 25 percent of the wages due, whichever is greater, by virtue of section 10 of the WPCL, if they fail to make timely payment of wages, and offer no good faith contest or dispute of the wage claim. 43 P.S. § 260.10.

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

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

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

Section 231.94 incorporates Act 168's minimum and maximum training periods for restaurant and food-service industry employees.

Section 231.95 contains the substantive and record-keeping requirements for the Food-Service Employee Incentive Account. Only one account is required per employer, even though multiple employees may be participating in the employer's program. Because these funds are to be maintained in an account for the benefit of the employees, any unlawful diversion of these funds by the employer could be prosecuted under the Crimes Code as a form of theft.

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

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

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

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

These record-keeping requirements are intended to reduce the occasion for misunderstanding between the employer and employee, to protect both parties in the event of disputes under the agreements and to facilitate the Department's investigation of complaints. The Department will develop, and post on its Web site (www.dli.state.pa.us), a sample form, which employers can use to enroll new employees in a Food-Service Employee Incentive Program.

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

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

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

Section 231.98(b) outlines the three circumstances in which separated employees are entitled to payment from the Food-Service Employee Incentive Account. Those circumstances are:

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

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

Section 231.99(a) conversely provides that employees, voluntarily terminating employment with the employer prior to completion of training, forfeit all funds in their Food-Service Employee Incentive Account. Section 231.99(b) similarly directs that employees terminated for “willful misconduct,” as that term is used in The Pennsylvania Unemployment Compensation Law (“UC Law”), act of Dec. 5, 1936, Second Ex. Sess., P. L. [1937] 2897, *as amended*, 43 P.S. 751 *et seq.*, prior to completing training, forfeit their entitlement to these funds. Because Act 168 refers to the UC Law to define willful misconduct, questions arose as to the interplay of WPCL complaints and UC Law claims from involuntarily-separated employees or employees at least claiming to be involuntarily separated. The Department proposes, in section 231.99(c), to rely upon final UC Law adjudications for investigation purposes in these circumstances. However, employees are not required to go through the Department under the WPCL, and may bring suit on their own under that statute. Moreover, the Department only intends to rely upon final adjudications in its investigation. It does not intend to postpone investigations while UC Law claims work their way through the system, up to, and including, judicial review.

E. *Affected Persons.*

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

F. *Fiscal Impact.*

The proposed regulations will have no impact on local government. Even if a unit of local government, such as a school district, has food-service employees, they are exempt from both the MWA and the WPCL. The Commonwealth and its political subdivisions are not included in either statute’s definition of the term “employer.” *See, Philipsburg-Osceola Educ. Ass’n. v. Philipsburg-Osceola Area School District*, 633 A.2d 220 (Pa. Cmwlth. 1993) (WPCL); 1976 OP. ATTY GEN. NO. 29 (MWA). Similarly, these

regulations do not affect employers or employees outside the restaurant and food-service industries, or employers or employees in those industries that opt to not participate.

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

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

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

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

G. *Paperwork Requirements.*

These regulations will require written notification and acknowledgment to and from participating employees. One record will suffice for both purposes. Additionally, the Department recommends that the schedule for installment payments from the Employee Incentive Account be revised if the employee is promoted before completing their training period. These records must be maintained with other payroll records required to be kept by employers under the MWA, and are considered to be important to the protection of both employers and employees who participate in the program. The Department will develop, and post on its Web site, a sample form for use by participating employers and employees to further reduce this already minimal burden.

H. *Sunset Date.*

Act 168, by its own terms, provides that section 5.1 of the MWA will expire three years after the effective date of these regulations. 43 P.S. § 333.105a (k). Accordingly, section 231.91(c) proposes that the regulations will expire within three years unless section 5.1 of the MWA is renewed by the legislature.

I. *Contact Person.*

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

J. *Regulatory Review.*

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

ANNEX "A"

**TITLE 34. LABOR AND INDUSTRY.
PART XII.
CHAPTER 231. MINIMUM WAGE.**

FOOD-SERVICE EMPLOYE INCENTIVE PROGRAM.

§ 231.91. Authority and effective date.

(a) Sections 231.91- 231.99 set forth the rules governing the Food-Service Incentive Employee Program for participating restaurant and food-service operations employers and their employees in Pennsylvania pursuant to section 5.1 of the Act (43 P.S. § 333.105a).

(b) Sections 231.91-231.99 shall be effective [insert date of adoption of final publication of regulations in the *Pennsylvania Bulletin*].

(c) Sections 231.91-231.99 will expire, along with section 5.1 of the Act (43 P.S. § 333.105a), three years following their adoption by the Department, unless section 5.1 is extended by the General Assembly.

(d) Pursuant to section 5.1(j) of the Act (43 P.S. § 333.105a(j)), a claim arising under the Food-Service Employee Incentive Program provisions shall be brought under the Pennsylvania Wage Payment and Collection Law (43 P.S. §§ 260.1 – 260.12).

§ 231.92. Eligibility.

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

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

§ 231.93. Amount of training wage.

(a) The amount of the training wage paid to participants in this program shall be established and agreed to in writing by the employee and the employer.

(b) The training wage cannot be less than the minimum wage established by the Act.

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

§ 231.94. Length of training period.

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

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

§ 231.95. Employee incentive account.

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

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

(c) Funds in the Food-Service Employee Incentive Account shall be the property of the employer until the employer is required to make payments to the employee. Funds in the Food-Service Employee Incentive Account are nontransferable and non-assignable.

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

(e) The employer shall maintain the records at the place of employment or at a central record-keeping office within or outside of the Commonwealth. The employer shall maintain these records for three years in accordance with section 231.31 of this Chapter.

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

§ 231.96. Writing required.

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

- (1) the training wage and the starting date of training;
- (2) the length of the training period and the position for which the employee is being trained;
- (3) the entry-level wage which the employee will receive upon completion of the training period;
- (4) the financial institution where the employer maintains the Food-Service Employee Incentive Account; and,
- (5) the installment-payment schedule to be followed after the employee completes the training period, provided the employer shall revise this schedule with the employee's written consent when the employee is promoted prior to completion of the training period.

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

(c) The employer shall maintain a copy of the signed acknowledgment for three years, along with other records required to be kept under sections 231.31 – 231.35 of this Chapter.

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

§ 231.97. Training.

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

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

§ 231.98. Completion of training.

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

(b) The employer shall pay funds credited to employees in the Food-Service Employee Incentive Account, within thirty days of separation, to employees who are separated from the employer under any of the following conditions:

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

§ 231.99. Forfeiture of escrowed funds.

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

(b) An employee terminated from employment for willful misconduct, as that term is used in The Pennsylvania Unemployment Compensation Law (43 P.S. §§ 751et seq.), prior to completion of the training period forfeits all funds credited to them in the Food-Service Employee Incentive Account.

(c) When investigating claims and complaints regarding payments or forfeitures of funds in the Food-Service Employee Incentive Account, the Department may rely upon any final adjudication issued pursuant to the Pennsylvania Unemployment Compensation Law regarding the nature of the employee's separation or whether the separation was for willful misconduct.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
HARRISBURG, PENNSYLVANIA 17120

THE SECRETARY

September 27, 2000

The Honorable John R. McGinley, Jr.
Chairman
INDEPENDENT REGULATORY REVIEW COMMITTEE
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

**Re: Proposed Rulemaking
I.D. # 12-55**

Dear Chairman McGinley:

In accordance with the Regulatory Review Act ("Act"), enclosed are copies of the face sheet, preamble, text and regulatory analysis for rulemaking proposed by the Department of Labor and Industry ("Department").

The proposed rulemaking will be published in the *Pennsylvania Bulletin* on October 7, 2000, with an invitation for public comment. Pursuant to section 5(c) of the Act (71 P.S. § 745.5(c)), copies of written comments received by the Department about these regulations will be submitted to the standing committees and the Independent Regulatory Review Commission within five days.

The proposed regulations consist of amendments to the Department's minimum wage regulations (34 Pa. Code, Chapter 231), and are intended to implement section 2 of Act 168 of 1998 (43 P.S. § 333.105a). Section 2 of Act 168 establishes an Employee Incentive Program for new employees hired by restaurant and food-service employers. Section 3 of Act 168, in turn, requires the Department to develop regulations, and postpones the effective date of section 2 until that time (43 P.S. § 333.105a note).

The Honorable John R. McGinley, Jr.

Re: Proposed Rulemaking

I.D. # 12-55

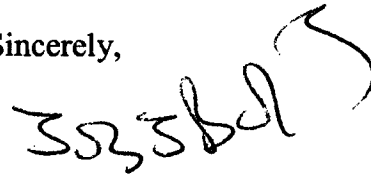
September 27, 2000

Page 2

The Department's Bureau of Labor Law Compliance developed these proposed regulations. Accordingly, written comments, suggestions or objections regarding them should be sent to Robert E. Moore, Director, Bureau of Labor Law Compliance, Department of Labor and Industry, Commonwealth of Pennsylvania, Room 1301, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17120 (PH: 717-787-4763; FAX: 717-787-0517; e-mail: rmoore@state.pa.us). Questions can also be directed to Richard C. Lengler, Deputy Chief Counsel, Labor Law Compliance Division, Office of Chief Counsel, Department of Labor and Industry, Commonwealth of Pennsylvania, 10th Floor, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, PA 17120 (PH: 717-787-4816; FAX: 717-783-5027; e-mail: rlengler@dli.state.pa.us).

The Department's staff is available to discuss these proposed regulations with you or members of your staff.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Butler", with a large, stylized flourish extending from the end of the signature.

Johnny J. Butler

Encls.

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

RECEIVED

2000 SEP 27 PM 3:17

I.D. NUMBER: 12-55
SUBJECT: Food-Service Employee Incentive Program
AGENCY: DEPARTMENT OF LABOR & INDUSTRY
#2151

INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- X Proposed Regulation
Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
9-27-00	[Signature]	HOUSE COMMITTEE ON LABOR RELATIONS
9/27/00	[Signature]	
9/27/00	[Signature]	SENATE COMMITTEE ON LABOR & INDUSTRY
9-27-00	B.L. Cairn	
9/27/00	[Signature]	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
9/27/00	[Signature]	LEGISLATIVE REFERENCE BUREAU

September 13, 2000