

Regulatory Analysis Form (Completed by Promulgating Agency) (All Comments submitted on this regulation will appear on IRRC's website)		INDEPENDENT REGULATORY REVIEW COMMISSION RECEIVED FEB 17 2022 Independent Regulatory Review Commission IRRC Number: 3322
(1) Agency Department of Labor and Industry		
(2) Agency Number: 12 Identification Number: 114		
(3) PA Code Cite: 34 Pa. Code, Chapter 231		
(4) Short Title: Amendments to 34 Pa. Code, Chapter 231 regarding Tipped Employees and Regular Rate		
(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Bryan Smolock, Director, Bureau of Labor Law Compliance, (717) 787-0606 <u>bsmolock@pa.gov</u> Secondary Contact: Robert Schramm, Deputy Chief Counsel, Office of Chief Counsel, (717) 787-4186 <u>rschramm@pa.gov</u>		
(6) Type of Rulemaking (check applicable box): <input type="checkbox"/> Proposed Regulation <input checked="" type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation		<input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General
(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less) The Department of Labor and Industry (Department) proposes amendments to Chapter 231 of 34 Pa. Code to update the regulations governing tipped employees. This final-form regulation clarifies that an employer can only take a tip credit for employees that make \$135 per month in tips and spend at least 80% of their weekly hours performing tipped duties and no more than 20% of weekly hours performing non-tipped duties. It also establishes rules for both traditional and non-traditional tip pooling. Employers would be required to notify employees of tip pools and keep records regarding tip pools. It prohibits employers from deducting payment processing fees from tips and requires employers to inform patrons that service charges are not tips. However, employers who remit service charges to employees may count these sums towards the employer's obligation to pay these employees the minimum wage and overtime; they may not count these sums as tips. In addition, it clarifies that to calculate the base hourly rate for overtime of salaried employees, employers must divide earnings in a workweek by 40.		
(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.		

The Department proposes this final-form regulation under the authority granted by sections 4 and 9 of the Minimum Wage Act of 1968 (MWA) (43 P.S. §§ 333.104 and 333.109).

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

There is no federal or state law, regulation or court order that mandates this final-form regulation. However, there are relevant federal statutes, regulations, and court decisions regarding tipped employees. In addition to the MWA, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et. seq.*, also governs tipped employees. Section 3 of the FLSA defines “tipped employee” as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. § 203(t).

On December 30, 2020, the United States Department of Labor (USDOL) published a final rule revising regulations concerning tipped employees. In its final rule, USDOL declared that it was changing regulations to allow 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, managers and supervisors cannot draw from these tip pools. 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. USDOL’s tipped employee rule was to be effective on March 1, 2021.

On January 21, 2021, the Commonwealth of Pennsylvania, along with the Commonwealth of Massachusetts, 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 statutory jurisdiction, authority, and limitations in violation of the federal Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(C), and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A). Specifically, the lawsuit alleged that USDOL’s tip rule was not in accordance with the FLSA’s statutory definition that a tipped worker be engaged in an occupation that receives tips and failed to consider and quantify the effect on tipped workers.

This lawsuit was stayed because on February 26, 2021, USDOL decided to reconsider the implementation of this regulation. On March 26, 2021, USDOL announced that it was postponing the effective date of parts of the final regulation until December 31, 2021 and stated that it intended to issue new proposed and final regulations on the issues. However, on April 30, 2021, USDOL allowed the part of the regulation regarding tip pooling to go into effect. USDOL’s regulation allows for “non-traditional tip pools,” meaning tip pools that include employees who customarily and regularly perform tipped work and employees who do not customarily and regularly perform tipped work so long as all employees are paid at least the full minimum wage of \$7.25 per hour. On September 24, 2021, USDOL clarified that while supervisors may keep tips given directly to them for services they directly and solely provide, they can contribute to a tip pool but cannot receive tips from a tip pool.

On October 29, 2021, USDOL published a final regulation which would codify the 80/20 rule for the first time. Specifically, the 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 “(1) does not 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.”

Recently, there has been a court challenge to USDOL’s tipped employee rule. In *Restaurant Law Center, et al. v. United States Department of Labor, et al.*, Case 1:21-cv-01106 (W.D. Tex.), the plaintiffs filed a Complaint for Declaratory and Injunctive Relief on December 3, 2021. Plaintiffs are the Restaurant Law Center, a public policy organization, and the Texas Restaurant Association, a non-profit that advocates for the interests of member restaurants. The lawsuit alleges that the USDOL erred in passing the 80/20 (also known as “dual jobs”) final rule provisions because the regulations: 1) exceed the statutory authority provided under the FLSA; 2) are arbitrary and capricious, an abuse of discretion, and not in accordance with the law; and 3) violate separation of powers found in Article I, section I of the Constitution because the USDOL (executive branch) engaged in prohibited legislative activity. USDOL has filed a response to a request for a preliminary injunction and argument on this motion occurred on February 9, 2022.

There is also relevant state law regarding the determination of a regular rate for salaried employees. The Pennsylvania Supreme Court addressed the issue of overtime for salaried employees when it decided that the MWA requires that a 1.5 multiplier be applied to the base hourly rate to determine an employee’s overtime rate when the employee works a fluctuating work week. *Chevalier v. General Nutrition Ctrs., Inc. and General Nutrition Corp.*, 220 A.3d. 1038 (Pa. 2019).

At issue in *Chevalier* was the provision of the MWA 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,” 34 Pa. Code § 231.41, but do not further prescribe how to define the base rate to be used to calculate overtime for salaried employees who work a fluctuating work week.

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

The Court noted that for employees paid based on an hourly rate, the overtime formula is simple: 1.5 x hourly rate x 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 Court 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 Supreme Court.

The Court focused on the question of whether the 0.5 or 1.5 multiplier should be applied to this “regular rate” to determine the overtime compensation rate. The MWA provision at issue is “each employee shall be paid for overtime not less than 1.5 times the employee’s regular rate of pay for all hours in excess of 40 hours in a workweek.” The Court found this language to be ambiguous and turned to the rules of statutory construction. Although this language is the same as the FLSA, and the federal regulations implementing the FLSA expressly permit the use of a 0.5 multiplier, the Court concluded that the FLSA should not be used as a guide for interpreting the MWA. The Court observed that the FLSA has been

deemed to act as a floor for minimum wage and overtime compensation while the MWA has been recognized as providing greater protection for employees. The Court concluded that it was unmistakable that the intent of the General Assembly in the MWA was to use the Commonwealth's police power to increase wages to combat the "evils of unreasonable and unfair wages," 43 P.S. § 333.101. Further, it determined that the rules of statutory construction require application of a 1.5 multiplier to the base hourly rate to calculate overtime pay for salaried employees working fluctuating hours.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This final-form regulation is necessary because of oscillation of federal regulations pertaining to these issues; because of ambiguity regarding the meaning of "regular rate" for non-exempt salaried employees and because the tip threshold in the definition of "tipped employee" should be updated after 44 years to reflect inflation and wage growth.

In recent years, successive federal administrations have put forth substantially different policies affecting tipped workers, including their proposed, final, postponed final, and amended final regulations, as well as in their department opinion letters and guidance. Pennsylvania employers and workers deserve to have stable and consistent laws and regulations they can depend on as they plan their work operations. This final-form regulation provides a reliable framework for Pennsylvania workers and employers that is more reflective of current wages and that reflects the inflation and wage growth since these portions of the regulation were last amended in 1977. This final-form regulation adopts by reference federal regulations on tip pooling to provide clarity and consistency for the regulated community and to ensure that workers and employers may seek guidance, compliance assistance, or enforcement from the Department of Labor & Industry's Bureau of Labor Law Compliance in addition to USDOL. This adoption by reference incorporates the federal 80/20 rule as it is currently written, excluding the 30-minute threshold, and does not automatically include in Pennsylvania regulations any future possible changes to the federal rules on either tip pooling or the 80/20 rule.

This final form regulation also adopts by reference the October 29, 2021, federal regulation on the 80/20 rule, which enshrined longstanding USDOL and federal court interpretations of the FLSA, but it does not adopt the new 30-minute threshold included in the federal final rule for two reasons. Again, this adoption by reference incorporates the federal 80/20 rule as it is currently written, excluding the 30-minute threshold, and does not automatically include in Pennsylvania regulations any future possible changes to the federal rule. Further, by promulgating a final-form regulation that establishes the 80/20 rule on the state-level and by incorporating a state-level regulation for tip pooling, workers will be able to turn to state enforcement authorities to ensure that their wages, time, and income are protected. Leveraging state enforcement authority in this way ensures that changes in federal administrations, be that changes in presidential priorities, USDOL investigatory staffing levels, or USDOL need for greater enforcement actions in other states to the detriment of Pennsylvania, do not leave Pennsylvania workers without adequate recourse.

First, the Department's intention in promulgating this regulation on the 80/20 rule has been to promote clarity and consistency in the regulatory space. As such the Department does not believe the 30-minute

standard, a new standard in the federal final rule, promotes clarity and consistency at this time. The impetus for this section of the regulation pertaining to the 80/20 rule has been the clear need for a consistent standard for Pennsylvania workers and businesses to follow as it pertains to the time and eligibility to take a tip credit for certain workers. Actions at the federal level over the past several years have introduced great uncertainty to the issue of tip credits and has raised questions on the part of employers and workers as to whether the 80/20 rule, the standard USDOL enforcement interpretation since at least 1988, remained in effect. The purpose of this Pennsylvania regulation is to alleviate any confusion by implementing the same standard that USDOL enforced since at least 1988, that federal courts have continued to apply when interpreting the FLSA, and that workers and employers have been familiar with for over 30 years. It is in the interest of removing the uncertainty for workers and employers in Pennsylvania in regard to the federal 80/20 rule that this regulatory package has intended to incorporate that standard and promote regulatory clarity and certainty in Pennsylvania.

Second, the Department does not adopt the 30-minute threshold because of concerns as to how it would enforce such a requirement and what would be required of employers to implement it. This is also a question that has yet to be fully answered by USDOL, and the Department looks forward to any clarity or new understanding USDOL may provide through the ongoing litigation pertaining to its final rule. To be clear, the Department does not foresee any challenges with enforcing the 80/20 rule which has been a standard test for tip credit eligibility, utilized by both USDOL and federal courts, for over 30 years. It is for these reasons—clarity and consistency and enforcement uncertainty—that the Department does not adopt the 30-minute threshold included in the federal final rule of October 29, 2021.

The Department acknowledges that some stakeholders may consider the difference between this final-form regulation on the 80/20 rule and the federal final regulation on the 80/20 that also includes the 30-minute threshold to be a “compliance trap.” It should be noted that except for the 30-minute threshold, the Pennsylvania and federal regulations on the 80/20 rule will be identical and that under Pennsylvania law, whichever standard is more beneficial to workers takes precedent. If the USDOL 30-minute threshold is upheld after the current court challenges described in Question 9, it will in no way negate the Pennsylvania final-form regulation on the 80/20 rule. Rather, employers and workers in Pennsylvania will then abide by the 80/20 rule—identical in Pennsylvania and federal regulations—and the federal 30-minute threshold. If the entire USDOL rule is struck down by federal courts, employers and workers in Pennsylvania will still benefit from this Pennsylvania final-form regulation that provides a baseline for determining tip credit eligibility that is consistent with how federal courts and USDOL have enforced it for over 30 years.

The Definition of “Tipped Employee”

Under the current but outdated regulation, Pennsylvania defines “tipped employee,” as an employee in an occupation in which that employee customarily and regularly receives more than \$30 per month in tips. For employees in Pennsylvania who customarily and regularly perform duties for which they receive tips that exceed \$30 per month, the employer may take a “tip credit” which allows them to pay the employee the tipped minimum wage of \$2.83 per hour rather than the minimum wage of \$7.25 per hour as long as the employee makes sufficient tips to make up the difference and their final hourly rate is at least \$7.25, tips and base rate included. The Department last updated the \$30 tip threshold in 1977, 44 years ago when the minimum wage was \$2.30 per hour. When the \$30 tip threshold was last updated, a worker had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a worker in Pennsylvania must earn just over four times the minimum wage in tips before their

employer can claim a tip credit. This tip threshold has deteriorated over time as the tipped minimum wage has not increased proportionally with the minimum wage nor has it increased proportionally with inflation. In short, \$30 was worth much more, in terms of a worker's time and in real dollars, in 1977 than it is today.

This final-form regulation updates the definition of tipped employee to include those who earn \$135 or more in tips per month. The Department determined this new threshold by using the Consumer Price Index to adjust the threshold for inflation, \$135 per month, this provision is higher than the federal tip threshold.

In addition, the Department's final rulemaking adds amended language formerly found in the Department's statement of policy and will rescind the statement of policy in Section 231.101 in the *Pennsylvania Bulletin*. The Department has the authority to adopt this final-form regulation under Section 9 of the MWA, 43 P.S. § 333.109. In addition, the Department places the methodology for calculating the tip credit. This clarifying final-form regulation will help ensure that employers and employees understand when employers may take advantage of the tip credit.

Under current federal regulations, once an employee customarily and regularly receives \$30 per month in tips, the employer can utilize a tip credit for each hour the employee performs work. The definition of "wage" in Section 3 of the MWA states,

In determining the hourly wage an employer is required to pay a tipped employee, the amount paid such employee by his or her employer shall be an amount equal to: (i) the cash wage paid the employee which for the purposes of the determination shall be not less than the cash wage required to be paid the employee 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 employee which is equal to the difference between the wage specified in subparagraph (i) and the wage in effect under section 4 of this act. The additional amount on account of tips may not exceed the value of tips actually received by the employee.¹

Accordingly, employers may pay the minimum wage, currently \$7.25 per hour, less the tip credit of \$4.42 per hour, to equal the minimum hourly cash wage for tipped workers of \$2.83 per hour.

Most tipped workers make more than \$135 per month in tips, as explained in Question 17. Therefore, the Department expects this final-form regulation to affect relatively few tipped employees, since the current threshold of \$30 per month in tips is woefully outdated. While other states except Vermont have not increased their tip threshold above the federal level of \$30 per month, the Department does not believe that inaction on the part of others relieves it of a responsibility to, from time to time, amend regulations to adjust to the economic reality of inflation. The certainty of normal—and, lately, historically high—inflation reduces the effectiveness of the \$30 per month in tips threshold in protecting workers' hours and income. Left unamended, it would in time become effectively meaningless. By increasing this threshold based on inflation between 1977 and 2021 from \$30 to \$135, this final-form regulation updates

¹
<https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&vr=1968&sessInd=0&smthLwInd=0&act=5&chpt=0§n=3&subsectn=0>

the dollar value to align with the original intent and purpose of the threshold, which is to ensure that employers may only take a tip credit for workers when those tipped workers earn a meaningful amount of tips as income.

Using the methodology of the Economic Policy Institute (EPI), the Department estimates that there are approximately 199,285 tipped workers in Pennsylvania, as defined by current MWA regulations. This includes both tipped workers who earn a base wage of \$7.25 per hour or more and tipped workers whose employers take a tip credit and thus earn a tipped minimum wage between \$2.83 and \$7.24 per hour.

Tip Credit, 80/20 Rule

This final-form regulation is needed because Pennsylvania law and regulations presently are silent on the amount of time per week an employee can be directed to work on non-tip-generating activities while being paid the tipped minimum wage of \$2.83 per hour. As such, Pennsylvania has looked to federal law for guidance. USDOL has long followed the “80/20 rule” which permits employees who may perform dual roles, tipped and untipped, to be compensated at a tip-credited wage so long as that employee does not spend more than 20% of their workweek performing duties that do not directly generate tips. The federal standard which has long upheld the 80/20 rule was overturned by a final rule published by USDOL on December 30, 2020 but postponed from implementation twice in 2021. The December 30, 2020, final rule was subsequently replaced by a new proposed and then new final rule published on October 29, 2021, that enshrined the 80/20 rule in federal regulation.

While USDOL stopped enforcing the 80/20 rule in 2018 and sought to prohibit by regulation future use of the 80/20 rule, federal courts, including the 3rd, 8th, and 9th Circuits, continued to apply it when interpreting and enforcing the FLSA.

The current USDOL 80/20 final rule, published on October 29, 2021, stipulates that an employer may 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.”

The Department’s final-form regulation adopts by reference USDOL’s October 29, 2021, final regulation except for the 30-minute threshold, which it does not adopt and which it explains in the beginning of its response to this question. While the Department initially proposed a regulation that differed slightly from the final federal regulation, it has heeded as much as possible the suggestions of the Pennsylvania Chamber of Business and Industry, the Chairman and eight members of the House Labor & Industry Committee, and of the Independent Regulatory Review Commission (IRRC) to align with federal regulations as closely as possible. As IRRC noted in its comments on the proposed regulatory package, adoption by reference could create a scenario in which the federal government could change its regulatory standard and, because it was incorporated into Pennsylvania regulations by reference, change Pennsylvania regulatory standards, too, without offering the regulated community in Pennsylvania, the General Assembly, or IRRC with the opportunity to offer public comment.

The Department opted to adopt the federal rule by reference with the clarification that this adoption is limited to the current 80/20 federal rule as it exists on the date of publication in the *Pennsylvania Bulletin*,

excluding the 30-minute threshold, and does not adopt by reference any future changes to these specific federal regulations. It does so to ensure as close as possible alignment with the federal regulations while taking care to avoid subverting the Pennsylvania regulatory process in the future.

By adopting by reference the federal regulation into Pennsylvania's MWA regulations in this way, this ensures that if the federal regulation pertaining to tipped workers changes in the future, the regulated community in Pennsylvania will have an opportunity to provide public comment and expert input in the regulatory process when the Department subsequently modifies Pennsylvania regulations in light of federal changes. As the aforementioned commenters requested, the Department is aligning with the current federal rules by adopting them by reference in their current form and excluding future amendments to the federal regulations, therefore the same standards will exist at the state level.

Employers and employees deserve long-standing and consistent rules they can depend on and around which they can plan their work responsibilities and businesses. This final-form Pennsylvania regulation does that.

This final-form regulation will enable Pennsylvania tipped workers whose employers fail to abide by the 80/20 rule to file complaints with either the federal USDOL or the Department. This Pennsylvania final-form regulation more closely aligns state regulations and federal regulations and provides workers with additional avenues for recourse.

According to calculations using methodologies from EPI and the Center for American Progress, there are between 93,479 and 159,707 employees in Pennsylvania who are paid a tipped minimum wage (between \$2.83/hour and \$7.24/hour), meaning their employer takes a tip credit. This final-form regulation will ensure that employers do not misclassify these workers as tipped employees when they spend the more than 20 percent of their weekly hours performing non-tipped work.

Tip Pooling

This final-form regulation is needed because while Pennsylvania law allows for tip pooling, Pennsylvania regulations presently are silent on tip pooling. This final-form regulation will adopt by reference into Pennsylvania regulations the USDOL's April 30, 2021, final rule on "traditional" and "non-traditional" tip pooling and conditions in which managers and supervisors may contribute to tip pools or keep tips.

Similar to the portion of the regulations that pertain to the 80/20 Rule, while the Department initially proposed a regulation that differed from the final federal regulation, it has heeded the suggestions public commenters including the Chairman and eight members of the House Labor & Industry Committee and of the Independent Regulatory Review Commission (IRRC) to align with federal regulations as closely as possible. As IRRC noted in its comments on the proposed regulatory package, adoption by reference could create a scenario in which the federal government could change its regulatory standard and, because it was incorporated into Pennsylvania regulations by reference, change Pennsylvania regulatory standards, too, without offering the regulated community in Pennsylvania, the General Assembly, or IRRC with the opportunity to offer public comment.

The Department opted to adopt the federal rule by reference with the clarification that this adoption is limited to the current federal rule and does not adopt by reference any future changes to these specific

federal regulations. It does so to ensure as close as possible alignment with the federal regulations while taking care to avoid subverting the Pennsylvania regulatory process in the future.

By adopting by reference the federal regulation into Pennsylvania's MWA regulations in this way, this ensures that if the federal regulation pertaining to tipped pooling changes in the future, the regulated community in Pennsylvania will have an opportunity to provide public comment and expert input in the regulatory process when the Department subsequently modifies Pennsylvania regulations in light of federal changes. As the aforementioned commenters requested, the Department is aligning with the current federal rules by adopting them by reference in their current form and excluding future amendments to the federal regulations.

This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. These affected tipped workers include both those who are paid at least \$7.25 per hour and tipped workers for whom their employers take a tip credit and who earn a tipped minimum wage of between \$2.83 and \$7.24 per hour. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a "bright line test" as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 back-of-the-house workers who may be included in a non-traditional tip pool. See the answer to question 15 for a list of back-of-the-house occupations who may be affected.

Credit Card and Other Payment Processing Deductions

Deducting credit card and other processing service fees from employees' tips is a common practice among employers who accept credit cards and other fee-bearing non-cash methods of payment to pay for a service and provide gratuity. Frequently, credit card and other payment processing companies will charge businesses a percentage of each transaction for the ability to charge that credit card or other payment processing for services rendered. A credit card or other payment processing fee deduction from tips occurs when an employer deducts the credit card or other payment processing transaction fee percentage from a tip that the patron charged to a credit card or other non-cash method of payment.

For example, if

- a service bill is \$100; and
- an employer chooses to allow patrons to pay for that service with a credit card or non-cash method of payment; and
- the patron chooses to leave a \$20 tip for services; and
- and the employer is charged 2% of all transactions placed on a credit card or other non-cash method of payment by the credit card or other payment processing company, some employers will deduct 2% of the \$20 tip to pay for the credit card or other non-cash method of payment transaction fee that the payment processing company charges the employer, or \$0.40.

This means the employee who receives the tip receives \$19.60 in tips and helps pay for the payment processing fee that the employer, not the employee, chose to incorporate into their business model. The decision to allow customers to pay for tips by credit card or other non-cash payment method was made by the employer, not the employee(s), as a matter of convenience for the customer. Ultimately, the tip has been earned by the employee, it should be the responsibility of the employer to cover operational costs.

The practice of deducting a percentage of employee's tip to pay a portion of the credit card or other payment transaction fee is permitted by USDOL under the FLSA. However, Section 3 of the MWA states that "the gratuity shall become the property of the employee." 43 P.S. § 333.103. While Chairman of the House Labor & Industry Committee and eight other members of that committee noted in public comment that "the clear language of the statute that gratuities are the property of the employee" and questioned whether this part of the regulation is necessary, the Department notes that other public commentators opposed this part of the regulation because they currently do deduct credit card and other processing fees from employees' tips. Moreover, commentators who are employees in the service industry reported this practice.

The Department agrees with the Chairman and members of the House Labor & Industry Committee that the statute is clear, but it offers this final-form regulation to help further clarify the statute because confusion persists about the legality of deducting payment processing fees from employee tips as has been demonstrated by public comments.

This final-form regulation will not inhibit the participation of tipped employees in tip pools because the MWA specifically permits tip pooling. The MWA specifically states that while "the gratuity shall become the property of the employee," it permits tip pooling in the very next phrase: "except that this subsection shall not be construed to prohibit the pooling of tips." 43 P.S. § 333.103.

It is possible that all 199,285 tipped workers in Pennsylvania would benefit from this final-form regulation, but it is impossible to know the exact number of workers, employers, or establishments affected by this final-form regulation given that not all establishments accept credit card as a form of payment. However, as more and more establishments go "paperless" or only accept credit and debit card transactions to pay for services, it is likely that many employers in industries in which employees perform duties for which they customarily or regularly receive tips may be affected. The use of cash for in-person transactions has declined over the past 15 years and non-cash methods of payment, including credit cards, continue to increase in frequency of use. In 2017, 64 percent of all in-person transactions were made by non-cash payments and by 2020, non-cash payments accounted for 70 percent of all in-person transactions.²

Service Charges

It is common for establishments that offer administration of a banquet, special function, or package deal to charge a "service charge" to a patron in addition to the actual services rendered that is separate and in addition to the voluntary gratuity a patron can choose to leave for the employee(s) who provided the service. These "service charges" may be ambiguous to the patron and can be used by an employer for a variety of unidentified purposes, including the administration of an event or payment of business expenses

² <https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-of-consumer-payment-choice/2020/2020-survey-of-consumer-payment-choice.pdf>. "Cash payments, 36 percent of purchases in 2017 (the last year that they were used most) were 30 percent in 2020" (page 19).

such as non-tip wages paid to employees. While some patrons may believe that “service charges” may be used for or are a euphemism for gratuity, the USDOL and IRS guidance both state the employers cannot use revenue derived from service charges to pay tips to employees. Recognizing that employers themselves may be confused by the difference between service charges and tips and their uses, the IRS provided guidance explaining the difference and how each must be reported. Tips are discretionary payments determined by a customer that an employer or employees receive from a customer. Service charges are automatic fees that an employer may charge a customer for services, the money an employer receives from service charges may be used to pay the non-tip wages paid to employees.³ This final-form regulation requires businesses that charge service charges to clarify that services charges are not tips so that consumers that wish to leave a tip know to do so and so tipped employees are given all of the money the consumer desires to leave them.

The Department appreciates IRRC’s request to explain its statutory authority to promulgate regulations that require employers to note that service charges are not tips in menus and contracts since the protections between businesses and consumers are under the Unfair Trade Practices and Consumer Protection Law (UTCPL), enforced by the Office of Attorney General (OAG), not the Department.

The Department met with staff in the OAG’s Consumer Protection Bureau, and they opined that the UTCPL allows for dual authority as the purpose behind the UTCPL and MWA are different. The UTCPL protects consumers from deceptive practices and the MWA 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 UTCPL unless it is expressly excluded. See, e.g., *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 regulation 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 UTCPL does not abrogate the Department’s statutory authority under the MWA, which permits the Department to enact regulations to protect tipped employees.

This final-form regulation will affect all employers that offer administration of a banquet, special function, or package deal and that charge a service charge as part of the bill presented to customers. Please see the answer to question 15 for more details.

Fluctuating Work Week “Regular Rate” Calculation

This final-form regulation would address the omission in existing regulations highlighted by the Pennsylvania Supreme Court and clarify that “regular rate” for salaried employees should be calculated based on a regular, 40-hour work week and not the total hours worked including overtime, which may be irregular and inconsistent from week to week.

The FLSA and USDOL regulations permit employers and employees to enter compensation agreements under fluctuating work week calculations. Under the fluctuating work week, an employer pays an employee a flat weekly salary regardless of the regular hours worked in a week, which may vary from

³ FS-15-08.pdf (irs.gov)

week to week. For all hours worked in excess of 40 in a week under the fluctuating work week, 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 work week or the total hours worked, including overtime hours. Typically, the “regular rate” in a fluctuating work week agreement is calculated based on total hours worked, which benefits the employer and disadvantages the employee since it results in a lower “regular rate.”

USDOL first introduced the fluctuating workweek method of calculating overtime pay in its 1940 Interpretive Bulletin No. 4.⁴ The U.S. Supreme Court upheld the fluctuating workweek method in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942). In that case, the Court held that where a nonexempt employee had received only a fixed weekly salary (with no additional overtime pay) for working irregular hours that frequently exceeded 40 per week and fluctuated from week to week, the employer was required to retroactively pay an additional 50 percent of the employee’s regular rate of pay multiplied by the overtime hours worked to satisfy the FLSA’s time and a half overtime pay requirement.⁵ The quotient of the weekly salary divided by the number of hours actually worked each week, including the overtime hours, determined the “regular rate at which [the] employee [was] employed” under the fixed salary arrangement. *Id.*

However, in this instance, by using the 40-hour workweek, the Department is proposing to enact a final-form regulation that is more protective of workers’ rights than found in federal law. “It is permissible for a state to enact more beneficial wage and hour laws. Indeed, the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded.” *Bayada Nurses, Inc. v. Com., Dep’t of Labor & Indus.*, 8 A.3d 866, 883 (Pa. 2010).

Updating the definition for “regular rate of pay” would address the omission in existing regulations identified by the Pennsylvania Supreme Court and clarify that “regular rate” in fluctuating agreements for salaried employees should be calculated based on a regular, 40-hour work week 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 employees and, as such, be consistent with the Act’s remedial purpose of protecting workers from unreasonably low wages.

This final-form regulation will benefit all employees who work a fluctuating work week schedule. In its November 2019 Proposed Rule on the fluctuating workweek method of computing overtime, USDOL estimated that 698,393 workers in the United States were being paid using the fluctuating work week method in 2019. According to the US Bureau of Labor Statistics (BLS), in November 2019, 6,228,361 Pennsylvanians were employed, or 3.93% of the national employed population (158,593,000 in November 2019). By applying that percentage of United States employees who count as employees in Pennsylvania (3.93%) to USDOL’s estimate of workers paid using the fluctuating work method in 2019, we estimate that approximately 27,427 Pennsylvanians are paid using the fluctuating work week method and will benefit from this final-form regulation.

In its comment, IRRRC noted that the proposed methodology for calculating a base hourly rate for salaried workers differs from the current methodology for calculating a base hourly rate for day workers covered by 34 Pa. Code § 231.43(b). IRRRC requested that the Department explain this difference and consider amending subsection (b). After careful review, the Department is declining to amend the language for

⁴ See Interpretative Bulletin No. 4 ¶¶ 10, 12 (Nov. 1940)

⁵ *Id.* at 573-74, 580-81

subsection (b) as there is a difference between workers covered under this subsection and workers covered by subsection (g).

34 Pa. Code § 231.43(b) provides, "If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek." 34 Pa. Code § 231.43(b) governs a group of workers more commonly known as day workers.

Unlike with day workers, the Department does not have a regulation governing the regular rate for salaried employees eligible for overtime. As such, the Department proposed adding a new subsection (g) in response to the Supreme Court's decision in *Chevalier* where the Court lamented the Department's lack of regulation regarding salaried employees who are eligible for overtime.

In *Chevalier*, the Supreme Court declined to impose the exact methodology to calculate the multiplier for overtime with day workers and salaried employees. General Nutrition Centers had urged the Court to adopt a 0.5 multiplier for salaried employees and asserted that the presence in the regulations of a 0.5 multiplier for day workers was grounds for the Court to apply it for salaried employees. However, the Supreme Court rejected this argument and noted that the 0.5 multiplier for day workers was an exception to the standard 1.5 multiplier. As such, it is permissible to have different overtime for rules for day workers and salaried employees.

The Department declines to address the day worker regulations because, unlike with salaried employees, the Department has not identified a need to address this issue. In at least the last five years, the Department is not aware of any complaints from day workers that their employers have violated the MWA. 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 this method 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. Additionally, including such regulations may affect new members of a larger regulated community who have not commented on this regulation package. However, the Department thanks IRRC for bringing this issue to its attention and the Department may update subsection (b) should the Department determine it is necessary in order to protect the rights of day workers.

The Department declines to address regulations regarding bonuses and commissions because, unlike with salaried employees, the Department has not identified a need to address this issue. Furthermore, including such regulations may affect new members of a larger regulated community who have not commented on this regulation package. As noted in comments received, the Department acknowledges that in its proposed regulation it stated that its intent was to clarify the regular rate "in all cases," and this may have been confusing to the regulated community. To be clear, the Department's intent is to clarify the regular rate for non-exempt salaried employees who are eligible for overtime, *not* employees who are exempt under federal law and who typically receive bonuses and commissions.

If the regulated community believes there is a need to clarify the regular rate for day workers or for non-exempt employees who are paid bonuses and commissions, the Department is open to conducting further

stakeholder engagement specific to this group of employees and identifying potential future regulations as necessary.

A note about the data used in this final-form regulation: the Department generally relies on the trustworthy Occupational Employment and Wage Statistics (OEWS), published by the Bureau of Labor Statistics (BLS), and the American Community Survey (ACS), published by US Census Bureau. Unfortunately, the Bureau of Labor Statistics (BLS) publicly acknowledged and reported that the COVID-19 Pandemic disrupted 2020 data collection activities, and lowered response rates which negatively affected data availability and quality.⁶ Because of this, unless otherwise noted, most data used to provide estimates in this final-form regulation was 2019 data. Please see the answer to question 28 for more information on the Department's use of data.

(11) 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 regulations.

This final-form regulation appropriately includes some provisions that are more stringent than federal standards. The federal FLSA merely provides a minimum floor for the protection of workers' wages but, as the MWA does here in Pennsylvania, states may afford their workers greater protections under their own laws. *See, e.g., Bayada Nurses* (affirming L&I regulation limiting the exemption to the Act's requirement that domestic workers be paid the minimum wage and overtime rate to those situations where the workers were paid directly by a householder who employs them, even though the regulation was narrower than the exemption provided by the federal FLSA, as that statute does not control the interpretation of the MWA); *In Re Amazon.com, Inc.*, 255 A.3d 191 (Pa. 2021) (noting the clear and unequivocal policy statement statutorily expressed in the Act, 43 P.S. § 333.101, that its overarching purpose is to address "[t]he evils of unreasonable and unfair wages," and to ameliorate employer practices which serve to artificially depress those wages).

Tip Credit, 80/20 Rule

This final-form regulation proposes § 231.111 to codify in Pennsylvania regulations the federal final rule on the so-called "80/20 rule" for tip credits and is not more stringent than federal standards. The federal rule prohibits employers from taking a tip credit for any time in which an employee performs duties that do not directly generate tips unless the employee spends at least 80% of their workweek performing duties that do directly generate tips, and the duties that do not directly generate tips are related to duties that directly generate tips. Additionally, the federal rule requires that employers must pay employees no less than the minimum wage for any time an employee spends performing duties that do not directly generate tips if the employee spends more than 20% of their workweek performing those duties, or if the non-tip generating work exceeds a 30-minute period, or if that employee spends any time performing duties unrelated to duties that directly generate tips.

Currently, Pennsylvania law and existing regulations are silent on the 80/20 tip credit rule. This final-form rule would adopt by reference into Pennsylvania regulation USDOL's final regulation on the 80/20

⁶ BLS Source (2021) Effects of COVID-19 Pandemic on Occupational Employment and Wage Statistics <https://www.bls.gov/covid19/effects-of-covid-19-pandemic-on-occupational-employment-and-wage-statistics.htm>

rule published on October 29, 2021, but it would not incorporate the federal rule's 30-minute threshold and is therefore less stringent than the federal rule. This final-form regulation provides strong protection to workers from being misclassified as a tipped employee while recognizing the employer's right to take a tip credit for employees who perform tipped work.

The Definition of "Tipped Employee"

The final-form regulation includes the definition of tipped employee as those who earn \$135 or more in tips per month. Federal regulations define "tipped employee" as an employee in an occupation in which he or she customarily and regularly receives more than \$30 per month in tips. This federal definition was last updated in 1977. The Department adopted the \$30 per month definition within its regulation, codified in 34 Pa. Code § 231.1. This Pennsylvania final-form regulation will increase the tip threshold by using the Consumer Price Index to adjust the threshold for inflation to \$135 per month, and this provision is more stringent than federal standards.

This final-form regulation is in the interest of Pennsylvanians because 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. The logical result would frustrate the purpose of the MWA of protecting workers by misclassifying employees as tipped employees.

Most tipped workers make more than \$135 per month in tips, so this final-form regulation will affect relatively few individuals; however, by increasing the tipped worker threshold to \$135 per month, as much as an additional \$105 per month, or up to \$1,260 per year, would directly go into the pockets of tipped workers who make less than \$135 per month in tips, such as those who work only a few days per month at an establishment, before their employer is able to reduce their hourly pay from the minimum wage to the tipped minimum wage by taking advantage of the tip credit.

Using the methodology of the Economic Policy Institute (EPI), the Departments estimates that there are approximately 199,285 tipped workers in Pennsylvania, as defined by current federal regulations and the Department statement of policy.

Tip Pooling

This final-form regulation proposes § 231.112 to codify in Pennsylvania regulations the recent federal final rule regarding tip pooling and is not more stringent than federal standards. This final-form regulation allows for employers to establish tip pooling arrangements among employees for whom an employer takes a tip credit (so-called "traditional tip pools") and among all employees, both those that customarily and regularly receive tips and those who do not so long as all employees earn at least the minimum wage of \$7.25 per hour (so-called "non-traditional tip pools"). This final-form regulation further clarifies that an employer may not receive tips from a tip pool and may not allow supervisors and managers to receive tips from the tip pool, though they may contribute. For the purpose of tip pooling, a manager or supervisor means: 1) any person whose primary duty is to manage the business or subdivision of the business, who regularly directs the work of two or more other employees, who has the authority to hire or fire other employees or whose suggestions are taken into consideration in hiring firing, or promoting other employees, or 2) an employee who owns at least 20 percent equity interest in the business where they are employed and who is actively engaged in management.

Further, this final-form regulation establishes a “bright line test” for when managers or supervisors may receive tips, namely, when a customer gives a tip for services provided directly and solely by the manager or supervisor. For example, a manager who provides service directly and solely to a customer at a bar and is unassisted in providing that service by any other employees would be entitled to a tip offered by that customer. However, a manager who helps a server bring out orders after the server took the orders would not be eligible for any part of a tip offered by the customer since the manager did not solely provide the service.

Credit Card and Other Payment Processing Deductions

This provision of the final-form regulation will prohibit employers from deducting a percentage of credit card or other payment processing fee surcharges from employees’ tips when a customer pays a bill and gives a tip using a credit card or other non-cash payment method. This provision, which is more stringent than federal regulation, is compelled by the express language of the MWA coupled with its underlying policy to protect workers’ wages. In Wage and Hour Opinion Letters FLSA-214 (March 28, 1977) and FLSA-2006-1 (January 13, 2006), USDOL advised that employers may deduct from employees’ credit card tips “a portion of the transactional fee charged by the credit card company.” Under this interpretation, if an employer is charged a 3% transaction fee each time a customer pays with a credit card or other non-cash method of payment, USDOL permits the employer to deduct 3% from any tip paid to the employee who received a tip by credit card or other non-cash method of payment. That said, this is USDOL guidance of the FLSA not a federal regulation. Further, in its December 30, 2020, final rule, USDOL specifically declined to include this guidance in its regulation, stating instead that it simply “affirms its longstanding guidance.”

In contrast to the federal position on this matter, the MWA provides that “the gratuity shall become the property of the employee.” 43 P.S. § 333.103. Although no court has interpreted this statutory language, this language, read in conjunction with the Act’s declaration of policy, militates against an interpretation that would permit an employer to use an employee’s tip to pay a credit card or other payment processing surcharge—an operational expense unrelated to the purpose and intent of a tip.

Some commenters, including the Chair and eight members of the House Labor & Industry Committee and IRRC questioned whether this final-form regulation is necessary given the clear language in the law. The fact that other commenters opposed to this regulation admit that they currently do—and defend—deducting credit card or other payment processing fees from employee tips (and that still other commenters support the regulation because they as workers have had such deductions made from their tips) serves to justify the need for this final-form regulation to expand specifically upon the clear language of the statute. The Department proposes this final-form regulation to ensure that gratuities earned by employees remain the property of said employees.

Service Charges

This provision of the final-form regulation stipulates that an employer that charges for the administration of a banquet, special function, or package deal must clarify that service charges are not gratuities by providing separate lines for service charges and tips in the billing statement and by notice on any menus provided.

This provision is more stringent than federal regulations, which are silent on this issue. USDOL and IRS guidance state that a compulsory charge for service cannot be distributed to employees as a tip, but that it may be used by the employer to satisfy their minimum wage and overtime obligations under the FLSA. This Department's final-form regulation is necessary to ensure that employees who customarily and regularly receive tips when providing services in the administration of a banquet, special function, or package deal receive the full gratuity intended to them by the patron without regard for any confusion the patron may experience in regard to the billing statement. This final-form regulation protects the tipped wages of tipped employees by ensuring that patrons know precisely which charges are service charges, what charges are for tips, and what charges are general administrative costs.

Fluctuating Work Week

This provision of the final-form regulation clarifies that the "regular rate" used to calculate overtime wages for salaried employers is based on a 40-hour work week and not the total hours worked in a week. The FLSA and USDOL regulations permit employers and employees to enter compensation agreements under the fluctuating work week method of calculating overtime. Under the fluctuating work week, 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 work week, 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 work week or the total hours worked, including overtime hours. Employers can calculate the "regular rate" in a fluctuating work week agreement based on total hours worked, which benefits the employer and disadvantages the employee since it results in a lower "regular rate."

USDOL first introduced the fluctuating workweek method of calculating overtime pay in its 1940 Interpretive Bulletin No. 4 (See USDOL Interpretative Bulletin No. 4 10, 12 (Nov. 1940)). The U.S. Supreme Court upheld the fluctuating workweek method in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942). In that case, the Court held that where a nonexempt employee had received only a fixed weekly salary (with no additional overtime pay) for working irregular hours that frequently exceeded 40 per week and fluctuated from week to week, the employer was required to retroactively pay an additional 50 percent of the employee's regular rate of pay multiplied by the overtime hours worked to satisfy the FLSA's time and a half overtime pay requirement.⁷ The quotient of the weekly salary divided by the number of hours actually worked each week, including the overtime hours, determined the "regular rate at which [the] employee [was] employed" under the fixed salary arrangement. *Id.*

In 2019, the Supreme Court of Pennsylvania ruled in *Chevalier* that since the MWA and its regulations explicitly mandate that any overtime hours worked must be compensated at time-and-a-half, or 1.5 times the regular rate, the practice of paying workers in a fluctuating work week agreement 0.5 time the regular rate for overtime hours violated Pennsylvania law. As such, any worker in a fluctuating work week agreement who works overtime must be paid time-and-a-half for all hours worked over 40. Since neither the MWA nor Department regulations address the calculation of "regular rate," the Supreme Court of Pennsylvania found that the fluctuating work week method of calculating the "regular rate" based on total hours worked including overtime hours did not violate Pennsylvania law.

⁷ *Id.* at 573-74, 580-81

This final-form regulation would address the omission in existing regulations and clarify that “regular rate” when calculating overtime in fluctuating work week agreements should be calculated based on a regular, 40-hour work week and not the total hours worked including overtime, which may be irregular and inconsistent from week to week. It is more stringent than federal regulations because greater clarity—as evidenced by the *Chevalier* case and pointed out directly by the Pennsylvania Supreme Court—is needed and because Pennsylvania’s workers are entitled to greater protection from unreasonably low wages.

We estimate that approximately 27,427 workers in Pennsylvania are paid using the fluctuating work week method as of 2019. In its November 2019 Proposed Rule on the fluctuating work week method of computing overtime, USDOL estimated that 698,393 workers in the United States were being paid using the fluctuating work week method in 2019. According to the US Bureau of Labor Statistics (BLS), in November 2019 6,228,361 Pennsylvanians were employed, or 3.93% of the national employed population (158,593,000 in November 2019). By applying that percentage of US employees who count as employees in Pennsylvania (3.93%) to USDOL’s estimate of workers paid using the fluctuating work method in 2019, we arrive at our estimate that approximately 27,427 Pennsylvanians are paid using the fluctuating work week method.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania’s ability to compete with other states?

Tip Credits and the 80/20 Rule

This final-form regulation proposes to codify the federal 80/20 rule for tip credits, but not the 30 continuous minute rule published October 29, 2021. Currently, Pennsylvania regulations are silent on classifying tipped duties during a work shift. However, other states mandate that when a tipped worker is assigned non-tipped work that takes up more than 20% of their shift, the employer must pay the full minimum wage. Both New Jersey and New York have fully codified 80/20. The current regulations in New York and New Jersey are similar to this final-form Pennsylvania regulation.

- Delaware: Does not have 80/20 in their regulations but follows the federal 80/20 rule
- Maryland: Has 80/20 in their regulations
- New Jersey: Has 80/20 in their regulations
- New York: Has 80/20 in their regulations
- Ohio: Does not have 80/20 in their regulations but follows the federal 80/20 rule

Codifying the federal 80/20 rule in Pennsylvania regulations will not make Pennsylvania less competitive with other states since other states are subject to the same standard at the federal level. Furthermore, this Pennsylvania final-form regulation will provide employers and employees long term consistency regarding the 80/20 rule by enshrining the long-standing USDOL standard, the consistent interpretation of federal courts, and the federal final regulation codifying the 80/20 rule into the Commonwealth’s own regulations. Pennsylvania will enjoy long-term consistency by codifying federal rule into Commonwealth regulations and will allow the Department to provide enforcement and compliance assistance to workers and businesses in Pennsylvania.

Definition of Tipped Workers

The current threshold in Pennsylvania for a “tipped employee” is defined as an employee who earns more than \$30 in tips per month in a departmental regulation. This final-form regulation would adjust the 1977-established definition in Pennsylvania’s regulations to inflation, specifically from \$30 to \$135. Other states definitions of tipped employees vary. In Vermont tipped workers are defined as earning more than \$120 a month in tips. Pennsylvania’s neighboring states’ definitions are as follows:

- Delaware: more than \$30 a month in tips.
- Maryland: more than \$30 a month in tips.
- New Jersey: not specified.
- New York: not specified.
- Ohio: more than \$30 a month in tips.

Approximately half of states currently have definitions of tipped workers within their regulations (AK, CO, CT, DE, HI, ID, IL, IA, KS, KY, ME, MD, MA, NH, NC, ND, OH, PA, SD, TX, UT, VT, WY).

Including a higher threshold within the definition of tipped workers will not make Pennsylvania less competitive than other states. In fact, increasing the threshold for the definition of tipped worker may make Pennsylvania more attractive and competitive for workers than neighboring states, which, for those that are defined, are at \$30 a month. Raising the threshold will make the take home pay for tipped employees more consistent and potentially increase take home pay, since they will have to earn \$105 more in tips before their employer can take a tip credit and reduce their regular rate to \$2.83/hour. As the Chief Financial Officer of Denny’s, Inc. pointed out recently, raising wages is good for business. He noted to shareholders that restaurants in states with a \$15/hour minimum wage have higher revenue than restaurants in states with lower wages.⁸

Tip Pooling

The final-form regulation proposes allowing employers to establish traditional and non-traditional tip pooling arrangements so long as the tip pools do not include managers or supervisors. For the purpose of tip pooling, a manager or supervisor means: 1) any person whose primary duty is to manage the business or subdivision of the business, who regularly directs the work of two or more other employees, who has the authority to hire or fire other employees or whose suggestions are taken into consideration in hiring firing, or promoting other employees, or 2) is an employee who owns at least 20 percent equity interest in the business where they are employed.

USDOL published a final rule on December 30, 2020, that allowed an employer to require tip pooling for employees for whom they do not take a tip credit and allowed an employer to implement mandatory, “nontraditional” tip pools that include both employees who do not customarily and regularly receive tips (such as cooks and dishwashers) and employees who do customarily and regularly receive tips. While other provisions of the December 30, 2020, final rule had been suspended from implementation, the tip pooling provisions went into effect on April 30, 2021. On September 24, 2021, USDOL modified regulatory provisions adopted by the December 2020 tip final rule which clarified that while managers and supervisors may not receive tips from mandatory tip pools, they are not prohibited from contributing

⁸Julia Rock, “Denny’s Shareholders Revolt After Top Exec Concedes \$15 Minimum Wage Won’t Hurt Business,” *Newsweek*, May 5, 2021.

<https://www.newsweek.com/dennys-shareholders-revolt-after-ceo-concedes-15-minimum-wage-wont-hurt-business-1588970>

tips to eligible employees in mandatory tip pools. The Department's final-form regulation adopts by reference the federal final rule on tip pooling for consistency.

Some states limit tip pooling to certain populations of workers or prohibit tip pooling altogether, including CA, IN, MN, MO, NH WY.

California has some of the most stringent tip pooling regulations. The California Labor Code Section 351 provides that "every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for." The section has been interpreted to allow for involuntary tip pooling so long as the tip pooling policy is not used to compensate the owner(s), manager(s), or supervisor(s) of the business, even if these individuals should provide direct table service to a patron or are in the chain of service to a patron. Indiana law is less stringent and restricts tip pooling to only employees who contribute to the chain of service are included in the pool while expressly prohibiting an employer or agent of the employer from receiving any part of the pool.

Pennsylvania's neighboring states generally permit tip pooling, with some restrictions.

- Delaware allows two kinds of tip pooling: mandatory and voluntary. For mandatory tip pooling, a tip pool required by an employer can involve only those employees who serve the customer, and no employee can be required to put more than 15% of their individually earned tips into the pool. For voluntary tip pooling, Delaware law allows employers to set up a system for a tip pool with the rules established by the employees, who may then volunteer to participate. The employer may not take any portion of that pool, and the employer may not coerce or require employees to either set up a pool or be part of it.
- New Jersey allows tip pooling but requires that an employer 1) must notify its employees of any required tip pool contribution amount, 2) may only take a tip credit for the amount of tips each employee ultimately receives, 3) may not keep any of the employees' tips for any other purpose, and 4) may not distribute them to non-tipped employees.
- Maryland, New York, and Ohio allow tip pooling.

This final-form regulation on tip pooling will not make Pennsylvania less competitive than other states because this final-form regulation adopts by reference the federal rule which provides a minimum standard to which other states must also abide.

Credit Card and Other Payment Processing Deductions

While Pennsylvania law and regulations currently are silent on deducting credit card and other payment processing fees from tips, there is precedent for this type of regulation at the local level within the Commonwealth. Specifically, Philadelphia's Gratuity Protection Law which was passed in 2011 prohibits employers from deducting credit card fees from an employee's tips or wages. At least seven other states prohibit employers from deducting credit card processing fees from tips (CA, ME, MA, CO, NV, NJ, OR). Pennsylvania's neighboring states have the following rules regarding credit card processing fees:

- New Jersey: Employers are prohibited from using an employee's tips including using the employee's tips to pay for credit card processing fees.
- Delaware: Tips are the sole property of the employee for whom they are left. The law is silent on the issue of credit card processing fees and Delaware courts have not determined whether employers may assess a processing fee on employee tips.

- Maryland: Tips belong to the employee although Maryland law doesn't directly address the issue of credit card processing fees.
- New York: Tips given by customers via credit card are the property of the employee who must be paid the amount due no later than the next regularly scheduled pay day. New York law does not specifically address the issue of credit card processing fees on tips.
- Ohio: Under Ohio law, tips belong to the employee, but Ohio law does not expressly address the issue of credit card processing fees.

This final-form regulation clarifies the clear intent found in the text of the MWA: that a gratuity paid to an employee for duties performed is the property of that employee and that an employer may not deduct any portion of that tip to pay operational expenses. This final-form regulation will increase compliance with the MWA and may make Pennsylvania less competitive with other states since some employers who had taken a portion of their employees' tips to pay operational expenses will be expressly prohibited from doing so, in line with the clear language of MWA.

Service Charges

This provision of the final-form regulation requires businesses that charge service charges to clarify that services charges are not tips so that consumers that wish to leave a tip know to do so and so tipped employees are given all of the money the consumer desires to leave them. Employers must provide a notice that indicates that service charges cannot be used for gratuity to the service worker. Currently, Pennsylvania law and regulations are silent on whether service charges can be used for tips, but other states do explicitly address the issue. Under New York law for example, there is a rebuttable presumption that any charge which is not for food and drink is a tip. Like this Pennsylvania final-form regulation, New York's Hospitality Wage Order⁹ includes provisions for notifying customers about service charges relating to banquets, special functions, and package deals. Adequate notification is a written statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity and will not be distributed as gratuities to the employees who provided service to the guests. The statements must use ordinary language readily understood and appear in a font size similar to surrounding text, but no smaller than a 12-point font.

Similarly, Delaware employers must state, on the menu, placard, bill, or other notice provided to customers, that some or all of a service charge is the property of management. Delaware requires the notice must be "clear and conspicuous" in at least 14-point type on a placard and at least 10-point type on other kinds of notices. If the notice is not provided, the entire service charge belongs to the service employee who waited on the customer.

Under Massachusetts law, no employer may demand, request, or accept from a service employee any payment or deduction from a tip or service charge. However, an employer may charge a "house or administrative fee" if the employer "provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

⁹ <https://dol.ny.gov/system/files/documents/2021/06/cr146.pdf>

Under Washington law, any service charges related to food, beverages, entertainment, or portage must be disclosed “in an itemized receipt and in any menu provided to the customer the percentage of the automatic service charge that is paid or is payable directly to the employee or employees serving the customer.”

The California Labor Code prohibits employers from deducting any part of an employee’s tip to pay service charges or credit card processing fees. It is illegal for employers to make deductions from gratuities, or from using gratuities as direct or indirect credits against an employee’s wages. With regard to service charges, some local ordinances in California (Santa Monica, Oakland, and Berkeley) require service charges to be paid in full to the employee that performed the services. Unless prohibited by local ordinance, California employers may keep or distribute mandatory service charges which are amounts that a patron is required to pay based on a contractual agreement or a specified required service amount listed on the menu of an establishment.

Under Hawaii law, service charges must be distributed to employees unless it is “clearly disclosed to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.”

Other than New York and Delaware, which are discussed above, no other neighboring states have laws that prohibit employers from retaining mandatory service charges.

This final-form regulation, which requires the establishment to clearly provide notice that these charges are not used for gratuity, will not make Pennsylvania less competitive with other states given that it is common practice in at least two neighboring states.

Regular Rate for Fluctuating Work Week

The final-form regulation clarifies that the rate used to calculate overtime work wages for fluctuating work week is based on a 40-hour work week, and not the total hours worked in a week. Currently, no neighboring states have statutes or regulations prohibiting fluctuating work week or provide guidance above and beyond what is permitted in the FLSA, but the fluctuating work week is effectively prohibited in New Jersey. In 2000, the New Jersey Commissioner of Labor rejected the use of the fluctuating work week method of calculating overtime wages on the basis that it violated New Jersey law. Other states including Connecticut, New Mexico, and California have clarified the definition of “regular rate” to ensure that employees who work under a fluctuating work week arrangement are paid overtime based on a 40-hour work week and are compensated for all hours over 40 at one-and-a-half times their regular rate.

Other than New Jersey’s prohibition of the fluctuating work week altogether, no other neighboring states to Pennsylvania have statutes or regulations prohibiting fluctuating work week or providing guidance above and beyond what is permitted in the FLSA.

This final-form regulation will not reduce the competitiveness of Pennsylvania in comparison to other states given that employers have a range of options—from paying workers regular overtime to hiring more employees to eliminate the need for overtime—to mitigate any increase in overtime costs.

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

This final-form regulation will not affect other regulations of the Department or any regulations of other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

In December 2020, the department solicited input about the MWA regulations within 60 days from a wide range of stakeholders, including members of the Minimum Wage Advisory Board, by email:

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

Members of the Minimum Wage Advisory Board:

- Knouse Foods Cooperative, Inc., Scott Briggs
- PA Chamber of Business and Industry, Alex Halper
- Keystone Research Center, Stephen Herzenberg
- Community Legal Services, Nadia Hewka
- Hudak & Company, Wayne Hudak
- SEIU State Council, Reesa Kossoff
- United Food and Commercial Workers Union, Local 1776, John Meyerson

- United Food and Commercial Workers Union, Local 1776, Barbara Johnson
- PA AFL-CIO, Samantha Shewmaker

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

Justice at Work Pennsylvania	Chelsea Edwards, Lead Employment Attorney Lerae Kroon, Lead Advocacy Attorney Nina Menniti, Staff Attorney
Outten and Golden, LLP Community Legal Services of Philadelphia	Deirdre A. Aaron, Partner Nadia Hewka, Supervising Attorney Seth Lyons, Supervising Attorney
National Employment Law Project	Catherine K. Ruckelshaus, General Counsel
PA AFL-CIO	Rick Bloomingdale, President
Lichten & Liss-Riordan, P.C.	Sarah Schalman-Bergen
Duquesne Law School, Unemployment Compensation Clinic	Michael D. Simon, Adjunct Professor/Supervising Attorney
Keystone Research Center	Stephen Herzenberg, Executive Director
PA Budget and Policy Center	Marc Stier, Director

On February 4, 2021, the department received written comment from Samuel Jones, Director, Restaurant Opportunities Center (ROC) Pennsylvania.

On February 5, 2021, the department received a written comment from Alex Halper, director of Government Relations, PA Chamber of Business and Industry.

On February 16, 2021, the department received a written comment from Jesse Wilderman, Secretary Treasurer and Director of Innovation, SEIU Healthcare PA.

The department also held stakeholder and legislative briefings on July 22, 2021 to announce the topics that would be covered under the proposed regulation.

On Friday, November 19, 2021, 269 individuals representing various organizations from the regulated community were emailed a notice advising them that the Department had submitted a proposed rulemaking affecting MWA regulations to the IRRC on November 5, 2021 and invited these organizations to comment on the proposed regulation during the public comment from Saturday, November 20, 2021 to December 20, 2021. The list of individuals, their associated organizations, and their email address can be found as an attachment to this regulatory package.

Between November 20 and December 22, 2021, IRRC held a public comment period for the proposed regulation. The Department received 273 public comments from employees, patrons, employers, business associations, and members of the General Assembly.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Tip Credit (80/20 rule) and Definition of Tipped Employee

Persons

Using data from EPI's Minimum Wage Simulation Model for 2021 and the Center for American Progress, we project that up to 199,285 workers may have their earnings protected by this provision of the final-form regulation. This estimate includes the between 93,479 and 159,707 tipped employees for whom their employer takes a tip credit and thus pays them a base rate of at least \$2.83/hour.

According to USDOL, "a large percentage of total tipped workers" work in full-service restaurants and drinking establishments as waitstaff and bartenders. According to the Occupational Employment and Wage Statistics (OEWS), in 2020 66,160 individuals were employed in Pennsylvania as waitstaff and 22,390 were employed as bartenders. These 2020 figures are lower than pre-pandemic, but we expect to see a return to pre-pandemic levels in 2021 data (OEWS data for 2021 is not yet available). According to OEWS for 2019, 96,210 individuals were employed in Pennsylvania as waitstaff and 32,450 were employed as bartenders. The majority of waitstaff and bartenders meet the definition of tipped employee and are paid a tipped minimum wage, but there is an unknown percentage for whom employers do not take a tip credit. The Center for Workforce Information and Analysis (CWIA) found that employees in the following occupations are likely to be tipped workers whose employers may be likely to take a tip credit and pay them a tipped minimum wage.

Occupations likely to be tipped workers for whom employers take a tip credit

- Counter attendants, cafeteria, food concession, and coffee shop
- Gaming services workers
- Barbers
- Hairdressers, hairstylists, and cosmetologists
- Miscellaneous personal appearance workers
- Manicurists and pedicurists
- Skincare specialists
- Other personal appearance workers.

Additionally, CWIA found that workers beyond these occupations also may often earn a tipped minimum wage because their employer takes a tip credit. These include workers in the occupational categories of "food server non-restaurant" and "food preparation and serving related workers, all other" in the following industries.

Industries likely to employ workers for whom employers take a tip credit

- Bowling centers
- Other amusement, gambling, and recreation industries
- Traveler accommodation
- Recreational vehicle parks and camps, and rooming and boarding
- Restaurants and other food services
- Drinking places, alcoholic beverages
- Barber shops
- Beauty salons
- Nail salons and other personal care services
- Other personal services

If every worker in the listed occupations earned the tipped minimum wage and received \$30 per month in tips, then there would be 159,707 workers affected by this final-form regulation. However, not all the individuals employed in these occupations often receive tips, and some may have an employer who takes a tip credit. According to data derived from EPI's economic modeling approximately 93,479 tipped workers earned \$12/hour or less as of July 2021. The Department considers it less likely that individuals earning \$12/hour or more, wages and tips inclusive, are earning a tipped minimum wage and have a tip credit taken by their employer. For an employee earning \$12/hour *and* earning a tipped minimum wage, the individual would need to average \$9.17 in tips each hour and report all tips received, an amount 26.7 percent higher than the average reported tips for bartenders (\$280.61 per week, or \$7.01 per hour) and 42.59 percent higher than the average reported tips for waitstaff (\$237.91 per week, or \$5.95 per hour) in the United States as reported by the U.S. Census Bureau's Current Population Survey in 2017.

Businesses

Using data from the 2019 Census County Business Patterns Data, the Department estimates that approximately 21,508 establishments in Pennsylvania have a high likelihood of taking a tip credit for one or more employees based on the industry of those establishments and the occupations of employees likely to be employed at those locations. These industries include the following establishments:

NAICS Code		Number of Establishments
722410	Drinking Places (Alcoholic Beverages)	2345
722515	Snack and Nonalcoholic Beverage Bars	2548
722511	Full-Service Restaurants	9655
713210	Casinos (except Casino Hotels)	7
812111	Barber Shops	251
812112	Beauty Salons	4810
812113	Manicure and Pedicure Salons	1892
		21508

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. The definition of “small business” as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to the US Small Business Administration’s (SBA) table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as “small” based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

Tip Pooling and Credit Card and Other Payment Processing Deductions

Persons

The Department estimates that up to 199,285 Pennsylvania employees who may earn tips, including both workers for whom their employer takes a tip credit and who receive a tipped minimum wage and workers who receive a wage of at least \$7.25/hour, may have their earnings protected by the sections of this final-form regulation that address tip pooling and credit card and other payment processing deductions. An additional 160,750 traditionally non-tipped employees may be affected by the tip pooling provisions of this final-form regulation as they may be eligible to participate in non-traditional tip pools. Finally, 47,250 food service managers and supervisors of food prep & serving workers who supervise the time and activities of tipped workers for whom employers take a tip credit will be affected by this final-form regulation as it provides a “bright line test” as to whether and when they may keep tips.

Of the up to 199,285 Pennsylvania employees who may earn tips, up to 159,707 may also earn a tipped minimum wage. The Department used data from EPI’s Minimum Wage Simulation Model for 2021 and the Center for American Progress to project the number of tipped employees who are also paid a tipped minimum wage based on occupations where such compensation practices are common.

According to USDOL, “a large percentage of total tipped workers” work in full-service restaurants and drinking establishments as waitstaff and bartenders. According to the Occupational Employment and Wage Statistics (OEWS), in 2020 66,160 individuals were employed in Pennsylvania as waitstaff and 22,390 were employed as bartenders. These 2020 figures are lower than pre-pandemic, but we expect a return to pre-pandemic levels in 2021 (OEWS data for 2021 is not yet available). According to OEWS for 2019, 96,210 individuals were employed in Pennsylvania as waitstaff and 32,450 were employed as bartenders. The majority of waitstaff and bartenders meet the definition of tipped employee and are paid a tipped minimum wage, but there is an unknown percentage for whom employers do not take a tip credit. Additionally, CWIA found that employees in the following occupations are likely to be tipped workers whose employers may be likely to take a tip credit and pay them a tipped minimum wage:

Occupations likely to include tipped workers

- Counter attendants, cafeteria, food concession, and coffee shop
- Gaming services workers

- Barbers
- Hairdressers, hairstylists, and cosmetologists
- Miscellaneous personal appearance workers
- Manicurists and pedicurists
- Skincare specialists
- Other personal appearance workers.

Additionally, other workers beyond these occupations may often earn a tipped minimum wage because their employer takes a tip credit based on the nature of their industry. These include workers in the occupational categories of “food server non-restaurant” and “food preparation and serving related workers, all other” in the following industries.

Industries likely to employ workers who receive tips and for whom employers may take a tip credit

- Bowling centers
- Other amusement, gambling, and recreation industries
- Traveler accommodation
- Recreational vehicle parks and camps, and rooming and boarding
- Restaurants and other food services
- Drinking places, alcoholic beverages
- Barber shops
- Beauty salons
- Nail salons and other personal care services
- Other personal services

If every worker in the listed occupations earned the tipped minimum wage and received \$30 per month in tips, then there would be 159,707 workers affected by this final-form regulation. Considering the reality that there are additional occupations where employees may customarily or regularly earn tips but typically are paid \$7.25 or more per hour, we added to the above list additional occupations considered likely to be tipped:

- Maids and housekeeping cleaners from the following industries as identified in the U.S. Census Bureau’s Community Population Survey:
 - services to buildings and dwellings (industry code 7690)
 - traveler accommodations (industry code 8660)
 - private households (industry code 9290)
 - recreational vehicle parks and camps/rooming and board (industry code 8670)
- Taxi drivers
- Shuttle drivers and chauffeurs
- Tour and travel guides
- Workers in the car wash industry who work as shuttle drivers, chauffeurs or cleaners of vehicles and equipment.
- Miscellaneous entertainment attendants and related workers
- Massage therapists

Adding these groups to the upper bound estimate available from the EPI's Minimum Wage Simulation Model for 2021 brings the final, upper-bound, count to 199,285 who earn tips. This estimate may overcount employees since some work that is tipped (such as ski/other instructors or tour/travel guides) is seasonal. This estimate also likely captures at least *some* tipped workers who are tipped but do not make \$30 per month in tips, though this is likely a small number of workers.

Additionally, non-tipped employees who work in establishments where an employer establishes a non-traditional tip pool between non-tipped and tipped employees, all of whom earn a base rate of \$7.25 per hour or more may be affected by this final-form regulation. This includes cooks, busboys, dishwashers, hosts/hostesses, bartender helpers, shampooers. Based on occupational wage data provided by the CWIA, the Department estimates that an additional 160,750 non-tipped workers may be affected by the tip pooling provision of this final-form regulation.

SOC Code	Occupation	2019 Employment Numbers
35-1011	Chefs & Head Cooks	3,020
35-2011	Cooks, Fast Food	7,840
35-2012	Cooks, Institution & Cafeteria	14,380
35-2014	Cooks, Restaurant	58,390
35-2015	Cooks, Short Order	2,270
35-2019	Cooks, All Other	220
35-2021	Food Preparation Workers	17,810
35-9011	Dining Room & Cafeteria Attendants & Bartender Helpers	16,330
35-9021	Dishwashers	22,060
35-9031	Hosts & Hostesses	15,930
35-9099	Food Prep & Serving Workers, All Other	980
39-5093	Shampooers	1,520
	Total	160,750

Based on occupational wage data provided by CWIA, the Department estimates that 47,250 food service managers and supervisors of food prep & serving workers who supervise the time and activities of tipped workers for whom employers take a tip credit will be affected by this final-form regulation. These managers and supervisors will benefit from the clarity provided by this final-form regulation as to when they can keep tips—when they directly and solely provide service to customers. Since the majority of tipped work occurs in the food service, restaurant, and drinking establishment industries, CWIA estimates the affected occupations of workers in the table below.

SOC Code	SOC Title	2019 Employment Numbers.
11-9051	Food Service Managers	6,610
35-1012	Supervisors - Food Prep & Serving Workers	40,640
	Total	47,250

Businesses

Using data from the 2019 Census County Business Patterns Data, the Department estimates that up to 32,888 establishments in Pennsylvania may be affected by these provisions of the final-form regulation because they have a high likelihood of employing workers who customarily or regularly receive tips and may be affected by the tip pooling and payment processing fee sections of this final-form regulation. These industries include the following types of establishments.

NAICS Code		Number of Establishments
713950	Bowling Centers	172
713	Other Amusement, Gambling, and Recreation	3446
7211	Traveler Accommodation	1614
7212 and 7213	Recreational Vehicle Parks and Camps, and Rooming and Boarding	395
812111	Barber Shops	251
812112	Beauty Salons	4810
8219	Other Personal Services	1768
812113	Manicure and Pedicure Salons	1892
811192	Car Washes	576
5617 (excluding 56173)	Services to Buildings and Dwellings	3416
722515	Snack and Nonalcoholic Beverage Bars	2548
722511	Full-Service Restaurants	9655
7224	Drinking Places, Alcoholic Beverages	2345
	Total	32888

This is likely an overestimation of affected businesses. In certain industries, many of these establishments likely do not employ any or enough tipped workers to implement a tip pool. Nevertheless, since establishments are not required to report tip pool or tip sharing arrangements for federal or state compliance purposes, we can only estimate the number of affected businesses based on the number of establishments that may employ tipped employees. Similarly, while the language of the MWA clearly states that gratuities are to be the property of the employee, the Department received several public comments on this regulation from businesses acknowledging that they *did* deduct payment processing from employees' tips and from employees alleging employers' deducted payment processing fees from their tips. Again, the Department considers this to be conservative estimate since it believes, as the Pennsylvania Restaurant and Lodging Association (PRLA) stated in its public comment about its own members, many businesses do not deduct processing fees from employees' tips.

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as "small businesses," and therefore would be required to comply with the final-form regulation. The definition of

“small business” as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to the SBA’s table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as “small” based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

Service Charges

Persons

The provision of the final-form regulation pertaining to service charges would affect tipped workers who are employed by businesses that provide banquets, special event, or package deal services to patrons and that include a service charge in the bill provided to patrons. Only a small percentage of the overall tipped employee workforce works at such an establishment.

Businesses

The provision of the final-form regulation pertaining to service charges would affect any business that includes a service charge for services to provide banquets, special event, or package deal services to patrons and that employs tipped workers. This likely includes caterers (NAICS 722320), of which there were 555 establishments in Pennsylvania in the third quarter of 2019 and 553 in the third quarter of 2020 based QCEW data. It also includes some but not all hotels and motels (NAICS 721110) and casino hotels (NAICS 721120). In the third quarter of 2019 there were 1,517 hotels in Pennsylvania and 4 casino hotels; in the third quarter of 2020 there were 1,521 hotels and 5 casino hotels according to QCEW data. Not all these businesses offer banquet, special event, or package deal services and thus some of them would not be affected by this final-form regulation, but there is no publicly available data indicating which hotels and casino hotels offer these services and which do not. Our estimate of the number of businesses potentially affected by this provision of the final-form regulation is conservative and is likely an overestimate.

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. The definition of “small business” as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to the SBA’s table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as “small” based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

Fluctuating Work Week

Persons

The Department estimates that approximately 27,427 workers in Pennsylvania who are paid using the fluctuating work week method as of 2019 will be affected by this final-form regulation. In its November 2019 proposed rule on the fluctuating work week method of computing overtime, USDOL estimated that 698,393 workers in the United States were being paid using the fluctuating work week method in 2019. According to the BLS, in November 2019, 6,228,361 Pennsylvanians were employed, or 3.93% of the national employed population (158,593,000 in November 2019). By applying that percentage of US employees who count as employees in Pennsylvania (3.93%) to USDOL's estimate of workers paid using the fluctuating work method in 2019, we arrive at our estimate that approximately 27,427 Pennsylvanians are paid using the fluctuating work week method.

Businesses

The Department estimates that approximately 1,303 establishments in Pennsylvania will be affected by this provision of the final-form regulation. In its June 8, 2020, final rule on the fluctuating work week method of computing overtime, USDOL estimated that 0.45 percent of American employers currently "pay or are interested in paying employees using the fluctuating workweek method." The Department applied that percentage—0.45%—to the number of Pennsylvania private employers as indicated from the Quarterly Census of Employment and Wages (QCEW) dataset, as of 3rd quarter 2020 (289,711).

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as "small businesses," and therefore would be required to comply with the final-form regulation. Since SBA states that 98.2% of businesses in Pennsylvania do classify as "small businesses," a high percentage of the affected businesses are likely "small businesses."

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Tip Credit and Definition of Tipped Employee

Persons

The Department estimates that between 93,479 and 159,707 Pennsylvania tipped workers will be required to comply from this part of the final-form regulation pertaining to tip credits. This includes employees who work in the occupations and establishments described in the response to Question 15. Based on occupational wage data provided by CWIA, the Department estimates that 47,250 food service managers and supervisors of food prep & serving workers who supervise the time and activities of tipped workers for whom employers take a tip credit will be required to comply with this final-form regulation.

Businesses

The Department estimates that approximately 21,508 establishments will have to comply with this final-form regulation on the tip credit. Using 2019 Census County Business Patterns Data, the Department estimates that approximately 21,508 establishments have a high likelihood of taking a tip credit for one or more employees based on the industry of those establishments and the occupations of employees likely to be employed at those establishments. The Department developed this estimate by identifying industries by NAICS codes that are likely to include significant numbers of the occupations that the EPI identified as most likely to include workers earning the tipped minimum wage. This includes the following types of establishments:

NAICS Code		Number of Establishments
722410	Drinking Places (Alcoholic Beverages)	2345
722515	Snack and Nonalcoholic Beverage Bars	2548
722511	Full-Service Restaurants	9655
713210	Casinos (except Casino Hotels)	7
812111	Barber Shops	251
812112	Beauty Salons	4810
812113	Manicure and Pedicure Salons	1892
		21508

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. The definition of “small business” as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to the SBA’s table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as “small” based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

Tip Pooling and Credit Card and Other Payment Processing Deductions

Persons

The Department estimates that up to 199,285 Pennsylvania employees who may earn tips, including both workers for whom their employer takes a tip credit and who receive a tipped minimum wage and those who receive a wage of at least \$7.25/hour, may have their earnings protected by the portions of this final-form regulation that address tip pooling and credit card and other payment processing fee deductions. This includes employees who work in the occupations and establishments described in the response to Question 15.

Additionally, non-tipped employees who work in establishments where an employer establishes a non-traditional tip pool between non-tipped and tipped employees, all of whom earn a base rate of \$7.25 per hour or more may be affected by this final-form regulation. This includes cooks, busboys, dishwashers, hosts/hostesses, bartender helpers, shampooers. Based on occupational wage data provided by the CWIA, the Department estimates that an additional 160,750 non-tipped workers may be affected by the tip pooling provision of this final-form regulation. Lastly, up to 47,250 food service managers and supervisors who this final-form regulation provides a “bright line test” for when they may keep tips for service they directly and solely provide will be required to comply with this final-form regulation.

Businesses

Using data from the 2019 Census County Business Patterns Data, the Department estimates that up to 32,888 establishments in Pennsylvania will be required to comply with these provisions of the final-form regulation because they have a high likelihood of employing workers who customarily or regularly receive tips. These industries include the following:

NAICS Code		Number of Establishments
713950	Bowling Centers	172
713	Other Amusement, Gambling, and Recreation	3446
7211	Traveler Accommodation	1614
7212 and 7213	Recreational Vehicle Parks and Camps, and Rooming and Boarding	395
812111	Barber Shops	251
812112	Beauty Salons	4810
8219	Other Personal Services	1768
812113	Manicure and Pedicure Salons	1892
811192	Car Washes	576
5617 (excluding 56173)	Services to Buildings and Dwellings	3416
722515	Snack and Nonalcoholic Beverage Bars	2548
722511	Full-Service Restaurants	9655
7224	Drinking Places, Alcoholic Beverages	2345
	Total	32888

This is likely a high estimate. In certain industries, many of these establishments likely do not employ any or enough tipped workers to implement a tip pool. Nevertheless, since establishments are not required to report tip pool or tip sharing arrangements for federal or state compliance purposes, we can only estimate the number of affected businesses based on the number of establishments that may employ tipped employees.

Similarly, while the language of the MWA clearly states that gratuities are to be the property of the employee (while also explicitly permitting tip pooling), the Department received several public comments on this final-form regulation that some businesses *do* deduct payment processing from employees' tips and from employees alleging employers' deducted payment processing fees from their tips. Again, the Department considers this to be a high estimate since it believes, as the PRLA stated in its public comment, many businesses do not deduct payment processing fees from employees' tips.

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as "small businesses," and therefore would be required to comply with the final-form regulation. The definition of "small business" as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to the SBA's SBA table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as "small" based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as "small businesses, a high percentage of the affected businesses are likely "small businesses."

Service Charges

Persons

The provision of the final-form regulation pertaining to service charges would affect tipped workers who are employed by businesses that provide banquets, special event, or package deal services to patrons and that include a service charge in the bill provided to patrons, and any patrons of such establishments in Pennsylvania. This includes a fraction of the 199,285 Pennsylvania workers who regularly and customarily earn tips, including those for whom employers take a tip credit. Only a small percentage of the overall tipped employee workforce works at an establishment offering banquets, special events, or package services.

Businesses

Businesses that provide banquets, special events, or package deal services, employ tipped workers, and charge a service charge would be required to comply with this provision of the final-form regulation. This likely includes caterers (NAICS 722320), of which there were 555 establishments in Pennsylvania in the third quarter of 2019 and 553 in the third quarter of 2020 based QCEW data. It also includes some but not all hotels (NAICS 721110) and casino hotels (NAICS 721120). In the third quarter of 2019 there were 1,517 hotels in Pennsylvania and 4 casino hotels; in the third quarter of 2020 there were 1,521 hotels and 5 casino hotels according to QCEW data. Not all of these businesses offer banquet, special event, or package deal services and thus some of them would not be affected by this final-form regulation, but there is no publicly available data indicating which hotels and casino hotels offer these services and which do not. Our estimate of the number of businesses potentially affected by this provision of the final-form regulation is conservative and is likely an overestimate.

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. The definition of “small business” as defined in Section 3 of the Regulatory Review Act, 71 P.S. § 745.3, refers to SBA’s (SBA) table of small business size standards (<https://www.sba.gov/document/support-table-size-standards>). For the types of businesses, the Department identified as likely to be affected, SBA defines such a business as “small” based on average annual receipts, data which is not publicly available for these businesses in Pennsylvania. However, SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses, meaning that a high percentage of the affected businesses are likely small.

Fluctuating Work Week

Persons

The Department estimates that approximately 27,427 workers in Pennsylvania who are paid using the fluctuating work week method as of 2019 will be required to comply with the provisions of the final-form regulation. In its November 2019 proposed rule on the fluctuating work week method of computing overtime, USDOL estimated that 698,393 workers in the United States were being paid using the fluctuating work week method in 2019. According to BLS, in November 2019 6,228,361 Pennsylvanians were employed, or 3.93% of the national employed population (158,593,000 in November 2019). By applying that percentage of United States employees who count as employees in Pennsylvania (3.93%) to the USDOL’s estimate of workers paid using the fluctuating work method in 2019, the Department estimates that approximately 27,427 Pennsylvanians are paid using the fluctuating work week method. In other words, the USDOL estimated in 2019 that 698,393 workers in the US, or approximately 0.4% of US workers, were paid using the fluctuating workweek method. If you apply that percentage to the number of employees in PA in 2019, you get 27,427.

Businesses

The Department estimates that approximately 1,303 establishments in Pennsylvania will be required to comply with this provision of the final-form regulation. In its June 8, 2020 final rule on the fluctuating work week method of computing overtime, USDOL estimated that 0.45 percent of United States employers currently “pay or are interested in paying employees using the fluctuating workweek method.” The Department applied that percentage—0.45%—to the number of Pennsylvania private employers as indicated from the Quarterly Census of Employment and Wages (QCEW) dataset, as of 3rd quarter 2020 (289,711).

Small Businesses

The Department cannot estimate the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses”, a high percentage of the affected businesses are likely “small businesses.”

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Tip Credit

Individuals

This final rule adopts into Pennsylvania regulations the current federal regulation on the 80/20 rule, except for the 30-minute threshold, governing when an employer may pay a tipped employee a tip credited wage (\$2.83 per hour). This final rule cements in Pennsylvania regulation the longstanding interpretation enforced by USDOL for thirty years and by federal courts independent of USDOL guidance. In the three-year gap between November 2018 and October 2021 when USDOL did not actively enforce the 80/20 rule, federal courts continued to uphold the 80/20 rule when interpreting the FLSA, including as recently as February 2021 in *Wintjen* in the 3rd Circuit. On October 29, 2021, the USDOL issued a final regulation on the 80/20 rule.

Economist Heidi Shierholz has projected that if the 80/20 rule were eliminated it would cost tipped workers, who are predominantly women and people of color, up to \$700 million in lost wages annually across the nation.¹⁰ This final-form regulation will enable Pennsylvania tipped workers whose employers fail to abide by the 80/20 rule to file complaints with either the federal USDOL or the Department. This Pennsylvania final-form regulation more closely aligns state regulations and federal regulations and provides workers with additional avenues for recourse.

As a result of this final-form regulation, tipped workers will enjoy greater protection of their time and wages since this rule upholds the integrity of the tip credit concept—that an employer should only be permitted to pay a tipped wage for time when an employee has the opportunity to earn tips regularly and customarily—and thus promotes financial stability for workers.

By codifying the 80/20 rule in Pennsylvania regulations, this final-form regulation will provide a reliable standard that benefits individuals by preventing an anticipated widening of racial disparities if the 80/20 tip credit rule was not preserved. As economists Heidi Shierholz and David Cooper have noted, eliminating the 80/20 rule would disadvantage workers of color. Eliminating the 80/20 rule would likely result in a reduction in nontipped food service occupations by 5.3 percent while increasing tipped food service occupations by over 12 percent. Since nontipped, back-of-house food service workers are disproportionately people of color, the shift of such jobs from nontipped to tipped would reduce incomes and possibly opportunities for black, Hispanic, Asian, and other people of color, particularly in the restaurant industry (<https://www.epi.org/publication/restaurant-workers/>).

Businesses/Small Businesses

A complete elimination of the 80/20 tip credit rule, as proposed by the Trump administration in the December 30, 2020 Final Rule, would have allowed employers to pay tipped workers as little as \$2.83 per hour while requiring them to spend the vast majority of their time performing duties not directly or

¹⁰ Danny Klein, "DOL Eliminates 80/20 Rule, Opens Tip Pooling to More Workers." December 29, 2020, *FSR Magazine*. <https://www.fsrmagazine.com/legal/dol-eliminates-8020-rule-opens-tip-pooling-more-workers>

indirectly related to earning tips. This Pennsylvania final-form regulation preserves the status quo by aligning more closely with current federal regulations (as published in final form on October 29, 2021, but not including the 30-minute rule) and thus will have a de minimis impact on small businesses and businesses and will likewise have little impact on labor communities or other public and private organizations.

This final-form regulation will provide a reliable standard that all businesses can depend on. Over recent decades, there has been oscillation in federal regulations regarding the 80/20 rule. For thirty years, from 1979 until 2009, the USDOL created and upheld the 80/20 standard through opinion letters and guidance in Field Operation Handbooks. Then, on January 16, 2009 the USDOL produced an opinion letter that superseded its 80/20 guidance, and instead provided guidance that placed no limitation on the amount of duties related to a tip-producing occupation that may be performed by a tipped employee, “as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.”¹¹

On March 2, 2009, USDOL withdrew their guidance from January 2009 and reverted to its previous guidance upholding the 80/20 approach until the USDOL issued guidance in 2018 and 2019 that was similar to that in the opinion letter from January 2009.¹² This 2018 and 2019 guidance provided that USDOL would no longer prohibit an employer from taking a tip credit for the time a tipped employee performs related, nontipped duties, as long as those duties are performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties.¹³ Further, in addition to the examples listed in § 531.56(e), the Occupational Information Network (O*NET) would be used to determine whether a tipped employee’s non-tipped duties are related to their tipped occupation.

Labor Communities

Only 1.7% of restaurant servers and 1.3% of bartenders are covered by union collective bargaining agreements.¹⁴ As these are two of the occupations most densely populated with tipped workers and impacted by this final-form regulation, the impact of this provision of the final-form regulation on labor communities will be small. No impacts on other public or private organizations are anticipated.

This provision of the final-form regulation is not anticipated to have any financial, economic, or social impacts on other public or private organizations.

Tip Pooling

Individuals

This portion of the final-form regulation protects employees’ wages that are generated from tips from being seized by employers, supervisors, managers, or bona fide owners of establishments. Research by the Center for Urban Economic Progress, the National Employment Law Project, and the UCLA Institute

¹¹ WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009)

¹² WHD Opinion Letter FLSA2009–23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009); WHD Opinion Letter FLSA2018– 27 (Nov. 8, 2018).

¹³ WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); Field Assistance Bulletin (FAB) 2019–2 (Feb. 15, 2019); FOH 30d00(f) (2018–2019 guidance).

¹⁴ https://unionstats.com/Occ_U_2021.htm

for Research on Labor and Employment has shown that 12 percent of tipped workers have had tips stolen from them by their employer or supervisor.¹⁵ Prohibiting employers, managers, supervisors, and bona fide owners from receiving moneys from tip pools is likely to reduce social pressure on lower-level workers to surrender tips they've earned to individuals who control their schedules or work opportunities. Lower-level workers will maintain more of a financial separation from other employees who have employment power over them.

Restricting tip pooling only to employees who are not owners or managers may mitigate race and gender-based wage challenges that are exacerbated by tipped wage payment practices. Women represent the greater share of tipped workers (69.1% nationally¹⁶) and are more likely to earn lower wages than their male counterparts.¹⁷ In instances of tip pooling, these two factors together disproportionately impact women workers, as more of women's tipped wages get transferred to employers instead of to the workers who earned them.

By codifying these tip pooling standards in Pennsylvania regulations, this final-form regulation will provide a reliable standard that benefits individuals by ensuring managers and supervisors cannot take a portion of tip pools and allowing individuals to reach out to the Department for enforcement and information on this standard.

Businesses/Small Businesses

As noted above, 88% of tipped employees have not reported having tips stolen from them by their employer or supervisor. Especially if the 12% who have had tips stolen have only experienced that wage theft a portion of the time, this indicates that the financial, economic, and social impact on business, and small businesses, will be small.

Similar to codifying the 80/20 rule, this final-form regulation will provide a reliable standard that all businesses can depend on while allowing businesses to opportunity reach out to the Department to ask questions and gather clarifications on this standard.

Labor Communities

Only 1.7% of restaurant servers and 1.3% of bartenders are covered by union collective bargaining agreements.¹⁸ As these are two of the occupations most densely populated with tipped workers and impacted by this final-form regulation, the impact of this provision of the final-form regulation on labor communities will be small. No impacts on other public or private organizations are anticipated.

Credit Card and Other Payment Processing Deductions

¹⁵ Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 2009, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009. <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/>

¹⁶ <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v2.pdf>

¹⁷ <https://www.epi.org/publication/women-would-lose-4-6-billion-in-earned-tips-if-the-administrations-tip-stealing-rule-is-finalized-overall-tipped-workers-would-lose-5-8-billion/>

¹⁸ https://unionstats.com/Occ_U_2021.htm

Individuals

Under the FLSA, where tips are charged on a credit card or other non-cash method of payment and the employer must pay the credit card or payment processing company a percentage on each sale, the employer may pay the employee the tip minus that percentage so long as the percentage deducted from the employee's tip to pay the percentage of the credit card or payment processing fee does not reduce the employee's hourly compensation below minimum wage. This final-form regulation would protect workers' wages from being taken by employers to pay the partial cost of a payment transaction service the employer, not the employee, chose to offer patrons.

Under the final-form regulation, employers would be prohibited from deducting credit card and other payment processing fees from employee tips when a customer pays with a credit card or other non-cash method of payment. Employees will keep their entire tip and employers will not have any claim to the wages earned by the employee to offset the cost of credit card and other payment processing fees, the use or adoption of which employees have zero say or influence. Additionally, patrons now know that employees keep the full tip, and that cash tips and credit card tips are equal in the effect that employees keep the same amount of tips paid either way. This amounts to a small potential increase in the wages and incomes of tipped employees who typically have low incomes even with tips.

Businesses/Small Businesses

Businesses will not be able to pass the cost of processing tips along to the employee, as businesses will now be responsible for the entire credit card or other payment processing fee. It must be noted that a clear reading of MWA indicates that this practice was already illegal. Public comments received from the Chairman of the House Labor & Industry Committee and eight members of that committee concur with this interpretation of the MWA. The final-form regulation, however, remains necessary to clarify this aspect of the law since some businesses engage in these sorts of deductions, as evidenced by public comments received from both employers and employees. Many businesses and small businesses might seek payment systems with lower transaction fees and/or refuse to accept credit cards with high fees. More business might also give customers incentives to pay with cash, as many businesses already do.

Labor Communities, Private and Public Organizations

The impact of this final-form regulation on labor communities will be small since very few tipped workers are covered by a union collective bargaining agreement and it is not anticipated to affect private organizations.

This final-form regulation may have a financial and economic effect on public organizations, including governments that levy taxes on wages. Because there would be no waitstaff-centered incentive to tip cash over tipping on a credit card or other non-cash method of payment, a greater number of tips may be given on credit cards or other non-cash methods of payment that are more easily accounted, and taxes might be collected on a larger share of tips because there is a better paper trail with credit card and other non-cash methods of payment tips.¹⁹ The actual financial and economic impacts of this final-form regulation on such public organizations cannot be calculated because the Department cannot accurately predict the

¹⁹ Theresa L. Schulz, "How Can the IRS Determine Employee Tip Income for FICA Purposes (01-463)," Preview of United States Supreme Court Cases 2001, no. 7 (April 12, 2002): 369-372.

degree to which method of payment choices or tipping habits of patrons might change due to this final-form regulation and thus increase wage tax collections.

The Definition of Tipped Employee

Individuals

The Department agrees with USDOL's estimate in its final rule published on December 30, 2020 that "a large percentage of tipped workers" work in full-service restaurants and drinking establishments as waitstaff and bartenders and will use them to illustrate the effects on tipped workers overall.

Under this provision of the final-form regulation, any worker earning less than \$135 in tips per month can no longer be considered a tipped employee and thus must be paid the full minimum wage of \$7.25 per hour and not the tipped minimum wage of \$2.83 per hour. This will be a small number of people: for a 30-hour-per-week worker, even \$35 per week is only about \$1 per hour worked (for a 30-hour-per-week worker, they would need to earn \$1.12 per hour in tips for their employer to be eligible to take a tip credit under the \$135 tip threshold). In addition, \$135 is far below the median tip earnings for wait staff and bartenders.

In its final rule published December 30, 2020, USDOL analyzed the portion of income from overtime pay, tips, and commissions (OTTC) for bartenders and waitstaff in restaurants and drinking places, the two groups of employees they considered most likely to be affected by its proposed rule on tip pooling. To estimate the average weekly tips earned by waitstaff and bartenders, USDOL examined national data from the BLS and the U.S. Census Bureau's Current Population Survey in 2017 and "assume[d] very few bartenders and wait staff at restaurants and drinking places receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal" (85 FR 86778). In other words, OTTC earned by bartenders and waitstaff is most likely earned as tips. Nationally, USDOL found that those who reported OTTC earnings averaged \$280.61 weekly for bartenders and \$237.91 for waitstaff, respectively. This equates to \$1,122.44 in tips on average in a month for bartenders, or 37.4 times the current tip credit threshold, and approximately \$951.64 in tips on average in a month for waitstaff, or 31.7 times the current tip credit threshold.

For a bartender to be affected by this final-form regulation and required to be reclassified from a tipped employee earning the tipped minimum wage of \$2.83/hour plus tips to a wage of at least the minimum wage of \$7.25/hour, a bartender would have to earn less than 12.02% of the national average monthly tips reported by bartenders. For a waiter or waitress to be affected by this final-form regulation and required to be reclassified from a tipped employee earning the tipped minimum wage of \$2.83/hour plus tips to a wage of at least the minimum wage of \$7.25/hour, a waiter or waitress would have to earn less than 14.18% of the national average monthly tips reported by waitstaff. While we consider all tipped employees to be potentially affected by this provision of the final-form regulation, we anticipate the actual number affected to be a fraction of that.

According to the Occupational Employment and Wage Statistics (OEWS), in 2020 66,160 individuals were employed in Pennsylvania as waitstaff and 22,390 were employed as bartenders. These 2020 figures are lower than pre-pandemic, but we expect a return to pre-pandemic levels in 2021 (OEWS data for 2021 is not yet available). According to OEWS for 2019, 96,210 individuals were employed in Pennsylvania as waitstaff and 32,450 were employed as bartenders. The majority of waitstaff and bartenders meet the

definition of tipped employee and may earn a tip-credited base wage below \$7.25 per hour, but there is an unknown percentage who are salaried or otherwise do not meet the definition of tipped employee.

Most tipped employees, especially those for whom employers take a tip credit, largely already earn more than \$30 per month in tips. Extending this limit to \$135 per month would mean that tipped employees who earn tip amounts less than one sixth of median tip earnings for wait staff and bartenders can no longer get paid the tipped minimum wage and must be paid the minimum wage. (In addition, these workers are potential victims of wage theft—if an employer pays as little as \$2.83 without tips sufficient to bring total earnings to \$7.25 per hour.)

Businesses/Small Businesses

Businesses that take a tip credit already must pay employees at least minimum wage if they take a tip credit for an employee and the employee's tips plus hourly wage do not meet at least \$7.25 per hour. Increasing the \$30 threshold to \$135 could reduce the number of employees for whom businesses can take a tip credit. If an employee worked 35 hours per week, (140 hours per month), the old threshold (\$30 in tips per month) allowed employers to take a tip credit for employees who earned, on average \$0.21 per hour in tips, or around \$1.71 per day. Under the new threshold, this is increased to \$0.96 per hour for 35 hours of work, or \$4.35 per day. Both thresholds are low for employees who meet tip credit final-form regulations, as the most common tipped employees (bartenders and waiters/waitresses) on average already make more than that per day in tips. For businesses, very few will see changes, but for those with employees earning low levels of tips, businesses will no longer be eligible to pay those employees the tipped minimum wage and take a tip credit for them.

This provision of the final-form regulation is not anticipated to have any financial, economic, or social impacts on labor communities or other public or private organizations.

Service Charges

Individuals

The impact of this final-form regulation on individuals is that employees' tips will be better protected. Patrons who intend to leave a gratuity for service provided by a tipped employee can more easily see where their money is going and are clear on what part of their charges are administrative/service charges, and what part constitute tips. By requiring employers to clearly delineate that a mandatory service charge is not and cannot be allocated as a gratuity, moneys intended by patrons to be given as a gratuity will reach the intended recipient: the tipped employee(s) that provided service.

Businesses/Small Businesses

The financial impact of this provision for small and larger businesses includes printing changes to business menus, and contracts to include this clarification, but these materials are typically reprinted regularly to reflect menu or option changes or specially based on the patron's selections. As such, the financial impact is expected to be de minimis.

This provision of the final-form regulation is not anticipated to have any financial, economic, or social impacts on labor communities or other public or private organizations.

Regular Rate for Fluctuating Work Week

Individuals

The impact of the final-form regulation defining regular rate for non-exempt salaried employees as weekly salary divided by 40 depends on whether employers were already using this method of computing regular rate or were defining regular rate as salary divided by the number of hours employees work. If employers were using the former method, there would be no impact. If employers were using actual hours worked to compute regular rate, the impact depends on hours worked. For these employers and their non-exempt salaried employees, the final-form regulation would increase overtime pay by a percentage based on the total hours worked over 40 in a work week. The calculation for determining that percentage of increase in overtime pay is included here:

$$((\text{Total Hours Worked} - 40 \text{ Hour Work Week}) / 40 \text{ Hour Work Week}) * 100 = \text{percent of increase in overtime pay}$$

For example, if Total Hours Worked equal 45, then $((45-40)/40) * 100 = 12.5$.

In other words, if a worker receiving overtime pay under a Fluctuating Work Week Method worked a total of 45 hours in a work week, or 5 hours over the 40-hour work week, this final-form regulation would increase their overtime pay by 12.5%. If Total Hours Worked = 50, for example, overtime pay would increase by 25%. If Total Hours Worked=60, overtime pay would increase by 50%.

Below are example calculations for a fluctuating work week schedule who works 55 hours per week and a weekly salary of \$1000.

Without the final-form regulation:

\$1,000 weekly salary/55-hour work week = \$18.18 hourly regular rate

\$18.18 hourly regular rate x 1.5 overtime multiplier = \$27.27 overtime hourly rate

15 overtime hours worked x \$27.27 overtime hourly rate = \$409.05 overtime pay

\$1,000 weekly salary + \$409.05 overtime pay = \$1,409.05 weekly pay for a 55-hour fluctuating workweek.

With the final-form regulation applied:

\$1000 weekly salary/40-hour work week = \$25 hourly regular rate

\$25 hourly regular rate x 1.5 overtime multiplier = \$37.50 overtime hourly rate

15 overtime hours worked x \$37.50 overtime hourly rate = \$562.50 overtime pay

\$1000 weekly salary + \$562.50 overtime pay = \$1,562.50 weekly pay for a 55-hour fluctuating workweek.

Businesses/Small Businesses

The impact of the method of calculating regular rate—for those employers for which it is a change—would be mitigated by employers' broad flexibility to modify management practices in response to the

change. Affected businesses will likely adapt to the final-form regulation in the least costly way possible. Small business response to the final-form regulation will vary depending on the characteristics of the business operations, current staffing structure, and current scheduling practices. To adjust for the rule, employers may pursue one or a combination of several options:

- Pay non-exempt employees overtime using the new “regular rate” calculation.
- Limit employee hours to 40 hours a week to avoid overtime costs.
- Hire additional employees to mitigate the need for overtime.
- Allow for some overtime but reduce base pay or benefits.
- Raise non-exempt employee salaries to above the salary threshold.

This provision of the final-form regulation is not anticipated to have any financial, economic, or social impacts on labor communities or other public or private organizations.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Tip Credit

This provision of the final-form regulation benefits the regulated community by providing regulatory stability, clarity, and consistency. Currently, Pennsylvania law and existing regulations are silent on the 80/20 rule and the federal government has since 2018 vacillated on whether it will remove the 80/20 rule from current interpretations, enshrine in regulation its elimination from practice, or amend the regulations to codify the 80/20 rule. On October 29, 2021, USDOL issued a final regulation codifying the 80/20 rule, which this Pennsylvania final-form regulation adopts by reference as it is currently published (but not including the federal rule’s new 30-minute threshold). The fact that there is now a federal regulation in line with what this Pennsylvania final-form regulation addresses does not negate the fact that this is the latest phase in years of uncertainty at the federal level. This adoption by reference adopts the federal rule as it is currently written and does not automatically incorporate any future possible changes to the federal rule.

The 80/20 rule has been around since at least 1988 as a matter of long-standing interpretation of the FLSA and included as part of the USDOL Wage and Hour Division’s Field Operations Handbook. That it has not been part of federal regulations to this date despite its effectiveness as protection of the time and wages of workers for whom employers took a tip credit has meant that it has been vulnerable to elimination or enhancement outside the regulatory process. Indeed, in November 2018 USDOL effectively repealed the 80/20 rule by issuing Opinion Letter FLSA 2018-27 and subsequently removing references to the 80/20 rule from the Field Operations Handbook. On December 30, 2020, USDOL published a final rule with an effective date of March 1, 2021, that would have effectively eliminated the 80/20 tip credit guidance. On February 26, 2021, USDOL issued a final rule delaying the effective date of this regulation until April 30, 2021, to allow for further review. On March 23, 2021, USDOL published a notice of proposed rulemaking that would extend to December 31, 2021, the effective date of the rule eliminating the 80/20 tip credit rule, to allow the USDOL to finalize a separate rulemaking in the intervening eight months. As noted above and throughout this document, USDOL on October 29, 2021, published a final regulation that would codify the 80/20 rule. This Pennsylvania final-form regulation adopts by reference that USDOL’s final regulation except for the federal rule’s new 30-minute threshold. This adoption by reference

incorporates the federal rule as it is currently written and does not automatically include in Pennsylvania regulations any future possible changes to the federal rule.

This Pennsylvania final-form regulation would codify the federal tip credit rule that has long been in effect in Pennsylvania, both through enforcement by the USDOL and interpretation by federal courts, and that was recently enshrined in federal regulation. This final-form regulation will ensure that the tip credit rule that has long been effective in the commonwealth and with which employers and employees are and have long been familiar continues to protect employees' time and wages.

Additionally, this provision of the final-form regulation ensures that employees who are paid the tipped minimum wage are not required to perform duties that do not directly generate tips for a disproportionate amount of time. Without the 80/20 rule, a job advertised as one with good opportunities to earn a significant amount in tips could quickly turn into a minimum wage or sub-minimum wage job. The benefit of ensuring a worker has the opportunity to earn tips when paid a tipped minimum wage outweighs the costs and adverse effects borne by the employer to ensure compliance, as they are required to maintain records pertaining to wages and tips in order to ensure that each tipped employee earns at least \$7.25 per hour, possibly with the employer increasing the base wage if the amount of tips plus \$2.83/hour do not meet or exceed the minimum wage.

The benefits of this provision of the final-form regulation outweigh any costs and adverse effects because it provides regulatory stability and predictability to an area of FLSA interpretation that has recently been the subject of significant uncertainty. Additionally, this provision of the final-form regulation benefits the regulated community by ensuring that tipped workers for whom an employer takes a tip credit are not required in their position to spend an excessive (over 20 percent) of their time at work engaged in activities that do not generate tips and are not directly related to activities that generate tips. In short, this final-form regulation benefits the regulated community by ensuring that tipped workers for whom an employer takes a tip credit are permitted to do work generating tips.

Tip Pooling

This final-form regulation incorporates USDOL's regulation which allows for employers to establish tip pooling arrangements among tipped employees so long as the tip pools do not include 1) individuals with a 20% ownership or partnership interest in the business who are actively involved in management or 2) employees who meet the executive employee duties test, which mirrors the executive duties test found in 29 C.F.R. Part 541.100 of the FLSA regulations. Incorporating the federal regulation will avoid confusion on the part of employers and to ensure a uniform standard by which state and federal enforcement agencies can protect workers' wages.

Currently, federal regulations allow employers to require that tipped employees share tips with non-tipped employees in a tip pooling arrangement so long as all employees participating in the tip pool are paid at least the minimum wage of \$7.25/hour. USDOL published a final rule on December 30, 2020, that would have allowed an employer to require tip pooling for employees for whom they do not take a tip credit and allowed an employer to implement mandatory, "nontraditional" tip pools that include both employees who do not customarily and regularly receive tips (such as cooks and dishwashers) and employees who do customarily and regularly receive tips. On February 26, 2021, USDOL delayed the effective date of this provision of the December 30, 2020, rule until April 30, 2021, to afford the department with additional time to review and consider the rule. On March 26, 2021, the USDOL published a proposed rule in which

it stated its intent to allow the tip pooling provisions of the December 30, 2020, rule to go into effect on April 30, 2021, which they did. 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.

The potential costs and adverse effects of this final-form regulation are outweighed by the benefits because this final-form regulation provides regulatory consistency and stability to an area of FLSA interpretation that has been the subject of uncertainty at the federal level. This Pennsylvania final-form regulation incorporates the standard of the federal regulation so that there is no gap between Pennsylvania and federal rules on this matter. By incorporating the federal rule into Pennsylvania regulation, workers and businesses will be able to seek compliance assistance and file complaints to the Department as well as to the federal government, as necessary.

Credit Card and Other Payment Processing Deductions

The benefits of this provision of the final-form regulation outweigh the potential costs and adverse effects because it ensures that tips earned by an employee remain the property of that employee and are not used to offset operational business costs for processing credit card and other non-cash methods of payment generated by the employer who opts to provide such a payment option to patrons. Additionally, this provision of the final-form regulation is a benefit to the regulated community because it provides regulatory stability and certainty to this area of FLSA interpretation. Pennsylvania law and regulations are silent on the specific issue of credit card and payment processing fees, however, the MWA is clear that gratuities are the property of the employee, language that clearly prohibits employers from deducting from employees' tips to pay operational expenses.

Federal law and regulations are silent on the specific issue of credit card deductions from tips, but in practice USDOL has held under Wage and Hour Opinion Letters FLSA-214 (March 28, 1977) and -2006-1 (January 13, 2006) that employers may deduct from employees' credit card tips "a portion of the transactional fee charged by the credit card company." Under this interpretation, if an employer is charged a 3% transaction fee each time a customer pays with a credit card, USDOL permits the employer to deduct 3% from any tip paid to the employee who received a tip by credit card. That said, this is USDOL guidance and not a federal regulation. Further, in its December 30, 2020, final rule, USDOL specifically declined to clarify the interpretation by including it in regulation, stating instead that it simply "affirms its longstanding guidance." While federal regulations are silent on this matter, the MWA states that "the gratuity shall become the property of the employee," which supports a regulation that prohibits an employer from using an employee's tips to pay the credit card surcharge or other processing fees.

The Department supports the interpretation that the MWA prohibits the deduction of credit card surcharges from employees' tips and, since the courts have not ruled on this issue, the Department proposes this final-form regulation to provide certainty to employers and protection for employees. The Chairman and eight members of the House Labor & Industry Committee support this interpretation of the MWA.

The Definition of "Tipped Employee"

The benefits of this provision of the final-form regulation, which amends the definition of tipped employee to those who earn \$135 or more in tips per month, an increase from \$30 or more per month, outweigh the costs or adverse effects because it fixes a definition that has not been updated in over 44 years, in 1977.

This final-form regulation is in the interest of Pennsylvanians because failing to adjust the tipped employee threshold for inflation will result in individuals being misclassified as a tipped employee. This definition is outdated and amending it to reflect the effect of inflation on wages since 1977 will ensure that Pennsylvania workers for whom employers take a tip credit are earning sufficient tips to justify that credit. When the Department last updated this threshold 44 years ago, the minimum wage was \$2.30 per hour. When the \$30 tip threshold was last updated, a worker had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a worker in Pennsylvania must earn just over four times the minimum wage in tips before their employer can claim a tip credit. By updating this threshold, the final-form regulation will ensure that the definition of tipped workers reflects the effect of 44 years' worth of inflation since the threshold was last updated in 1977, and that workers' hourly wages will reflect market values.

In addition, the Department is codifying the former statement of policy found in 34 Pa. Code § 231.101. This clarifies that tipped wage is \$2.83 per hour and that the tip credit is the difference between the tip wage and the minimum wage in effect.

Service Charges

This provision of the final-form regulation stipulates that a business that charges for the administration of a banquet, special function or package deal shall educate patrons of this charge by providing notice in statement in a contract or agreement with the patron and on any menu provided to the patron. This provision also requires that the notice provided by the employer to the patron must state that the administrative charge cannot be used to provide tips to the employees who provided service to the patron. Finally, this provision also requires that employers who choose to use service charges in their billing to patrons clarify with separate lines in the billing statement between service charges and tips.

This provision of the final-form regulation benefits Pennsylvanians because while USDOL's regulations prohibit an employer from using the gross receipts generated from a service charge paid by a patron from being paid to an employee as a tip for the purposes of taking a tip credit. In many cases, patrons paying for the administration of a banquet, special function, or package deal may mistake the service charge for an automatic gratuity or may assume that an administrative charge in whole or part will count as gratuity, whereas the service charge specifically cannot be paid as gratuity. The benefits of this final-form regulation, namely that patrons will be clearly informed as to what counts as gratuity and what does not and that employees who customarily and regularly receive tips do in fact receive tips intended by patrons and are not denied those tips if a patron makes the mistake of assuming the service charge includes gratuity.

This provision of the final-form regulation may carry with it costs borne by the employer to reprint menus or contracts provided to the patron informing them that the service charge does not include a gratuity. However, the benefits of providing clarity for the patron and ensuring payment intended to be paid as a tip is actually paid to the employee as a tip for service outweighs the costs or adverse effects.

Fluctuating Work Week

This provision of the regulation clarifies that the "regular rate" used to calculate overtime wages for a fluctuating work week is based on a 40-hour work week and not the total hours worked in a week. The benefits of this provision outweigh the costs because it ensures that employees who are compensated under

the fluctuating workweek method are not paid less because they work more hours. This final-form regulation will increase the cost of labor for employers who pay workers overtime under the fluctuating workweek method and while some may characterize this as potentially forcing employers out of business because of the increase in labor costs, employers have a variety of options to allay the increased cost of labor likely under a “regular rate” definition that is based on a 40-hour work week. Employers could change the schedule of work assignments for an employee to ensure that they do not work overtime but instead work under forty hours per week on a consistent basis. Employers could also hire more employees so that there is less of a need to have workers labor for more than 40 hours per week. The MWA’s purpose is to protect workers from low wages and this regulation fulfills that purpose.

(19) 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. Explain how the dollar estimates were derived.

The regulated community includes three groups of businesses:

- 1) those that employ workers who meet the definition of tipped employee, meaning they regularly and customarily receive tips in excess of the tip threshold in the definition of tipped employee; this includes businesses that take a tip credit for and pay a lower tipped minimum wage (at least \$2.83/hour) to at least one employee;
- 2) those that charge service charges for banquets, package deals, or special events—some of which may also be included in the population of businesses with tipped employees; and
- 3) those that pay employees under a fluctuating work week method of paying overtime.

The exact costs and savings to each employer will vary based on specific circumstances, including but not limited to their decision-making around human resource allocation, compensation strategies, and increased clarity and consistency in commonwealth regulations amidst federal regulatory vacillation.

Initial compliance costs to employers are based on the following:

- 1) estimates of the number of employees who earn a tipped minimum wage and the number of establishments likely to take a tip credit for at least one employee, as explained in Question 15;
- 2) estimates of the number of tipped employees who regularly and customarily earn tips and the number of establishments that may employ such workers, as explained in Question 15;
- 3) estimates of the number of establishments that offer banquet, special event, or package deals and charge a service charge, as explained in Question 15;
- 4) and estimates of the number of employers who compensate employees for overtime under a fluctuating work week method, as explained in Question 15.

The regulated community bears four types of total direct costs related to compliance: 1) regulatory familiarization; 2) adjustment; 3) managerial; and 4) transfer costs from employers to employees. Regulatory familiarization and adjustment costs will occur primarily in Year 1. The Department does not anticipate ongoing managerial costs since the final-form regulation either requires one-time changes to processes (definition of tipped employee and service charges); partially or fully adopting by reference

existing federal regulations (80/20 and tip pooling) that employers are already required to comply with; or adjusts an existing calculation that is already computed on a weekly or bi-weekly basis (fluctuating work week). The Department does anticipate a transfer cost to businesses to comply with the final form regulation in its prohibition of employer deductions from employee tips for credit card and other payment processing costs, despite this being a practice that several commenters including the Chairman and eight members of the House Labor & Industry Committee agree is implicitly prohibited by the MWA. None of the provisions of this final-form regulation require new and ongoing changes to the management of employees that would require employers to bear new managerial costs.

Regulatory Familiarization Costs

Regulatory familiarization cost is the cost for an employer to review the new final-form regulation. The regulatory familiarization cost to the regulated community in Pennsylvania in FY 2022-2023 is \$1,958,418 (based on an average hourly wage of \$33.13 for a human resources specialist in Pennsylvania 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). This includes costs borne by all businesses that are likely to employ tipped employees; all businesses that may charge service charges for banquet, special event, or package deal services; and all employers who likely compensate employees for overtime using the fluctuating work week method.

In its own calculation of regulatory familiarization costs for the December 30, 2020, final rule regarding tipped workers, USDOL estimated that it would only take an average of 15 minutes to review that regulation. For its June 8, 2020, final rule on the fluctuating work week method of compensating overtime, USDOL estimated that it would take an average of 30 minutes to review the regulation. The USDOL final rule regarding the 80/20, published on October 29, 2021, estimated that establishments would spend on average one hour familiarizing themselves with the regulation. Since this final-form regulation contains both novel elements and standards to which businesses are already complying with because this Pennsylvania final-form regulation adopts by reference the federal ones, the Department estimates that on average establishments will spend one hour on regulatory familiarization. This final-form regulation contains multiple parts, but not all employers are affected by all parts and many affected employers are already required to comply with the identical federal standards (in the case of tip pooling and 80/20).

Adjustment Costs

Adjustment costs are the costs for an employer to determine how they will comply with the final-form regulation and make one-time adjustments to scheduling, staffing, printed materials, and/or payroll. In the proposed regulation, the Department estimated this cost based on the assumption that each employer will have to perform this adjustment for each individual employee, but upon review of recent federal regulations, the Department has determined that adjustments would be made on an establishment, not employee, basis. The adjustment cost to the regulated community in Pennsylvania in FY 2022-2023 is up to \$1,958,418. This is based on an average hourly wage of \$33.13 for a human resources specialist in Pennsylvania plus benefits cost equaling 46% base salary plus overhead cost at 17% base salary multiplied by one hour multiplied by the total number of affected employers in Year 1 who are likely to employ tipped workers (32,888), offer banquets, special events, or package deal services (2,076 hotels and casino hotels), or employ workers who are paid overtime using a fluctuating work week method (1,303).

The costs incurred by businesses that offer banquet, special event, and package deals and charge a service charge to include a separate line in the billing statement provided to patrons will be minimal. Such materials are typically produced specific to patron for whom the services are contracted and thus complying with this final-form regulation will not require reprinting outside the normal business process. Additionally, while some employers who opt to pay at least the full minimum wage (\$7.25/hour or more) instead of the tipped minimum wage may have to revise employee handbooks, modify payroll systems, or make related decisions concerning how they allocate their resources and employees' time, these adjustment costs would result from a choice, not requirement, of how to comply by the regulation. Adjustments for complying with the portions of this final-form regulation pertaining to tip pooling or tip credits (80/20 rule) will be de minimis since employers already must comply with the identical federal rules on which these sections are based. Finally, employers with tipped employees for whom they take a tip credit may need to adjust their compensation structures based on the new \$135 per month tip threshold, but as articulated in the response to Question 17, most tipped employees already meet the \$135 per month tip threshold so the number of employees who will be reclassified and for whom a tip credit cannot be taken will be small.

This estimate of adjustment costs is a conservative estimate. Employers who utilize the fluctuating work week method of paying overtime already have the option under the FLSA to calculate the regular rate based on a 40-hour work week, as this final-form regulation would require employers who already calculate the regular rate based on a 40-hour work week will have no adjustment costs, however we cannot estimate the number of employers who do so currently since such information on the fluctuating work week is not required to be reported to either commonwealth or federal agencies.

Managerial Costs

Managerial costs are the costs for an employer to ensure compliance with the final-form regulation during regular operations.

There is no ongoing managerial cost from this final-form regulation to businesses that charge a service charge for banquet, special event, or package deal services since these businesses are not required by the service charge provision of the final-form regulation to change their oversight of employees. Similarly, there is no ongoing managerial cost for businesses that pay employees overtime using the fluctuating work week method, since they are already calculating the regular rate in one of the two options currently available under the FLSA and, at most, would just need to substitute 40 for the actual hours worked. Similarly, there is no ongoing managerial cost resulting from the new definition of tipped employee (earning at least \$135 per month in tips) since employers must already determine whether employees for whom they desire to take a tip credit meet the current threshold (\$30 per month) and, if not, must ensure that their base rate plus tips equals at least \$7.25 per hour. This final-form regulation, therefore, imposes no new ongoing managerial costs on employers.

Concerning the 80/20 rule, businesses that take a tip credit for tipped employees who are paid a tipped minimum wage will bear no new managerial costs since they are already required to comply with the identical federal rule. In its final rule published October 29, 2021, USDOL estimated that employers would likely spend 10 minutes per week on management costs in order to comply with the federal rule, a total of 8.68 hours annually at an average cost of \$376.36 per year, per establishment. Since employers are already complying with federal regulation, there is no additional managerial cost due to this

Pennsylvania final-form regulation. Regulated businesses should already be monitoring employee activities as part of regular business practices to comply with federal regulations.

Similarly, in regard to tip pooling, businesses will bear no new managerial costs since they are already required to comply with the identical federal rule. This Pennsylvania final-form regulation imposes no new managerial requirements for tip pooling since it adopts by reference the federal rule.

Employers have a range of options if they do not want to bear added costs posed by their compliance to this final-form regulation. Employers who formerly took a tip credit but do not want to perform additional oversight of their employees to comply with the requirements of this final-form regulation could raise their employees' wages to the minimum wage of \$7.25/hour. Employers who do not want to recalculate the regular rate as prescribed by this final-form regulation for employees compensated for overtime using the fluctuating work week method could opt to pay employees under a standard method of compensation based on an hourly or salaried rate plus overtime. Employers who do not want to bear the entire cost of credit card or other payment processing transaction fees could opt to pass the cost on to patrons or incentivize or require patrons to use other forms of payment, such as cash or digital payment platforms. It is for these reasons, the Department projects the ongoing managerial cost to the regulated community to be zero.

Since not every employer has a human resources representative, the total cost estimate reflects the average cost across all establishments. Some establishments will have no employees affected by this final-form regulation and therefore assume little to no costs. Some will spend more time and resources on familiarization, adjustment, and, possibly, management because of one or more employees who are affected by this final-form regulation or because of human resources staffing realities.

Transfer Costs from Employers to Employees

The regulated community in Pennsylvania may incur some transfer costs related to this final-form regulation but the Department does not have the predictive economic modeling to simulate business decision-making by employers as a result of this final-form regulation. Employers who do not abide by the tip credit provision of this final-form regulation and who subsequently opt not to pay a tipped minimum wage but rather to increase employee wages to the minimum wage of \$7.25/hour and above will incur an added cost of labor. The Department has no method of projecting which or how many employers would make this choice. Additionally, the new threshold of tips (\$135/month) for an employee to meet the definition of tipped employees may increase labor costs for employers previously paid a tipped minimum wage and took a tip credit but who are now ineligible for the tip credit because their employees do not satisfy the new definition of tipped employee. These employers would be ineligible to pay a tipped minimum wage and would be required to pay employees at least the tipped minimum wage of \$7.25/hour. Employers could opt to shift to a non-tipped workforce or, in the case of employers using the fluctuating work week method of paying overtime, hire additional employees and impose regular hours and/or shifts to avoid higher overtime costs. These are only a few of the options employers may have available as such the Department cannot project how employers will respond.

Estimated Savings to Workers from Prohibiting Credit Card and Other Payment Processing Deductions

In 2018, the most recent year for which IRS Statistics of Income (SOI) data is available, Pennsylvania workers reported to the IRS approximately \$1,500,945,460 in total tips, both Social Security tips and Allocated tips. The Department determined this figure by determining the percentage of 2018 Pennsylvania salaries and wages (\$309,323,940,000) of the 2018 total US salaries and wages (\$7,890,791,770,000), 3.92%. In other words, PA salaries and wages were 3.9% of all US salaries and wages based on 2018 IRS data (US and PA salaries and wages data here: <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2>).

$(2018 \text{ Total PA Salaries and Wages} / 2018 \text{ Total US Salaries and Wages}) * 100 = \text{PA Percentage of Total US Salaries and Wages, 2018}$

$(\$309,323,940,000 / \$7,890,791,770,000) * 100 = 3.92\%$

PA Percentage of Total US Salaries and Wages for 2018 = 3.92%

The IRS makes available to the total Social Security Tips and Allocated Tips--\$38,485,781,000--reported for the US, most recently for 2018 (data can be found here: <https://www.irs.gov/statistics/soi-tax-stats-individual-information-return-form-w2-statistics>). This data is not broken out by state, but we can derive an estimate of 2018 Pennsylvania reported Social Security Tips and Allocated Tips by applying the percentage that PA salaries and wages comprise the total US totals.

$(2018 \text{ Total US Social Security and Allocated Tips}) * (2018 \text{ PA Percentage of Total US Salaries and Wages}) = \text{Estimate of 2018 Total PA Social Security and Allocated Tips}$

$(\$38,485,781,000) * (0.0392) = 1,508,642,615$

\$1,508,642,615 = Estimated Social Security and Allocated Tips reported to the IRS for Pennsylvania in 2018.

A 2018 report by the Treasury Inspector General for Tax Administration reported that the IRS estimated that unreported tips accounted for 52 percent of the total estimate tips received in 2006. It is likely that most of these unreported tips were cash payments. Since 2006, cash payments have declined while credit card and other non-cash payment methods have increased. According to the Federal Reserve Bank, cash payments made up 40 percent of all transactions in 2012, but only 32 percent in 2015.²⁰ For in-person transactions only, the use of cash for payment has similarly declined. In 2017, individuals used cash for 36 percent of in-person transactions; 2017 was also the last year when cash was the most-used method of payment. In 2018 the percentage of in-person cash payments dropped to 35 percent and by 2020, the percentage of in-person transactions using cash dropped further to 30%.²¹

In summary, Americans use cash less frequently today when making purchases and they use cash even less frequently for in-person transactions. Since it is likely that a large percentage of unreported tips are cash payments, it is similarly probable that the decline in cash payments has also decreased the amount of unreported income from tips. While it may be that in 2006 that 52 percent of tips were unreported, the

²⁰ <https://www.frbsf.org/cash/publications/fed-notes/2016/november/state-of-cash-2015-diary-consumer-payment-choice/>

²¹ <https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-of-consumer-payment-choice/2020/2020-survey-of-consumer-payment-choice.pdf>

rate of unreported tips has likely decreased since cash payments have declined and non-cash payments are more easily captured for reporting purposes.

This means, however, that the majority of Social Security Tips and Allocated Tips reported to the IRS are likely received via non-cash methods of payment.

This final-form regulation's provisions regarding credit card and other payment processing deductions from employee tips only affects payments made by non-cash methods. If we presume that 90 percent of reported Social Security Tips and Allocated Tips were paid using a credit card or other non-cash method, and we assume that the average fee charged for processing such payments was 3 percent, then the total amount deducted by employers from employee tips in 2018 was up to \$40,733,350.61.

(Estimated PA total Social Security and Allocated Tips reported to the IRS)(Estimated Payment Processing Fee)=Maximum Amount Deducted by PA Employers from Employees' Tips for Payment Processing Fees

$(\$1,508,642,615)(.90)(0.03) = \$40,733,350.61$ estimated amount deducted from employee tips to pay percentage of payment processing fees if all relevant employers engaged in such practices in 2018.

While this amount can be construed as the cost to businesses that deduct a percentage of employees' tips when paid by the customer using non-cash methods to comply with this final-form regulation, the Department considers it more accurate to consider this amount to be moneys that will be returned to employees, given the language of the MWA that "the gratuity shall become the property of the employee."

To be sure, the above estimate presumes that *all* employers who accept non-cash methods of payment for services and employees' tips *do* deduct a percentage of payment processing fees from employees' tips despite the clear language of the MWA. In public comments, the Department heard from employers who acknowledged deducting payment processing fees from employees' tips and from employees who stated that their employers' deducted percentages of their tips for such purposes (see public comments e.g. Steve Hansen, Gloria Merlino, Ruth Lotz, Lisa Foley, Rachel Green, Katherine Bigstaff, Caroline Ewing, Lisa Cotter, Patricia Runyon, Lei Cluckey, Sarah Williams, Aubrey Pratt, Brendan Gillis, Bethany Jameson, Sally Simpson, James Mackey, James Young, Elizabeth Weaver, Mary Ann Sheldon, Jessica Brittain, Joyce Crock, Kay Reinfried, Peter Hecht, Slima Ellis, Susan Miner, Taylor Stessney). These comments establish that despite the language of the MWA, some employers require clarification through regulation so that they can come into compliance with the law.

Not all employers, however, deduct from employees' tips. The PRLA, which represents 2,700 businesses in the restaurant, hospitality, tourism, and lodging industries, stated in its public comment that deducting payment processing fees from employees' tips "is something that many of our members have told us they already do not do." While the term "many" does not provide much quantitative certainty, we might presume that it is not a majority but is still significant or else the practice would be aptly described as rare or uncommon. While precise data on the percentage of employers who deduct credit card or other payment processing fees from employee tips is not available, in order to provide an estimate of the transfer costs we estimate that 50 percent of employers of tipped employees do deduct processing fee costs from employee tips despite the clear language of the law.

When applying this ratio to the total estimated amount of Social Security and Allocated tips reported for Pennsylvania (i.e., that 50 percent of businesses with tipped employees do deduct payment processing fees from employees' tips), the Department estimates that employees lose approximately \$20,366,675.30 annually.

(Estimated 2018 total PA reported Social Security Tips and Allocated Tips) * (Estimated percentage of tips reported paid for by non-cash methods) * (Estimated percentage of tips received by employees with employers who deduct percentage of tip to pay operational expenses) * (Estimated payment processing fee as a percent of total transaction) = 2018 Estimated amount deducted from employee tips for employer operational expenses.

$(\$1,508,642,615)(.9)(.5)(0.03) = \$20,366,675.30$

2018 Estimated amount deducted from employee tips for employer operational expenses = \$20,366,675.30.

In summary, the Department estimates that this final-form regulation will result in \$20,366,675.30 being restored to employees in the form of tips and represents a cost that employers who had previously deducted from employee tips to pay operational costs must bear to comply with this final-form regulation. The Department estimates that this will be an ongoing cost to employers, reflected in Question 23 in FY+1 through FY+5. However, as noted previously in this final-form regulation and as the Chairman and eight members of the House Labor & Industry Committee noted in public comment, the Pennsylvania Minimum Wage Law already prohibits such deductions from employee tips. This final-form regulation clarifies the clear intent of the law and removes any ambiguity that employers may claim. In that spirit, this estimate is recorded as a cost to employers in the regulated community but also represents the estimated amount of wages restored to tipped workers.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no additional compliance, legal or consulting costs or savings that are anticipated for local governments in their role as an employer. Under the MWA, the definition of employer is, "any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee." 43 P.S. § 333.103(g). The definition specifically omits public employers. In *Huffman v. Borough of Millvale*, 591 A.2d 1137 (Pa. Cmwlth. 1991), the Commonwealth Court in interpreting the Wage Payment and Collection Law held that "in construing the statute, we must give effect to the legislature's intent as it was expressed in the language of the statute and cannot supply an omission in a statute where it appears that the matter has been intentionally omitted. Municipal corporations such as the Borough are not included within the definition of "employer," and we, as an appellate court, cannot expand the definition of "employer" to include them." *Id.* At 1138-39. Similarly, since the General Assembly chose not to include the Commonwealth or any of its political subdivisions in the MWA's definition of employer, the Department has interpreted this law to exclude them. The Office of the Attorney General has also opined that the MWA does not apply to public employees. 1976 Op.Atty.Gen. No. 29. However, it is important to note that the Fair Labor

Standards Act explicitly includes public agencies in its definition of employer; thereby, making local governments subject to federal minimum wage requirements. 29 U.S.C. § 203(d).

The Department cannot estimate the effect of this final-form regulation on tax revenue because the actual effect on employee income will depend on employer choices and thus cannot be accurately projected.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no additional compliance, legal or consulting costs or savings that are anticipated for state government for its role as an employer. Under the MWA, the definition of employer is, "any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee." 43 P.S. § 333.103(g). The definition specifically omits public employers. In *Huffman v. Borough of Millvale*, 591 A.2d 1137 (Pa. Cmwlth. 1991), the Commonwealth Court in interpreting the Wage Payment and Collection Law held that "in construing the statute, we must give effect to the legislature's intent as it was expressed in the language of the statute and cannot supply an omission in a statute where it appears that the matter has been intentionally omitted. Municipal corporations such as the Borough are not included within the definition of "employer," and we, as an appellate court, cannot expand the definition of "employer" to include them." *Id.* At 1138-39. Similarly, since the General Assembly chose not to include the Commonwealth or any of its political subdivisions in the MWA's definition of employer, the Department has interpreted this law to exclude them. The Office of the Attorney General has also opined that the MWA does not apply to public employees. 1976 Op.Atty.Gen. No. 29. However, it is important to note that the Fair Labor Standards Act explicitly includes public agencies in its definition of employer; thereby, making the state government subject to federal minimum wage requirements. 29 U.S.C. § 203(d).

The Department cannot estimate the effect of this final-form regulation on tax revenue because the actual effect on employee income will depend on employer choices and thus cannot be accurately projected.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

For employers that require tipped employees to participate in a tip pool or tip sharing arrangement, this final-form regulation would require such employers to keep records of the name and position of each employee participating and the amount distributed to them. These records may be maintained in the

manner best suited to the employer so long as they are available to be presented in the course of an investigation by the Bureau of Labor Law Compliance. Employers who take a tip credit are already required to maintain records of their employees' tips to ensure they comply with the MWA and FLSA, and employers who establish a mandatory tip pool or tip sharing arrangement for employees who earn \$7.25/hour or more already must keep records of such arrangements as required by the federal Internal Revenue Service's Form 4070. Employers who distribute service charge to employees will be required to keep records on sums distributed.

(22a) Are forms required for implementation of the regulation?

No forms are required.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

Not applicable.

(23) 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:	\$	\$	\$	\$	\$	\$
Regulated Community	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable
COSTS:						
Regulated Community	\$24,283,511. 30	\$20,366, 675.30	\$20,366,6 75.30	\$20,366,6 75.30	\$20,366,6 75.30	\$20,366,6 75.30
Local Government	0	0	0	0	0	0

State Government	0	0	0	0	0	0
Total Costs	\$24,283,511.30	\$20,366,675.30	\$20,366,675.30	\$20,366,675.30	\$20,366,675.30	\$20,366,675.30
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable
State Government	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable
Total Revenue Losses	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable	Not calculable

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

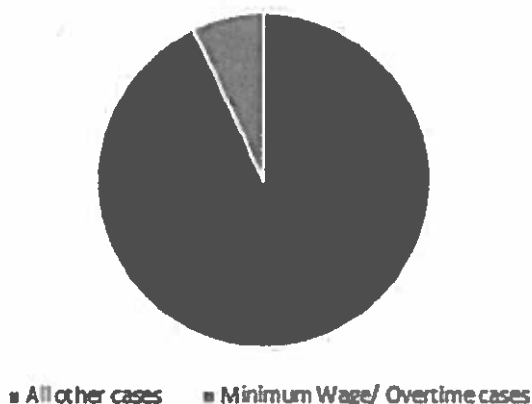
The Bureau of Labor Law Compliance (BLLC) has one budget for enforcing 13 different laws, including the MWA. The table below thus lists the entire Bureau budget, which has not changed in the past several fiscal years.

For FY2020-2021, BLLC's budget consists of \$2,659,354.43 in personnel costs and \$170,617.54 in operations costs (significantly lower than average years because of COVID-19 and limitations on in-person investigations) for a total of \$2,829,971.97.

To put this into perspective, MWA enforcement accounts for the following percentage of the Bureau's workload:

	FY 17-18	FY 18-19	FY 19-20	FY 20-21	TOTAL
Minimum Wage/Overtime	382	322	234	169	1,107
All other cases	4923	4991	5006	3760	18,680
Percentage of Case load	7%	6%	5%	4%	6%%

Minimum wage and Overtime cases compared to all cases received by the Bureau (All fiscal years combined)



Program	FY -3 (FY2018-2019)	FY -2 (FY2019-2020)	FY -1 (FY2020-2021)	Current FY (FY2021-2022)
Bureau of Labor Law Compliance	\$4.0 million	\$4.0 million	\$4.0 million	\$4.1 million

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.

We estimate that most of the affected businesses are likely classified as “small businesses.”

The definition of “small business” as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012 refers to the US Small Business Administration’s (SBA) table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). SBA defines a business as “small” based on average annual receipts²², which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

²² U.S. Small Business Association Table of Small Business Size Standards [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%2019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%2019%2C%202019%20Rev.pdf)

- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the regulation, including the type of professional skills necessary for preparation of the report or record.

The reporting, recordkeeping and other administrative costs required for compliance with the final-form regulation are de minimis. For employers that require tipped employees to participate in a tip pool or tip sharing arrangement, this final-form regulation would require such employers to keep records of the name and position of each employee participating and the amount distributed to them, a requirement that already exists for such employers under federal regulations. These records may be maintained in the manner best suited to the employer so long as they are available to be presented in the course of an investigation by the Bureau of Labor Law Compliance. Employers who take a tip credit are already required to maintain records of their employees' tips to ensure they comply with the MWA and FLSA, and employers who establish a mandatory tip pool or tip sharing arrangement for employees who earn \$7.25/hour or more already must keep records of such arrangements as required by the federal Internal Revenue Service's Form 4070.

- (c) A statement of probable effect on impacted small businesses.

Tip Credits and Definition of Tipped Employee

Using data from the 2019 Census County Business Patterns Data, the Department estimates that approximately 21,508 establishments in Pennsylvania have a high likelihood of taking a tip credit for one or more employees who meet the definition of tipped employee, based on the industry of those establishments and the occupations of employees likely to be employed at those locations.

We estimate that most of the affected businesses are likely classified as "small businesses."

The definition of "small business" as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012 refers to the US Small Business Administration's (SBA) table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). SBA defines a business as "small" based on average annual receipts²³, which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as "small businesses," a high percentage of the affected businesses are likely "small businesses."

Service Charges

Businesses that provide banquets, special events, or package deal services, employs tipped workers, and charge a service charge would be required to comply with this provision of the final-form regulation. This likely includes caterers (NAICS 722320), of which there were 555 establishments in Pennsylvania in the third quarter of 2019 and 553 in the third quarter of 2020 based QCEW data. It also includes some but not all hotels (NAICS 721110) and casino hotels (NAICS 721120). In the third quarter of 2019 there were 1,517 hotels in Pennsylvania and 4 casino hotels; in the third quarter of 2020 there were 1,521 hotels and 5 casino hotels according to QCEW data. Not all of these businesses offer banquet, special event, or

²³ U.S. Small Business Association Table of Small Business Size Standards [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%2019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%2019%2C%202019%20Rev.pdf)

package deal services and thus some of them would not be affected by this final-form regulation, but there is no publicly available data indicating which hotels and casino hotels offer these services and which do not. Our estimate of the number of businesses potentially affected by this provision of the final-form regulation is conservative and is likely an overestimate.

We estimate that most of the affected businesses are likely classified as “small businesses.”

The definition of “small business” as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012 refers to the US Small Business Administration’s (SBA) table of small business size standards (<https://www.sba.gov/document/support-table-size-standards>). SBA defines a business as “small” based on average annual receipts²⁴, which is not publicly available for these businesses in Pennsylvania. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses,” a high percentage of the affected businesses are likely “small businesses.”

Tip Pooling and Credit Card and Other Payment Processing Deductions

Using data from the 2019 Census County Business Patterns Data, the Department estimates that up to 32,888 establishments in Pennsylvania will be required to comply with the tipped worker provisions of the final-form regulation because they have a high likelihood of employing workers who customarily or regularly receive tips.

The Department estimates that most of the affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses”, a high percentage of the affected businesses are likely “small businesses.”

Fluctuating Work Week

The Department estimates that approximately 1,303 establishments in Pennsylvania will be required to comply with the fluctuating work week provision of the final-form regulation. In its June 8, 2020 final rule on the fluctuating work week method of computing overtime, USDOL estimated that 0.45 percent of United States employers currently “pay or are interested in paying employees using the fluctuating workweek method.” The Department applied that percentage—0.45%—to the number of Pennsylvania private employers as indicated from the Quarterly Census of Employment and Wages (QCEW) dataset, as of 3rd quarter 2020 (289,711).

The Department estimates that most of the affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the final-form regulation. Since SBA states that 98.2% of businesses in Pennsylvania do classify as “small businesses”, a high percentage of the affected businesses are likely “small businesses.”

- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation.

²⁴ U.S. Small Business Association Table of Small Business Size Standards [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%2019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%2019%2C%202019%20Rev.pdf)

Tip Credit

The Department considered prohibiting an employer from taking a tip credit for employee's work if it exceeds 80 percent of their daily shift. The final-form regulation, which is based on a workweek instead of a daily shift, is the least burdensome considered.

Tip Pooling

The Department considered prohibiting tip pooling between tipped employees who earn \$7.25 per hour or more and employees who are not customarily and regularly tipped. The final-form regulation is the least burdensome considered.

The Definition of "Tipped Employee"

The Department considered eliminating the definition of "tipped worker" altogether. The Department also considered amending the definition of tipped worker to functionally eliminate the tipped minimum wage and ensure that all workers in Pennsylvania regardless of whether they performed duties that customarily or regularly earned them tips were paid an hourly rate of at least the current minimum wage in the commonwealth. The Department also considered amending the definition of tipped worker to adjust the amount of tips earned monthly for a worker to be defined as a "tipped employee" from \$30 to \$135 and indexed to inflation annually in subsequent years. The final-form regulation is the least burdensome considered.

Service Charges

The Department considered requiring employers that charge for the administration of a banquet, special function, or package deal by using a service charge to educate their customers on the use of such charges by listing exactly what they fund. The final-form regulation is the least burdensome considered.

Fluctuating Work Week

The Department considered setting the "regular rate" to be based on either a 37.5 or 40-hour workweek depending on whichever was the average full-time workweek for workers in the same occupation in Pennsylvania or the industry-accepted standard for that occupation in Pennsylvania, not to exceed 40 hours. Occupational data that specifies workweek length information is not available. The final-form regulation is the least burdensome considered.

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

There are no special provisions for small businesses as the MWA's definition for employer does not distinguish between the size of the business. The final-form regulation benefits all employees including those who are minorities or elderly.

While this final-form regulation contains no special provisions for farmers, the MWA already exempts labor on a farm from the MWA's minimum wage and overtime protections. 43 P.S. § 333.105(a)(1).

The Department will conduct outreach and educational sessions after publication of the final rulemaking in the *Pennsylvania Bulletin* and before its effective date. During these outreach and educational sessions, the Department will solicit comments on the regulation 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 to 90 days to ensure that the regulated community has ample opportunity for education and assistance with compliance planning.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

Tip Credit

The Department considered prohibiting an employer from taking a tip credit for employee's non-tip-producing work if it exceeds 80 percent of their daily shift. The final-form regulation, which is based on a workweek instead of a daily shift, is the least burdensome considered.

The Department considered fully aligning with the current federal regulation on prohibiting an employer from taking a tip credit for an employee performing duties that do not directly generate tips that last longer than a 30 consecutive minute period. The Department decided not to include the 30 consecutive minute portion of the federal regulation in its regulation as it would be very difficult to enforce and found it to be overly burdensome to employers.

The Definition of "Tipped Employee"

The Department considered eliminating the definition of "tipped worker" altogether. The Department also considered amending the definition of tipped worker to functionally eliminate the tipped minimum wage and ensure that all workers in Pennsylvania regardless of whether they performed duties that customarily or regularly earned them tips were paid an hourly rate of at least the current minimum wage in the commonwealth. The Department also considered amending the definition of tipped worker to adjust the amount of tips earned monthly for a worker to be defined as a "tipped employee" from \$30 to \$135 and indexed to inflation annually in subsequent years. The final-form regulation is the least burdensome considered.

Tip Pooling

The Department considered prohibiting any manager or supervisor from participating in a tip pooling arrangement but opted to allow for employees who have some supervisory authority—for example, deciding who is assigned to serve which tables in a section of a restaurant but who otherwise performs duties that customarily or regularly earn tips—to be eligible for the tip pool. The final-form regulation is the least burdensome considered.

The Department considered prohibiting all non-traditional tip pools, such as tip pools that include workers who do not customarily and regularly receive tips. After hearing from workers and employers who use non-traditional tip pools and recognizing there are many different business operations that may use a non-

traditional tip pool that truly benefit employees, the Department decided to fully align with the federal rule on tip pooling and allow for non-traditional tip pools as long as a tip credit is not taken.

Service Charges

The Department considered requiring employers that charge for the administration of a banquet, special function, or package deal by using a service charge to educate their customers on the use of such charges by listing exactly what they fund. The final-form regulation is the least burdensome considered.

Fluctuating Work Week

The Department considered setting the “regular rate” to be based on either a 37.5 or 40-hour workweek depending on whichever was the average full-time workweek for workers in the same occupation in Pennsylvania or the industry-accepted standard for that occupation in Pennsylvania, not to exceed 40 hours. Occupational data that specifies workweek length information is not available. The final-form regulation is the least burdensome considered.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses.
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.
- c) The consolidation or simplification of compliance or reporting requirements for small businesses.
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

a) The establishment of less stringent compliance or reporting requirements for small businesses

This final-form regulation does not require the regulated community to complete any additional forms or reports beyond those already required by other state or federal regulations, though the regulation may affect an employer’s recordkeeping requirements depending on how it chooses to address employees who are newly qualified or are newly disqualified from being paid the tipped minimum wage of \$2.83/hour.

Generally, employers must maintain records of an employee’s full name, home address, hourly rate of pay, occupation, time and day of the workweek’s beginning, number of hours worked daily and weekly, total wages due for hours worked during the workweek, overtime compensation for the workweek, additions to or deductions from wages, allowances, total wages paid each pay period, date of payment and pay period covered, and any special certificates for students and learners. 34 Pa. Code § 231.31.

If because of this final-form regulation an employer decides to change an employee's method of payment or designation as a "tipped employee," the employer would still be required to maintain the records listed above, which they are required to do already.

b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses

The establishment of less stringent schedules or deadlines for compliance or reporting for small businesses is not practical for this final-form regulation. Businesses that employ tipped workers must comply with the record requirements as enumerated above and there are no exceptions or less stringent requirements based on the size of a business. Implementing a secondary or tiered system of reporting requirements for this final-form regulation or other existing provisions in the MWA and its regulations would create conditions such that the law and its regulations would be all but unenforceable. Any exception for small businesses could create situations where the reporting requirements for businesses vary based on the season, particularly for those for whom many patrons are tourists, students, or even attendees of sporting events. Businesses that hire temporary help for larger events may breach the "small business" designation for a short period of time and thus be subject to a different reporting requirement, potentially without even knowing it.

The Department will conduct outreach sessions before this final-form regulation would take effect in its final form and will publish educational information on its website. In its final-form regulation, the Department extended the effective date from 60 to 90 days after publication of this regulation in the *Pennsylvania Bulletin* to provide for an additional month to educate the public.

c) The consolidation or simplification of compliance or reporting requirements for small businesses

The final-form regulation does not require regulated entities to complete any additional forms or reports.

d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation

Not applicable

e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The definition for "employer" found in the MWA applies to all business regardless of size.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be

accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Data was used to estimate the number of persons, businesses, and small businesses affected by this final-form regulation, but data only served as the basis for this final-form regulation in one section: the definition of tipped employee.

The last time the definition of tipped employee was updated was 1977 when the threshold was set at \$30 in tips per month. In other words, an employee had to earn at least \$30 per month to meet the definition of tipped employee. Inflation has risen in the past 44 years and has devalued that threshold. When this threshold was last updated 44 years ago, the minimum wage was \$2.30 per hour. Then, a worker had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a worker in Pennsylvania earning just over four times the minimum wage in tips allows their employer to claim a tip credit. To determine what level the threshold should be set at to reflect the effect of inflation over the past 44 years, the Department used the Consumer Price Index for All Urban Consumers (CPI-U), which represents changes in the prices of all goods and services purchased for consumption by urban households. Using the Bureau of Labor Statistics CPI Inflation Calculator (https://www.bls.gov/data/inflation_calculator.htm), we calculated the effect of inflation on \$30 between January 1977 (the year of the last change) and March 2021. Adjusted for inflation using CPI-U, \$30 in January 1977 is equivalent to \$135.83 in March 2021 dollars. The Department rounded down to \$135 to have a round number.

To estimate the number of persons, businesses, and small businesses affected by this final-form regulation, the Department used publicly available data from the US Census Bureau's County Business Patterns 2019 dataset. The Department also used the Occupational Employment and Wage Statistics dataset produced by the US Bureau of Labor Statistics. Additionally, the Department relied on methodology and modeling available from the Economic Policy Institute's Minimum Wage Simulation Model 2021, which relies on data from the Economic Policy Institute's American Community Survey and Current Population Survey data set, which draws from publicly available data. The American Community Survey and the Current Population Survey are both produced by the US Census Bureau.

To estimate the number of small businesses affected, the Department considered using aggregated sales data for certain industries available on the Department of Community and Economic Development's website. This data, however, was determined not to be acceptable. The aggregated data is available based on NAICS codes for particular industries based on a private data set owned by Info USA and the private data set is not available for public evaluation. Test searches of the data revealed several concerns. First, "Pennsylvania" could be selected as both the 'state' and the 'region,' and selecting either produced different results indicating that the two "Pennsylvania" options generated different sets of information. Second, the number of industries in certain NAICS codes did not match with the number available in publicly available sources. Third, while the level of aggregation of the sales data made it possible to estimate the average sales receipts for each establishment within a NAICS code, this does not allow for a confident estimate of how many establishments actually classified as small because annual sales is different from "average annual receipts." "Small business" as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012 refers to the US Small Business Administration's (SBA) table of small business size standards (<https://www.sba.gov/document/support--table-size-standards>). SBA defines such a business as "small" based on average annual receipts, which is typically calculated as the average receipts for the previous three completed fiscal years. Even if we were able to get a sense of the actual

sales for each establishment within a NAICS code, it would be insufficient to adhere strictly to the definition as “small business” because annual sales are part of but not the same as average annual receipts. Therefore, we cannot consider this source to be sufficiently reliable for accurately estimating the number of small businesses affected.

For the sake of providing only valid and reliable wage data, the Department generally relies on the trustworthy Occupational Employment and Wage Statistics (OEWS), published by the Bureau of Labor Statistics (BLS), and the American Community Survey (ACS), published by US Census Bureau. Unfortunately, the Bureau of Labor Statistics (BLS) publicly acknowledged and reported that the COVID-19 Pandemic disrupted 2020 data collection activities, and lowered response rates which negatively affected data availability and quality.²⁵ According to the US Census Bureau, also, in 2020, the COVID-19 pandemic disrupted the lives of people across the country and significantly disrupted data collection for its American Community Survey (ACS), “the nation’s most current, reliable and accessible data source for many local statistics, with many statistics that do not exist anywhere else”.²⁶ The Bureau reported that these disruptions hindered its ability to collect quality data because the National Processing Center (NPC) in Indiana that prints, assembles, and mails out survey invitations; capture data from completed forms; and provide telephone support for people who respond, was closed due to Indiana’s Lockdown Mandate. The Bureau reported that NPC canceled its Census mailouts for the April, May and June 2020 panels and is still limited by social distancing requirements and staff shortages. The Census Bureau warns researchers that it expects the 2020 ACS statistics to look different, highly skewed, compared to prior years because of the pandemic’s effects on the survey itself. Furthermore, according to the Bureau of Labor Statistics (BLS), the Occupational Employment and Wage Statistics (OEWS) program that produces employment and wage estimates annually for nearly 800 occupations was also impacted in 2020. OEWS usually provides estimates for the entire nation, for individual states, and for metropolitan and nonmetropolitan areas; national occupational estimates for specific industries are also available. However, because of the pandemic, response rates for the November 2019 and May 2020 OEWS panels were lower. BLS blames this low response rate on the timing of attempts to collect data from employers during the months when most businesses were closed, especially those in the tipped industry, like restaurants. BLS also reported that these lower response rates negatively affected its data availability and quality for 2020. In the absence of valid and reliable 2020 data, and with 2021 data yet to be available, the department determined 2019 data would be the most up-to-date, valid, and reliable data to use. In fact, BLS reported, for example, that 2019 QCEW employment data which preceded the COVID-19 pandemic, and do not reflect these negative effects of the pandemic, are more reliable and more reflective of data in previous normal times, and projected 2021 estimates.

(29) Include a schedule for review of the regulation including:

- | | |
|---|----------------------------|
| A. The length of the public comment period: | 30 days |
| B. The date or dates on which any public meetings or hearings will be held: | Hearings will not be held. |

²⁵ BLS Source (2021) Effects of COVID-19 Pandemic on Occupational Employment and Wage Statistics <https://www.bls.gov/covid19/effects-of-covid-19-pandemic-on-occupational-employment-and-wage-statistics.htm>

²⁶ USCB Source (2021) Adapting the American Community Survey Amid COVID-19. <https://www.census.gov/newsroom/blogs/random-samplings/2021/05/adapting-the-acrs-amid-covid-19.html>

C. The expected date of delivery of the final-form regulation:	February 17, 2022
D. The expected effective date of the final-form regulation: in the <i>Pennsylvania Bulletin</i> .	90 days after publication
E. The expected date by which compliance with the final-form regulation will be required: in the <i>Pennsylvania Bulletin</i> .	90 days after publication
F. The expected date by which required permits, licenses or other approvals must be obtained:	Not applicable.

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Department will closely review the complaints it receives concerning tipped employees and overtime for salaried employees for any unintended consequences and for any trends in misapplication. Also, the Department will conduct outreach and educational sessions after publication of the final rulemaking in the *Pennsylvania Bulletin* and before the date the regulation becomes effective. During this outreach and educational sessions, the Department will solicit comments on the final-form regulation and keep track of common themes or issues.

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**



(Pursuant to Commonwealth Documents Law)

RECEIVED

FEB 17 2022

**Independent Regulatory
Review Commission**

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Department of Labor & Industry</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>12-114</u></p> <p>DATE OF ADOPTION: _____</p> <p> BY: _____ Jennifer L. Berrier Title: <u>Secretary</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY:  _____</p> <p><u>February 16, 2022</u> DATE OF APPROVAL</p> <p>Deputy General Counsel (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
---	--	---

NOTICE OF FINAL RULEMAKING

TITLE 34

PART XII BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231 MINIMUM WAGE

NOTICE OF FINAL RULEMAKING

Title 34 Labor and Industry Regulations for Minimum Wage 34 Pa. Code, Part XII, Chapter 231

The Department of Labor and Industry (Department), by this order, amends 34 Pa. Code, Part XII, Chapter 231 (relating to regulations for minimum wage). The amendments are submitted in accordance with Sections 4 and 9 of the Minimum Wage Act of 1968 (Act) (43 P.S. §§ 333.104(c) and 333.109), Act of January 17, 1968, P.L. 11, No. 5, for the purpose of carrying out the purpose of the Act and to safeguard the minimum wage rates established thereby.

Statutory Authority

This final-form rulemaking is issued under the authority provided in both 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 employees 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 employees; allowances for gratuities; or allowances for such other special conditions or circumstances which may be incidental to a particular employer-employee relationship."

Purpose

This final-form regulation amends the Department's existing minimum wage regulations in Title 34 at Sections 231.1 (relating to definitions), 231.34 (relating to tipped employees) and 231.43 (relating to regular rate). This regulation also adds the following new sections: 231.101a (relating to minimum wage increase), 231.111 (relating to tip credit for non-tipped duties), 231.112 (relating to tip pooling), 231.113 (relating to credit card and other processing fees) and 231.114 (relating to service charges).

This 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 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 rulemaking protects tipped employees in several ways. First, this rulemaking raises the tip threshold to account for 44 years of growth and inflation since this rule was implemented. Second, this 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 rulemaking protects tip 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 rulemaking prohibits employers from deducting credit card and other processing fees from tips. Finally, this 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 included in this rulemaking, this rulemaking enacts bright line rules for Pennsylvania employers who over the last two 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 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 the Commonwealth. In addition, the increased competitiveness of Pennsylvania's employers 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, 43 P.S. § 333.104(a.1) provides that every employer shall pay to each of his or her employees a minimum wage of \$7.25 per hour. However, there is a special provision for tipped employees. Section 3 of the Act defines "wage" in the context of tipped employees as follows:

In determining the hourly wage an employer is required to pay a tipped employee, the amount paid such employee by his or her

employer shall be an amount equal to: (i) the cash wage paid the employee which for the purposes of the determination shall be not less than the cash wage required to be paid the employee 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 employee which is equal to the difference between the wage specified in subparagraph (i) and the wage in effect under section 42 of this act.

43 P.S. § 333.103.

Section 3 of the Act was a statutory amendment effective December 21, 1998. The day before the effective date of the amendment to the law, the tipped minimum wage was \$2.83 per hour. This figure was calculated because at the time of the amendment, the Act's language concerning tipped employees read as such, "In determining the hourly wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of forty-five percent of the applicable minimum wage rate." The minimum wage at that time was \$5.15 per hour. 43 P.S. § 333.104(a)(6). Thus, an employer can only increase the tipped wage by up to 45% of \$5.15 per hour which is \$2.32 per hour. If you subtract \$2.32 from \$5.15 then you get \$2.83 which was the lowest base rate to pay an employee. 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 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." 34 Pa. Code § 231.1. 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. §§ 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. § 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 86771 (December 30, 2020). In its final rule, USDOL announced that it was allowing employers to institute tip pools with employees who do not customarily and regularly receive tips if the employer does not take a tip credit. However, these tips pools may not include managers or supervisors. In addition, these regulations would allow employers to take a tip credit for any time spent performing duties that are related to those that customarily and regularly produce tips and which are done contemporaneously with tipped duties or for a reasonable time immediately before or after tipped duties. This rulemaking would have ended the 80/20 rule. USDOL's tipped employee rule was to be effective on March 1, 2021.

On January 21, 2021, the Commonwealth of Pennsylvania, along with the Commonwealth of Massachusetts, 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, 5 U.S.C. § 706(2)(C) (APA), and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 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 "Employees shall be paid for overtime not less than one and one-half times the employee's regular rate as prescribed in regulations promulgated by the secretary." 43 P.S. § 333.104. The Department has a regulation defining the term "regular rate." 34 Pa. Code § 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 work week to determine the regular rate for salaried employees. See 29 C.F.R. § 778.114. Under the fluctuating work week, 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 work week 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 work week. *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,” 34 Pa. Code § 231.41. 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 work week.

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 thirty or sixty hours.

The Court noted that for employees paid based on an hourly rate, the overtime formula is simple: 1.5 x hourly rate x 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 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 Supreme Court.

After the proposed regulations, 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 follows.

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 three 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 below. 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 regulation to align with the federal rulemaking. In areas where the Department has declined to make changes, the Department has added 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 to final. First, the Department modified its proposed regulation to incorporate by reference 29 C.F.R. § 531.54, 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 Pennsylvania.

Tip credits for non-tipped work have changed from proposed to final. 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 C.F.R. § 531.56, 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 Pennsylvania employers 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 its final form regulation; 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 C.F.R. § 531.57. 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 to final form. The Department has updated 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 services charges so the Department does not believe its regulation will cause any confusion.

The Department also clarified 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*. <https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-30#B30d03>

The Department also added 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 to final form. 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. 29 U.S.C. § 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 to final form. The Department revised § 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 Pennsylvania employers 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 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. 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." 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." 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 Section 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 the final rulemaking in the *Pennsylvania Bulletin* and before its effective date. During these outreach and educational sessions, the Department will solicit comments on the regulation 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 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 Section 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 regulation 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 regulatory analysis form for the proposed regulation stated holiday pay would be *included* in the regular rate. The Department regrets the grammatical errors in the proposed regulation 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 be taking all remuneration 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 multiplied 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 section 231.43 in that it is the only subsection to use a 0.5 multiplier rather 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 five years, the Department is not aware of any complaints from day workers that their employers have violated the MWA. 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 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 in order 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. 34 Pa. Code § 231.42 currently provides, "The term workweek shall mean a period of seven 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." The final-form regulation provides that the regular rate for salaried employees is taken by adding up compensation in a workweek and dividing 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 has amended the language in subsection (g) to clarify that the regular rate includes all compensation with the exceptions outlined in (a)(1)-(a)(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 Sections 231.111 and 231.112 (relating to tip credit for non-tipped duties; and tip pooling). A cornerstone of the Regulatory Review Act 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 has declined to incorporate USDOL regulations regarding the regular rate for salaried employees who are eligible for overtime. See 29 C.F.R. § 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 has declined 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 regulation, as compared to the proposed regulation, 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 Pennsylvania. 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 work week 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 MWA and the obligation of the Department to protect workers.

4. Implementation of Section 231.101.

IRRC noted that the Department's proposed regulation included an amendment to 34 Pa. Code § 231.101, a statement of policy. IRRC suggested that the Department rescind 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 rescind the statement of policy when it publishes the final-form regulation in the *Pennsylvania Bulletin*. The Department also adopts a new section in this final-form rulemaking, Section 231.101a, which contains the language that the Department proposed to the statement of policy found in Section 231.101.

Specifically, this new regulation will clarify that the minimum wage in Pennsylvania is \$7.25 per hour. Section 4(a.1) states that the minimum wage in Pennsylvania 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 regulation 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 section 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 has incorporated USDOL's final rule at 29 C.F.R. § 531.56 into its final-form rule including the definitions and examples suggested by the commentators. The Department has determined 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 declined 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 declined to adopt this, as described more fully above 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 Pennsylvania 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 regulation 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 has fully incorporated 29 C.F.R. §§ 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 regulation did not address the deduction of credit fees for employers who institute tip pooling. In response, the Department has amended its final-form regulation 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 MWA provides that tips are the property of the employee. In response, the Department retains this section 231.113 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 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 kept this section in its final-form rulemaking.

Finally, IRRC requested the Department to address the House Labor and Industry Committee's comment that this regulation include other types of processing fees. In response, the Department added 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 its proposed regulation, 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 the Office of Attorney General's authority under the Unfair Trade Practices and Consumer Protection Law (UTCPL) and asked the Department to make any necessary amendments. However, after further review, the Department has determined that the MWA grants the Department authority to regulate service fees in this manner to protect tipped employees.

The MWA 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 UTCPL does not prohibit the Department from promulgating this final-form rulemaking. The Department met with staff in the OAG's Consumer Protection Bureau, and they opined that the UTCPL allows for dual authority as the purpose behind the UTCPL and MWA are different. The UTCPL protects consumers from deceptive practices and the MWA 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 UTCPL unless it is expressly excluded. See, e.g., *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 UTCPL does not abrogate the Department's statutory authority under the MWA, 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 pursuant to section 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 regulation will benefit up to 434,712 workers in Pennsylvania. 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 work week 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 employees 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 Hon. Gerald J. Mullery. The second is a comment from the Democratic Chair of the Senate Labor and Industry Committee, the

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

Chairman Cox noted that the COVID-19 pandemic was difficult for the hospitality industry and that that, considering the severe impact of the 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. Chairman Cox opined that the appropriate course of action for the Department would seem to be a delay - until the impact of the 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 pandemic. The purpose of the Act is to protect workers from unreasonably low wages. The 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 pool; 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 pandemic does not nullify the Act's mandate to protect workers. That is what the Department's final-form regulation accomplishes, it protects hospitality workers from unreasonably low wages.

Chairman 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, Chairman Cox requests the Department use a "light touch" when it discovers violations of this portion of the regulation.

In response, the Department has determined 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, Chairman 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 Chairman 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.

Chairman Cox also provided several supportive comments. The Chairman praised the Department for the reasonable level for its increase to the tipped employee threshold. The Chairman 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 Chairman Cox's comments, the Department received two legislative comments in support of the Department's regulation. The Department acknowledges these supportive comments.

Specifically, Representative Mullery noted that the Department's proposed regulation was consistent with the Act's purpose of protecting workers from the evils of unreasonably low wages. Specifically, 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 regulation.

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, 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 above, the Department did decide to amend its proposal 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.

34 Pa. Code § 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 proposal and, as such, the Department has kept this proposal in its final-form regulation.

This final-form rulemaking adds a definition for "tip credit" to provide clarity to its regulations. This definition will make it clear that a tip credit is the difference between the statutory minimum wage outlined in section 4 of the Act, 43 P.S. § 333.104, and the base hourly rate that employers pay to tipped employees. No commentator objected to this proposal and, as such, the Department has kept this proposal in its final-form regulation.

This rulemaking also amends the definition for "tipped employee" to raise the tipped employee threshold from \$30 per month to \$135 per month. The tipped salary threshold was set in 1977. When the \$30 tip threshold was last updated, a tipped employee had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a tipped employee in Pennsylvania 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. Chairman Cox commended the Department for the reasonable level of its increase to the tip threshold. As such, the Department decided to keep the proposed increase in its final-form regulation.

The Department's final-form rulemaking also adds a new definition for the phrase "customarily and regularly." This definition will clarify language found in the Department's definition of "tipped employee". This language is consistent with language found in 29 C.F.R. § 531.57.

The Department's final-form rulemaking adds a new 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.

The Department's final-form rulemaking adds a new definition for "USDOL" which stands for "The United States Department of Labor". The Department added this definition because

its final-form rulemaking incorporates USDOL regulations regarding tip pooling and the 80/20 rule.

34 Pa. Code § 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, 43 P.S. § 333.103. 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. No commentators objected to this proposed change and, as such, the Department has kept this proposal in its final form regulation.

The Department proposed to add new paragraph (6) which would require employers to keep records of the names and positions of each employee participating in a tip pool and the amount distributed to that person. This subsection 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 proposed tip pooling regulations.

While no commentator specifically objected to this proposed change, 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 has determined that its proposed change is necessary and has kept this proposal in its final-form regulation.

34 Pa. Code § 231.43. Regular Rate.

The Department proposed to add "(a)" to indicate the first subsection of the regulation. This subsection currently has no designation. No commentators objected to this stylistic change and, as such the Department has kept this proposal in its final-form regulation.

The Department proposed to amend subsection (a)(1) to replace "at Christmas time" with "during any holiday." As discussed above 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 conceded that the Department's explanation of the proposed language was incorrect.

However, the Department made 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 has kept this proposal in its final-form regulation.

The Department proposed to amend subsection (b) and replace the words "he" and "his" with the words "the" and "the employee." This will make the language of the regulation gender neutral. No commentators objected to the Department's proposal and, as such, the Department has kept this proposal in its final-form regulation. Moreover, the Department also changed language in subsections (a)(2) and (d) by replacing "his" with gender neutral language.

As discussed above in response to IRRC's comment 3, this rulemaking adds a new 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 work week 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 has decided to keep a definition for regular rate for salaried employees in its 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 did amend 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.

34 Pa. Code § 231.101a. Minimum Wage Increase.

The Department proposed to amend subsection (b) and (b)(1) of 34 Pa. Code § 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 \$135.00 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 adopting the amended language the Department proposed to the Statement of Policy and creating new section 231.101a. The Department will rescind the Statement of Policy in a separate document.

Subsection (a) clarifies that the minimum wage in Pennsylvania is \$7.25 per hour. Section 4(a.1) of the Act, 43 P.S. § 333.104(a.1), states that the minimum wage in Pennsylvania is equal to the minimum wage set by the Fair Labor Standards Act 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 forth in section 4(a)(8) of the Act, 43 P.S. § 333.104(a)(8), 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 regulation 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.

34 Pa. Code § 231.111. Tip Credit for Non-Tipped Duties.

The Department proposed to add this section to its regulations because, other than record keeping requirements outlined in 34 Pa. Code § 231.34, the Department has no regulations governing tipped employees.

The Department's proposed language in subsection (a) would have provided 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 proposed language in subsection (b), which would have provided that employers have to pay the minimum wage for any time where an employer cannot take a tip credit. The Department proposed this to clarify and reinforce that the lower tipped minimum wage is an exception to the requirement that employers pay employees the minimum wage required by section 4 of the Act, 43 P.S. § 333.104.

Many commentators including IRRC, Chairman 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 C.F.R. § 531.56. This change should allow 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. § 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.

34 Pa. Code § 231.112. Tip Pooling.

The Department proposed this new section because, while the Act permits tip pooling, there are no regulations addressing this subject.

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

The Department's proposed language in subsection (b) would have excluded 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 proposed language in subsection (c) would have required 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, 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 decided to amend its proposed regulation to incorporate language from USDOL's regulation in 29 C.F.R. § 531.54 (tip pooling). 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 did retain the notice requirement it proposed as subsection (c) as the new subsection (b). The Department retained this language because it is important for employees to be aware of tip pools before they are required to participate in them.

34 Pa. Code § 231.113. Credit Card Fees.

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

Some commentators including IRRC, and Chairman Cox questioned the necessity of this section given that section 3 of the Act specifically states that tips are the property of the employee. 43 P.S. § 333.103. 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 its final-form regulation to provide clear guidance that this practice is not permitted in Pennsylvania.

The Department did amend language in its final-form regulation. First, the Department heeded the suggestion of Chairman Cox and added a prohibition of deducting any type of processing fees from tips not just credit card processing fees. The Department also added 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.

34 Pa. Code § 231.114. Service Charges.

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

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

The Department proposed to add subsection (b) which would require a service charge notice to state that the charge is for the administration of the banquet, special function, or package deal and is not a tip to be distributed to employees. The Department proposed this regulation to clarify to patrons that a service charge is different than a tip.

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

IRRC, Chairman 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 its final-form rulemaking.

The Department addressed Chairman 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 added new 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 regulation will affect all Pennsylvania employers covered by the Act and all individuals who are employed by these entities who performed tipped work or are salaried employees eligible for overtime.

The Department estimates that this regulation will benefit up to 434,712 workers in Pennsylvania. 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 work week method.

Fiscal Impact

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

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

Specifically, the regulatory familiarization cost to the regulated community in Pennsylvania in FY 2022-2023 is \$1,958,418 (based on an average hourly wage of \$33.13 for a human resources specialist in Pennsylvania 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 Pennsylvania 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 Pennsylvania 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 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.

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 Pennsylvania and considering method of payment trends over the past two 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 Regulatory Analysis Form.

Reporting, Recordkeeping and Paperwork Requirements

This regulation will not require the creation of new forms. However, employers who institute a tip pooling arrangement will have to keep record of the employees who are part of the

tip pool and the dates and amounts of tips disbursed to these employees. These employers will have to make these records available to the Department upon request.

Sunset Date

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

Effective Date

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

Contact Person

Interested persons who require further information about this regulation may submit inquiries to Bryan M. Smolock, Director, Department of Labor & Industry, Bureau of Labor Law Compliance, 651 Boas Street, Harrisburg, Pennsylvania, 17121 or by electronic mail to 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 (November, 20, 2021), 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, on _____, 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 _____ and approved the final-form rulemaking.

Findings

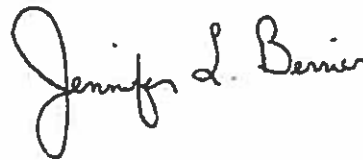
The Department finds that:

- (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), known 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 (November, 20, 2021).
- (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, 231.43, and adding §§ 231.101a, 231.111, 231.112, 231.113 and 231.114 to read as set forth in Annex A.
- (b) The Department shall submit this order, and Annex A to the Office of Attorney General 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) The regulations shall take effect 90 days after publication in the *Pennsylvania Bulletin*.



Jennifer L. Berrier
Secretary

Fiscal Note:

ANNEX A

TITLE 34. LABOR AND INDUSTRY

PART XII. BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231. MINIMUM WAGE

§ 231.1. Definitions.

* * * * *

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

* * * * *

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

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

***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, trimester 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 [\$30] \$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.

* * * * *

§ 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[, not in excess of 45% of the applicable statutory minimum wage until January 1, 1980 and thereafter 40% of the applicable statutory minimum wage]. The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week. An employee failing or refusing to report to the employer the amount of tips received in any workweek shall not be permitted to show that the tips received were less than the amount determined by the employer in the workweek.
- (4) Hours worked each workday in any occupation in which the tipped employee does not receive tips and total daily or weekly straight-time payment made by the employer for such hours.
- (5) Hours worked each workday in occupations in which the employee received tips and total daily or weekly straight-time earnings for the hours.
- (6) For employers who implement tip pools, the names and position of each participant in the tip pool and the amount distributed to each participant in the tip pool.

§ 231.43. Regular rate.

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

- (1) Sums paid as gifts, payments in the nature of gifts made [at Christmas time] during any holiday or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.
- (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause, reasonable payments for traveling expenses or other expenses incurred by an employee in the furtherance of ~~his~~ **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 ½ times the rate established in good faith for like work performed in nonovertime hours on other days.
- (7) Extra compensation provided by a premium rate paid to the employee in pursuance of an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday not exceeding 8 hours or workweek not exceeding the maximum workweek applicable to the employee under § 231.41 (relating to rate), where the premium rate is not less than 1 1/2 times the rate established in

good faith by the contract or agreement for like work performed during the workday or workweek.

- (b) If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if [he] the employee receives no other form of compensation for services, [his] the employee's regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. [He] The employee is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek.
- (c) No employer may be deemed to have violated these §§ 231.41—231.43 (relating to overtime pay) by employing an employee for a workweek in excess of the maximum workweek applicable to the employee under § 231.41 (relating to rate) if the employee is employed under a bona fide individual contract or under an agreement made as a result of collective bargaining by representatives of employees, if the duties of the employee necessitate substantially irregular hours of work. For example, where neither the employee nor the employer can either control or anticipate with a degree of certainty the number of hours the employee must work from week to week, where the duties of the employee necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours, or where the substantially irregular hours of work are not attributable to vacation periods, holidays, illness, failure of the employer to provide sufficient work, or other similar causes, and the contract or agreement:

- (1) Specifies a regular rate of pay of not less than the minimum hourly rate and compensation at not less than 1 1/2 times the rate for hours worked in excess of the maximum workweek.
 - (2) Provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.
- (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 ~~him~~ **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 ½ 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 RENUMERATION ~~determined by totaling all remuneration for employment to or on behalf of the employee received in a workweek except sums, payments, contributions, and compensation enumerated~~ UNDER subsection (a), divided by 40 hours.

~~§ 231.101. Minimum wage increase.~~

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

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

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

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

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

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

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

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

§ 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 PENNSYLVANIA MINIMUM WAGE CONTAINED IN SUBSECTION (a).
- (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.

- (a) ~~An employer may take a tip credit for any time in which an employee performs duties that do not directly generate tips if all of the following conditions are met:~~ THE USDOL STANDARDS FOR TIPPED EMPLOYEES AT 29 C.F.R. 531.56 (RELATING TO "MORE THAN \$30 A MONTH IN TIPS") IN EFFECT AS OF _____ [EDITOR NOTE: PLEASE ENTER THE DATE OF PUBLICATION OF THE FINAL-FORM RULEMAKING], ARE INCORPORATED BY REFERENCE WITH THE EXCEPTION OF SUBSECTION (F)(4)(ii).
- ~~(1) The employee spends at least 80% of the employee's workweek performing duties that directly generate tips.~~
 - ~~(2) The duties that do not directly generate tips support the duties that directly generate tips.~~
 - ~~(3) The employee spends less than 30 continuous minutes performing duties that do not directly generate tips.~~

- (b) ~~If an employer cannot take a tip credit under subsection (a), the employer shall pay the employee at least the minimum wage required by section 4 of the Act.~~

§231.112 Tip Pooling.

- (a) ~~An employer may establish a tip pooling arrangement amongst tipped employees.~~

THE USDOL STANDARDS FOR TIPPED EMPLOYEES AT 29 C.F.R. 531.54 (RELATING TO "TIP POOLING") IN EFFECT AS OF _____ [EDITOR NOTE: PLEASE ENTER THE DATE OF PUBLICATION OF THE FINAL-FORM RULEMAKING], ARE INCORPORATED BY REFERENCE.

- (b) ~~Tip pools may not include~~ 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.

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

(2) ~~Any employee who meets any part of the duties test outlined in 29 CFR 541.100(2) (1) (relating to the general rule for executive employees).~~

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

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

§ 231.113 Credit Card 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 PURSUANT TO A TIP POOLING ARRANGEMENT ALLOWED UNDER SECTION 231.112.**

§ 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.
- (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. ANY AMOUNT DISTRIBUTED TO EMPLOYEES MUST COUNT AS REMUNERATION IN ACCORDANCE WITH SECTION 231.43(a) OF THE ACT BUT MAY NOT COUNT AS A TIP IN ACCORDANCE WITH SECTION 231.1 OF THE ACT.

Comment and Response Document

I.	INSUFFICIENT PUBLIC COMMENT PERIOD.....	2
II.	NEED FOR LEGISLATIVE ACTION	3
III.	FEDERAL LITIGATION.....	4
IV.	EFFECT OF THE PANDEMIC	4
V.	GENERAL OPPOSITION TO TIPPED EMPLOYEE REGULATIONS	5
VI.	RAISING OF THE TIP THRESHOLD.....	6
VII.	TIP CREDIT FOR NON-TIPPED WORK.....	7
VIII.	TIP POOLING	10
IX.	CREDIT CARD AND OTHER PROCESSING FEES	14
X.	SERVICE CHARGES	17
XI.	REGULAR RATE	18
XII.	HOLIDAY PAY	22
XIII.	RECORDKEEPING AND TRACKING	22
XIV.	THE TIPPED MINIMUM WAGE	22
XV.	THE MINIMUM WAGE.....	24
XVI.	SALARY THRESHOLDS	25

I. INSUFFICIENT PUBLIC COMMENT PERIOD

a. Comment:

The National Federation of Independent Business, Pennsylvania Campground Owners Association, Pennsylvania Chamber of Business and Industry, Pennsylvania Food Merchants Association, Pennsylvania Licensed Beverage & Tavern Association, Pennsylvania Restaurant & Lodging Association, and Pennsylvania Retailers' Association commented that 30 days to submit a public comment on the proposed rulemaking was an insufficient amount of time to review and comment (1).

Department Response:

An extension of the public comment period was unnecessary because the Department conducted public outreach prior to proposing this rulemaking. In December 2020, the Department solicited input by email about the Minimum Wage Act regulations with a 60-day public comment period from a wide range of stakeholders. The Department then held meetings with several private stakeholder groups throughout the spring of 2021. Additionally, on July 22, 2021, the Governor's Office hosted three notification calls for members of the legislature, business associations, and workers' rights advocacy groups. During these notification calls, the Department reviewed the six components of the regulation and answered questions asked by stakeholders. Lastly, on Friday, November 19, 2021, in advance of the posting of this proposed regulation in the *Pennsylvania Bulletin* and before the opening of the public comment period, the Governor's Office sent an email notification to a wide range of stakeholders including members of the legislature, business associations, and workers' advocacy organizations informing them of the submission of the regulations to the Independent Regulatory Review Commission (IRRC) and the impending opening of the public comment period from November 20 - December 20, 2021.

Additionally, many of the concepts within this regulation have been in the public discourse among interested and affected parties for the past several years, including the United States Department of Labor's (USDOL) recent proposed and final rules on the 80/20 rule and tipped pooling under both the Trump and Biden Administrations. As such, a 30-day public comment period was sufficient for businesses to comment on the rulemaking.

b. Comment

The Pennsylvania Chamber of Business and Industry (Pa Chamber) issued another comment stating that 30 days was an insufficient period for affected groups to become aware of the proposed rules, consider their impact, and prepare and submit feedback. The Pa Chamber urged IRRC to rectify this situation (255).

Department Response

The Department provided sufficient time for the regulated community to become aware of and provide feedback on this regulation. This is evidenced by the fact that the Department received 273 comments on the Department's proposed rulemaking, many thoughtful and detailed and that represented both business and employee advocacy groups. Extending the public comment period would be unlikely to provide any additional meaningful feedback and could delay the solely needed protections for Pennsylvania's tipped employees and salaried employees.

c. Comment

The Columbia Montour Chamber of Commerce (CMCC) opined that the Department proposed its regulation during a busy time of year and provided insufficient time to comment (260).

Department Response

The Department provided sufficient time for the regulated community to become aware of and provide feedback on this regulation. This is evidenced by the fact that the Department received 273 comments on the Department's proposed rulemaking, many thoughtful and detailed and that represented both business and employee advocacy groups. Extending the public comment period would be unlikely to provide any additional meaningful feedback and could delay the solely needed protections for Pennsylvania's tipped employees and salaried employees.

II. NEED FOR LEGISLATIVE ACTION

a. Comment

The Pennsylvania Restaurant & Lodging Association (PRLA) and other commentators stated they were that confident that the General Assembly would be best suited to consider these changes and the most appropriate body to handle such substantive policy change. Going through the legislative process would allow for broader and more reliable input from stakeholders across the state. Pennsylvanians have relationships with their local legislators, and they look at their State Representatives and Senators to help navigate potential changes like the ones being considered on this subject (259).

Department Response

The General Assembly has granted the Department the authority to issue regulations regarding the regular rate and tipped employees. *See* 43 P.S. §§ 333.104 and 333.109. Moreover, the Regulatory Review Act provides the General Assembly an opportunity to disapprove a regulation if it does not believe the

regulation was within the Department's authority or the public interest. *See* 71 P.S. § 745.7(d).

III. FEDERAL LITIGATION

a. Comment

Littler Mendelson and the Pa Chamber commented that the Department should defer the final-form rulemaking pending the outcome of a federal challenge to regulations issued by USDOL. Like the Department, on October 29, 2021, USDOL published final-form regulations regarding the taking of a tipped credit for non-tip producing work. The Restaurant Law Center and the Texas Restaurant Association filed a lawsuit in the United States District Court for the Western District of Texas challenging the federal rule. *Restaurant Law Center, et al. v. United States Department of Labor, et al.*, Case 1:21-cv-01106 (W.D. Tex.). The lawsuit seeks to have the federal regulation enjoined and then vacated by the Court because it is arbitrary, capricious, and contrary to the FLSA. Littler Mendelson warns the Department's proposed regulation could be subject to the same challenge (252, 255).

Department Response

The Department has declined to wait to promulgate its regulations for the conclusion of the lawsuit for three reasons. First, the suit was filed on December 3, 2021, and there is no indication as to whether the lawsuit has any merit. Tipped workers in Pennsylvania deserve the protections offered by the Department's 80/20 regulation without having to wait years for the conclusion of a federal lawsuit that will not be binding on the Department, Pennsylvania employers and Pennsylvania courts. Second, "federal courts have nearly uniformly given deference to the 80/20 Rule". *Sicklesmith v. Hershey Entm't & Resorts Co.*, 440 F.Supp.3d 391, 403 (M.D. Pa. 2020). As such, the Department expects that USDOL's regulations will survive the federal challenge. Finally, the Department's regulation is materially different than USDOL's regulation. USDOL's regulation does not permit an employer to take a tip credit if an employee performs more than 30 consecutive minutes performing non-tip producing work. This is a new requirement that has not been tested in federal court. The Department's final-form regulation does not contain this requirement and, as such, the Department believes it can distinguish this regulation from any federal court decision striking down USDOL's 80/20 regulations.

IV. EFFECT OF THE PANDEMIC

a. Comment

The Pa Chamber stated that it has worked particularly closely with employers during the course of the pandemic. This challenging time has been especially

harmful to employers in the food service industry, many of whom were decimated by the pandemic and business shutdown orders, if not shut down entirely. This industry remains in a tenuous state and continues to face daunting challenges and higher costs to comply with regulations and help ensure workplace safety; in addition to labor shortages and supply chain disruptions that are compounding an historically difficult environment for restaurants, taverns and others in the food industry. The Pa Chamber expressed surprise that the Department would issue regulations that it claims could raise costs and create further disruption (255).

Department Response

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 pandemic. The purpose of the Act is to protect workers from unreasonably low wages. The 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 pool; 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 align its regulations to current federal regulations that employers already are required to follow. However, the pandemic does not nullify the Act's mandate to protect workers. That is what the Department's final-form regulation accomplishes; it protects hospitality workers from unreasonably low wages.

V. GENERAL OPPOSITION TO TIPPED EMPLOYEE REGULATIONS

a. Comment

Many commentators stated that the Department's proposed regulations on tipped workers are a direct example of the government trying to micro-manage business. Tipped employees are some of the hardest working individuals in Pennsylvania and do not support these changes. The commentators contended that in states where these changes have been proposed and even enacted, tipped workers have fought adamantly against them and continue to do so (189, 191, 262, 263).

Department Response

The Department did not receive a single comment from a tipped worker who opposed the proposed regulations governing tipped employees. In fact, the overwhelming number of comments were from tipped employees who supported the Department's proposed regulation. The Department is not aware of tipped employees in other states opposing their states' tipped regulations.

VI. RAISING OF THE TIP THRESHOLD

a. Comment

One commentator opined that raising the tip threshold to \$135 per month would reduce flexibility because it would limit the offering of part time hours (215).

Department Response

Unfortunately, the data the Department possesses is on full time employees so the Department cannot predict with any accuracy whether the Department's final-form rulemaking will result in fewer part-time workers in the hospitality industry. However, the final-form rulemaking does not limit employer's flexibility to offer part-time hours and, presumably, employers will continue to make decisions that are most advantageous for their business.

The purpose of the Act is to protect workers from unreasonably low wages and the lower tipped wage is an exception to the statutory minimum wage of \$7.25 per hour. It follows the Act's purpose to ensure that workers who receive the low tipped wage of \$2.83 per hour are truly tipped employees. The final-form rulemaking accomplishes this by raising the tipped employee threshold by the rate of inflation. It is within the public interest to protect tipped workers even if it means that employers will have to raise the base wage of some part-time employees to \$7.25 per hour.

b. Comment

Community Legal Services, Duquesne Law School Unemployment Compensation Clinic, Winebrake & Santillo, Lichten & Liss-Riordan, Keystone Research Center, Outten & Golden, LLP, Justice at Work, Pennsylvania AFL-CIO, National Employment Law Project, Women's Law Project, Raise the Wage PA! and ROC Pennsylvania (collectively known as CLS) filed a comment supporting the Department's proposal to raise the tipped minimum wage threshold to \$135 per month. However, CLS suggested an amendment to limit tips that count towards the threshold to those received directly from patrons. This would prohibit tips received under tip pooling arrangements from counting towards the tip threshold. The FLSA currently allows this practice (253).

Department Response

The Department appreciates the support for the tip threshold. The Department made no changes to its proposed regulation. The Department did not prohibit tips received under a tip pooling regulation from counting towards the tip threshold. This is consistent with federal regulations and, the Department does not see a

justification to prohibit any tip money received by an employee from counting towards the threshold.

c. Comment

ROC United expressed support for raising the tip threshold to reduce the number of workers who can be paid the lower tipped wages (254).

Department Response

The Department agrees that raising the employee tip threshold will reduce the number of workers who will be paid the lower tipped employee wage. While the Department cannot accurately estimate the number of employees who will benefit from raising the tipped employee threshold, the Department notes it last updated the \$30 tip threshold in 1977, 44 years ago when the minimum wage was \$2.30 per hour. When the \$30 tip threshold was last updated, a worker had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a worker in Pennsylvania must earn just over four times the minimum wage in tips before their employer can claim a tip credit.

d. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they praised that the regulations would limit employees who can be paid less than \$7.25 per hour to employees who earning a meaningful amount of tips per month, \$135 per month rather than \$30 per month (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

The Department agrees with this comment and its final-form regulation has kept its proposal of raising the monthly tip threshold to \$135 per month.

VII. TIP CREDIT FOR NON-TIPPED WORK

a. Comment

Littler Mendelson noted that while the Department's proposed regulation stated that it mirrored USDOL's 80/20 rule it was significantly more abbreviated than USDOL's rule and did not provide a definition or examples of duties that directly generate tips, duties that do not directly generate tips or work that is not part of the

tipped occupation. Littler noted that a court could then conclude that the Department did not mean to incorporate any of these provisions which would make the Department's regulation different than USDOL's regulation (252).

Response

The Department's final-form rulemaking has heeded this suggestion and has incorporated 29 U.S.C. § 531.56. This is USDOL's 80/20 regulation and includes definitions and examples of duties that directly generate tips, duties that do not directly generate tips or work that is not part of the tipped occupation. The only exception was the Department chose not to incorporate subsection (f)(4)(ii). This subsection contains USDOL's prohibition against employers from taking a tip credit if an employee works more than 30 consecutive minutes performing non-tip producing work. As such, there should not be any confusion for employers, employees and courts interpreting the Department's final-form regulation.

b. Comment

The Pa. Chamber opined that the Department should mirror USDOL's 80/20 regulation as one of the most common complaints cited by employers are workplace laws imposed by different levels of government that are similar in purpose but different in detail, leaving employers vulnerable to inadvertent violations when they are compliant at one level but mistakenly in violation at another level (255).

Department Response

The Department's final-form rulemaking has heeded this suggestion and has incorporated 29 U.S.C. § 531.56. This is USDOL's 80/20 regulation and includes definitions and examples of duties that directly generate tips, duties that do not directly generate tips or work that is not part of the tipped occupation. The only exception was the Department chose not to incorporate subsection (f)(4)(ii). This subsection contains USDOL's prohibition against employers from taking a tip credit if an employee works more than 30 consecutive minutes performing non-tip producing work. As such, there should not be any confusion for employers, employees and courts interpreting the Department's final-form regulation.

c. Comment

One commentator expressed concern that the proposed regulations were vague and could be arbitrarily enforced. In addition, he expressed concern that stating 80% of a tipped employee's workweek must be work that produces work. He felt this would make an employee's work shift too regimented (215).

Department Response

By adopting federal tip pooling regulations, the Department has rectified any vagueness that may have existed in the proposed regulations. Federal regulations contain more detailed language and examples of work that produces tips, work that does not produce tips and work that supports work that produces tips.

The Department notes that its regulation does not prohibit an employer from requiring employees to spend more than 20% of their workweek from performing work that does not produce tips. However, then the employer cannot take a tip credit. It remains within the employer's discretion to assign work.

d. Comment

CLS supports the Department's proposed regulation regarding the 80/20 rule and noted that federal courts in Commonwealth have regularly applied the 80/20 Rule under the Act for tipped employees alleging that they performed an impermissible amount of non-tip generating tasks or "sidework." *See, e.g., Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 538, 512 n.1 (E.D. Pa. 2019) ("Plaintiffs' claim that it violates the FLSA to take the tip credit for all the hours worked by Plaintiffs, when Plaintiffs spent or spend more than twenty percent of their working time performing untipped related duties, is legally cognizable" and noting that "[t]his opinion will only reference the FLSA, because any result reached under this statute applies equally to Plaintiffs' FLSA claims and Plaintiffs' Pennsylvania Minimum Wage Act claims.") (253).

Department Response

The Department appreciates CLS's support, and its final-form regulation continues to apply the 80/20 rule for determining when an employer may take a take credit for work that does not directly produce tips. The Department also notes that federal courts have recognized the 80/20 rule in Pennsylvania. The Department, however, did incorporate USDOL's 80/20 except for the provision prohibiting the employer from taking a tip credit for non-tip producing work if that work is performed for more than 30 consecutive minutes. The Department notes that prohibiting employers from taking a tip credit for more than 30 consecutive minutes is a new concept under federal law and would be too difficult for employers to track and the Department to enforce.

e. Comment

Many commentators opined that tipped workers should not have to endure hours of side work that does not result in earning tips without being paid a full wage (2-40, 42-54, 146-148, 171-181, 184, 214, 216-222, 226-230, 232-239, 245, 251, 256, 264-272).

Department Response

The Department agrees employers should not be able to take a tip credit for employees who are not tipped employees while at the same time recognizing that even tipped employees occasionally need to perform work that does not directly produce tips. The Department's final-form regulation balances these interests by stating that employers may only take a tip credit if an employee spends 80% of their workweek performing work that directly generates tips and if the remaining work supports work that directly generates tips.

f. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they praised limiting employees who can be paid less than the tipped wage to those who perform tipped duties most of time, at least 80% (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

The Department agrees with this comment and its final-form regulations continue to prohibit employers from taking a tipped credit unless an employee spends at least 80% of their workweek performing tipped work.

VIII. TIP POOLING

a. Comment

Littler Mendolson objected to the Department's proposed tip pooling regulation because it prohibited non-tipped employees from participating in tip pools when the employer does not take a tip credit. Littler Mendolson opined that this exceeded the Department's authority under the Act. At the minimum, Littler asked the Department to amend the final-form regulation to make it clear that employers may institute a tip pooling arrangement with back of the house employees when the employer pays everyone in the tipped pool the minimum wage (252).

Department Response

The Department disagrees that the Act limits its authority to prohibit tipped pooling with non-tipped employees even when the employer pays all of its employees the minimum wage. However, the Department made the decision incorporate 29 U.S.C. § 231.54, which is USDOL's regulation regarding tip pooling. As such, the Department's final-form rulemaking does allow employers to institute tip pools

with non-tipped employees as long as the employer pays everyone in the pool at least the minimum wage and provided that the tip pools exclude managers, supervisors and owners.

b. Comment

The CMCC opined that the Department's proposed regulation would exclude some employees from tip pooling, reduce those employees' wages and make it more difficult for employers to recruit for those positions. The commentator also stated that the proposed regulation is likely to harm more employees than help, as wages have risen in the industry based on workforce challenges. The CMCC noted that restaurant owners/managers they have spoken with are all paying more than \$7.25 per hour. (260).

Department Response

The Department made the decision to mirror USDOL's regulations regarding tip pooling. As such, the Department's final-form rulemaking does allow employers to institute tip pools with non-tipped employees as long as the employer pays everyone in the pool at least the minimum wage and provided that the tip pools exclude managers, supervisors and owners.

The purpose of the Act is to protect workers from unreasonably low wages. The Department's final-form rulemaking adheres to the Act's mandate by protecting tipped workers. This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. These affected tipped workers include both those who are paid at least \$7.25 per hour and tipped workers for whom their employers take a tip credit and who earn a tipped minimum wage of between \$2.83 and \$7.24 per hour. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a "bright line test" as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 back-of-the-house workers who do not customarily and regularly receive tips but who may be included in a non-traditional tip pool.

c. Comment

Pittsburgh Restaurant Workers Aid noted that strengthening clarifications regarding who can be considered a tipped employee and who can participate in a valid tip pool will help ensure that employees in our industry are being paid full wages for their work (41, 246).

Department Response

The Department agrees that having clear regulations regarding tip pools will ensure wages are paid full wages for their work. That is why the Department align its tip pooling regulations with federal regulations: to provide clarity to employees and protection to tipped employees.

d. Comment

CLS supports the Department's proposed regulation regarding tip pools, specifically the provisions excluding owners, supervisors and those who do not perform direct customer interaction. CLS also supported the Department's requirement that employers notify employees of tip pools (253).

Department Response

The Department's final-form regulation incorporates USDOL's tip pooling regulation. This regulation will continue to prohibit owners and supervisors from participating in tip pools. The Department, however, will permit employees who are not typically tipped employees to participate in tip pools if those employees do not customarily and regularly receive tips.

This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a bright line test as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a non-traditional tip pool.

The Department did keep the proposed notice requirement in the final-form regulation.

e. Comment

ROC United supported the Department's proposal to limit tip pools to workers who perform tip producing work. They opined that sharing tips with workers who do not perform tip producing work would erode the wages of tipped workers (254).

Department Response

The Department carefully considered all positions on this issue and made the decision to align with federal tip pooling regulations. This final-form regulation will continue to prohibit owners and supervisors from participating in tip pools. The Department, however, will permit employees who are not typically tipped employees to participate in tip pools if those employees do not customarily and regularly receive tips.

This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a bright line test as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a non-traditional tip pool.

f. Comment

One commentator stated that employers should not take tips from tipped employees to supplement the wages of low paid back of the house restaurant workers (183).

Department Response

After careful consideration, the Department amended its proposal and will allow employers to allow for tip pools between tipped and non-tipped employees but only if the employer pays everyone in that pool at least the minimum wage. This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a bright line test as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a non-traditional tip pool.

g. Comment

One commentator noted that he had personally seen tip pools with tipped and non-tipped employees work well to build employee morale (215).

Department Response

The Department's final-form rulemaking changed its proposal and now permits tip pools with non-tipped employees as long as the employer pays every pool participant at least the minimum wage and as long as the tip pool does not include supervisors, managers or owners. The Department cannot project whether this will boost employee morale.

h. Comment

A few commentators noted that they work in the back of the house in a restaurant and do not receive tips. They informed the Department that the hourly wage they are paid is insufficient to buy enough food for their families (246, 248, 250).

Department Response

These commentators were all paid at least the statutory minimum wage, but none made more than \$12.00 per hour. The Department has consistently supported efforts to amend the Act to raise the minimum wage to provide a living wage to all Pennsylvanians. However, this final-form regulation will permit employers to institute tip pools to share tips between front of the house servers and back of the house kitchen staff. This final-form regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips and clarify that they are not required to surrender tips to managers or supervisors when it is not possible to attribute the service provided directly and solely to the manager or supervisor. Additionally, this final-form regulation will benefit employers who employ tipped workers as it provides clear and consistent guidance as to how and when tip pools may be established. This final-form regulation will also benefit approximately 47,250 food service managers and supervisors by providing a bright line test as to when they may keep tips received from a customer for services they directly and solely provide. Lastly, this final-form regulation may benefit approximately 160,750 workers who do not customarily and regularly receive tips but may be included in a non-traditional tip pool.

IX. CREDIT CARD AND OTHER PROCESSING FEES

a. Comment

Littler Mendelson stated that the Department's proposed regulation prohibiting employers from deducting credit card fees violates the Act in that the Department

may only prohibit this practice if the employer does not take a tip credit. Littler urges the Department to omit its proposal or, at the very least, amend its regulations to provide that the Department may only prohibit the deduction of credit card processing fees for employers who take tips (252).

Department Response

The Department's final-form regulation continues to prohibit employers from deducting credit card processing fees. Unlike with the FLSA, the Act provides that gratuities are the property of the employee. This evidences a desire of the General Assembly to provide greater protection to tipped employees than is found under the FLSA. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa.C.S. § 1921(a). The General Assembly clearly evidenced its intention in Section 1 of the Act when it provided, "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 employees employed therein and of the public interest of the community at large." 43 P.S. § 333.101. As such, the Department is interpreting the language requiring tips to remain the property of the employee to prohibit the deduction of credit card processing fees because this interpretation is in accordance with the purpose of the Act.

Moreover, the Department notes all the legislative comments supported the concept that the Act prohibits employers from deducting credit card processing fees.

b. Comment

One commentator stated that credit card transactions have grown greatly in the last 20 years and have become a substantial cost to restaurants. The commentator warned that if operators can no longer off set the credit card fees it might force them to no longer take credit cards (169).

Department Response

Section 3 of the Act, 43 P.S. § 333.103, states that gratuities are the property of the employee. This comment demonstrates the need for the Department's final-form regulation to clarify that the Act prohibits employers from deducting credit card and other processing fees from tips. Employers have the discretion to no longer take credit cards if they do not wish to pay the processing fees. However, the Department does not believe that most employers will forego the benefits of taking credit cards because they cannot deduct processing fees from tips.

c. Comment

Pittsburgh Restaurant Workers Aid opined that some restaurant owners have taken advantage of legal loopholes such as deducting credit card fees from tips (41, 246).

Department Response

The Department's final-form regulation makes it clear that employers cannot deduct credit card and other processing fees from employee tips.

d. Comment

CLS supported the Department's proposed regulation prohibiting employers from deducting credit card processing fees from employee tips as this regulation was consistent with the Act's requirement that tips are the property of the employee. *See* 43 P.S. § 333.103 (253).

Department Response

The Department agrees with CLS, and its final-form regulation continues to prohibit employers from deducting credit card processing fees. The Department clarified and strengthened this regulation by also prohibiting other processing fees and by clarify that employers cannot deduct credit card fees even for employees who participate in tip pools.

e. Comment

ROC United expressed support for prohibiting employers from deducting credit card fees from employee tips because it would erode wages for tipped workers (254).

Department Response

The Department agrees that the deduction of credit card and other processing fees erode wages for tipped workers and such a deduction is in opposition of the Act's mandate that tips are the property of the employee. *See* 43 P.S. § 333.103.

f. Comment

Many commentators agree with the Department's proposal to prohibit employers from deducting credit card processing fees from tips (2-40, 42-54, 146-148, 171-181, 184, 214, 216-222, 226-230, 232-239, 245, 251, 256, 264-272).

Department Response

The Department agrees that the deduction of credit card fees contradicts section 3 of the Act, 43 P.S. § 333.103, which provides that tips are the property of the employee. To prevent any confusion over whether this practice is permitted, the

Department has kept this proposal in its final-form regulation and strengthened it by also prohibiting the deduction of other processing fees.

g. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they praised prohibiting the payment of credit card fees with tips (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

The Department agrees with this comment and its final-form regulations strengthened protections for workers by also prohibiting the deduction of other processing fees.

h. Comment

One commentator objected to the fact that credit card companies can charge processing fees (215).

Department Response

The Department does not have the authority to prohibit credit card companies from charging credit card processing fees.

X. SERVICE CHARGES

a. Comment

Pittsburgh Restaurant Workers Aid opined that requiring employers to inform patrons that service charges are not tips will better protect the incomes that tipped employees have to rely on (41, 246).

Department Response

The Department's final-form rulemaking retained the requirement that employers who charge service fees for administration of a banquet, special function, or package deal shall notify patrons of this charge.

b. Comment

CLS supported the Department's proposed service fee regulation because it would prevent any potential confusion on the part of the patron as to how much the employees providing services will actually receive in tips.

Department Response

The Department agrees with CLS's comment, and its final-form regulation did not amend the proposed language for service charges.

c. Comment

Many commentators opined that employers must be doing their due diligence of informing their customers that the services fees that are included on certain bills are not actually tips being paid to their employees (2-40, 42-54, 146-148, 171-181, 184, 214, 216-222, 226-230, 232-239, 245, 251, 256, 264-272).

Department Response

The Department agreed that, to protect tipped employees, employers who charge service charges must notify customers if service charges are different than tips. As such, the Department kept the proposed language and employers who charge service charges will be required to notify customers that service charges are not tips.

c. Comment

One commentator noted that his business charges a 20% service charge for large groups to ensure that employees receive proper wages (215).

Department Response

The Department's final-form rulemaking does not prohibit this practice. The Department merely requires employers who charge service fees to provide information on the service charge so customers know whether they are tips. Employers, however, are free to remit service charges to employees. If employers choose to distribute service charges to employees, employers cannot count those sums as tips; they can count those sums to fulfill the employer's obligation to pay employees the minimum wage or overtime.

XI. REGULAR RATE

a. Comment

Littler Mendelson had two objections to the Department's proposed regulation regarding the regular rate. First, Littler opined the Department's regulation leaves the regulated community unsure how to calculate overtime on commissions or other incentive compensation paid to non-salaried employees. Second, Littler claimed Pennsylvania's regulation would impose an unprecedented burden on Pennsylvania employers because it would include variable incentive pay to include as part of all remuneration to divide by 40 (252).

Department Response

The Department clarified in its preamble that the proposed subsection 231.43(g) only applied to salaried employees. Under the Department's current regulations at 231.43, "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." This same section then outlines seven exceptions. This definition of regular rate applies to salaried employees, as well as all other employees. Thus, the Department rejects the argument that its regulation is confusing for employers with regards to incentive pay as this regulation does not change how employers should treat sums earned under incentive plans. However, to the extent it was confusing, the Department amended the proposed regulation to clarify that remuneration shall include all sums less the seven exceptions outlined in 34 Pa. Code § 231.43(a).

Second, the Department has declined to adopt a regulation for salaried employees whereas flat sums are divided by 40 and variable incentive pay is divided by the hours worked. The Department rejects this because using two different methodologies to calculate overtime pay for salaried employees who receive incentive pay will be confusing for employers and will be difficult to enforce. Moreover, it would treat salaried employees differently than employees who are paid hourly, monthly or by piece rate. For these employees, the regular rate is determining by totaling *all* remuneration even remuneration earned pursuant to a variable incentive plan. The Department does not see a need to change this rule.

b. Comment

The Pa Chamber urges L&I to adopt the federal model of the Fluctuating Workweek (FWW). According to the Pa Chamber, the FWW has allowed employers and certain nonexempt employees to agree on a compensation plan that provides the employee with the certainty and flexibility of earning a salary and provides the employer flexibility for complying with overtime requirements. The Pa Chamber also urged the Department to adopt a regulation adopting a rule that variable earnings are compensation for all hours worked (255).

Department Response

The Department's final-form regulation do not allow for a fluctuating work week calculation 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 MWA and the obligation of the Department. The Department notes that employers have a range of options—from paying workers regular overtime to hiring more employees to eliminate the need for overtime—to mitigate any increase in overtime costs.

The Department rejects the Pa. Chamber’s suggestion to adopt a rule regarding variable earnings because using two different methodologies to calculate overtime pay for salaried employees who receive incentive pay will be confusing for employers and will be difficult to enforce. Moreover, it would treat salaried employees differently than employees who are paid hourly, monthly or by piece rate. For these employees, the regular rate is determining by totaling *all* remuneration even remuneration earned pursuant to a variable incentive plan. The Department does not see a need to change this rule.

c. Comment

A few commentators stated that prohibiting a fluctuating work week calculation would limit flexibility during an ongoing labor shortage (189, 191, 262, 263).

Department Response

The Department’s regulation will not reduce the competitiveness of Pennsylvania in comparison to other states given that employers have a range of options—from paying workers regular overtime to hiring more employees to eliminate the need for overtime—to mitigate any increase in overtime costs. The Department’s final-form regulation do not allow for a fluctuating work week calculation 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 MWA and the obligation of the Department.

d. Comment

One commentator who had experience working as a salaried employee and who pays employee salaries believes there should be flexibility with salaried employees. The commentator believes salaried employees should be expected to work some overtime but not over 55 hours per week without extra compensation. The commentator provides his employees with compensable time for hours worked over 45. He suggested overtime for hours worked over 50 hours per week (190).

Department Response

The Act provides, “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.” 43 P.S. § 333.104(c). As such, the Act requires pay for overtime for hours in excess

of forty hours in a workweek. Moreover, the Department's regulations prohibit the use of compensatory time in lieu of overtime. 34 Pa. Code § 231.42. As such, non-exempt salaried employees are entitled to overtime for hours worked over 40.

e. Comment

CLS issued a comment supporting the Department's proposed regulation regarding regular rate as it rejected the fluctuating work week method of calculating overtime for salaried employees and provided a clear methodology for calculating overtime for salaried employees (253).

Department Response

The Department thanks CLS for its comment and recognizes the need to provide clear guidance to employers and to protect the wages of salaried workers. As such, the Department final-form regulation continues to require the regular rate for salaried employees by taking remuneration and dividing it by 40. The Department estimates approximately 27,427 Pennsylvanians are paid using the fluctuating work week method and will benefit from this final-form regulation.

f. Comment

ROC United supported the Department's proposed regulation regarding the regular rate for salaried employees stating they would deliver "basis fairness" to salaried employees eligible for overtime (254).

Department Response

The Department agrees that calculating the regular rate for salaried employees by totally all remuneration and then dividing it by 40 is accordance with the Act's mandate to protect workers from the evils of unreasonably low wages. The Department estimates approximately 27,427 Pennsylvanians are paid using the fluctuating work week method and will benefit from this final-form regulation.

g. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they praised the Department's proposal for delivering basic fairness to lower-paid, salaried employees entitled to overtime by paying their overtime based on their pay averaged over a 40-hour work week (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

The Department agrees with this comment and its final-form regulation continue to set the regular rate by dividing remuneration by 40 hours. The final-form regulation is consistent with the Act's purpose because it would result in more overtime pay for employees and, as such, be consistent with the Act's remedial purpose of protecting workers from unreasonably low wages.

XII. HOLIDAY PAY

a. Comment

Littler Mendolson commented that in the preamble to the Department's proposed regulation that holiday pay counted toward the calculation of the regular rate. Littler asked for a clarification (252).

Department Response

The Department concedes that the Preamble to the proposed regulation was in error. The Department's final-form regulation excludes holiday pay from the calculation of the regular rate unless that pay is dependent on hours worked, production or efficiency.

XIII. RECORDKEEPING AND TRACKING

a. Comment

The CMCC opined that the Department's proposed regulation would create significant additional tracking and reporting requirements for employers, much of which is impractical and does not account for the need for employees to be flexible in their job duties based on day-to-day fluctuations in customer volume and other business factors (260).

Department Response

The only new recordkeeping requirement is record keeping as it relates to tip pools. Presumably employers will already be keeping these records to comply with USDOL's tip pool regulation. Employers who take a tip credit are already required to maintain records of their employees' tips to ensure they comply with the MWA and FLSA. As such, the Department's regulation is not burdensome on employers.

XIV. THE TIPPED MINIMUM WAGE

a. Comment

ROC United opinion that Pennsylvania should eliminate the tipped minimum wage as their research, published in the Federal Reserve System's Investing in America's Workforce initiative, shows that higher wages with no subminimum tipped wage are better for workers and lead to higher industry growth, and reduce race and gender inequity. Any regulation that might bring restaurant workers in Pennsylvania closer to parity with higher wage states will benefit both workers and employers (254).

Department Response

The Department agrees that the elimination of the tipped minimum wage would result in higher wages for tipped workers. However, this rate is set by Section 3 of the Act, 43 P.S. § 333.103 and the Department is without authority to raise or eliminate the tipped wage. The Department has promulgated this final-form rulemaking to protect the wages of tipped employees.

b. Comment

Many commentators noted that it was unfortunately legal for employers to pay workers as little as \$2.83 per hour (2-40, 42-54, 146-148, 171-181, 184, 214, 216-222, 226-230, 232-239, 245, 251, 256, 264-272).

Department Response

The Department agrees that it is unfortunate that employers can pay tipped employees as little as \$2.83 per hour. However, this rate is set by Section 3 of the Act, 43 P.S. § 333.103 and the Department is without authority to raise or eliminate the tipped wage. The Department has promulgated this final-form rulemaking to protect the wages of these low-paid employees.

c. Comment

One commentator noted that she taught school for 25 years and waitressed for 29 years. She stated that servers worked as hard as factory workers yet could barely count on a paycheck of a couple of dollars for hours. Tips were compensation for hustling and pounding the floors. These workers are amongst the most vulnerable (55).

Department Response

The Department recognizes that many tipped employees are paid low wages. The purpose of the final-form rulemaking is to protect these workers from unreasonably low wages.

d. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they recommended the elimination of the tipped minimum wage (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

Elimination of the lower tipped base rate would fulfill the Act's purpose because it would result in higher wages for employees. However, this would require the General Assembly to pass legislation amending the Act.

e. Comment

One commentator stated it was barbaric that servers have to depend on customers leaving tips. The commentator expressed support for the proposed rulemaking but opined that the central issue was that servers deserve real wages (182).

Department Response

Elimination of the lower tipped base rate would fulfill the Act's purpose because it would result in higher wages for employees. However, this would require the General Assembly to pass legislation amending the Act.

f. Comment

The PRLA praised the Department for recognizing the validity of the tipped wage (259).

Department Response

The Act permits employers to pay a lower wage to tipped employees and the Department has issued this final-form rulemaking in light of that unfortunate reality. The Department continues to support efforts to eliminate the Act's allowance of the lower hourly base rate for tipped employees.

XV. THE MINIMUM WAGE

a. Comment

Pittsburgh Restaurant Workers Aid opines that broader changes including increasing the minimum wage to a livable wage for all workers in Pennsylvania regardless of whether they earn tips (41, 246).

Department Response

The Department agrees that raising the minimum wage to a livable wage is long overdue and has repeatedly supposed bills that would raise the wage. However, the Department is without authority to raise the minimum wage. Only the General Assembly can pass legislation to raise the minimum wage.

b. Comment

A few commentators have stated that they make \$10.00 per hour and that is insufficient wages to support a family. The request the Department to support proposals to raise the minimum wage (247-250).

Department Response

The Department agrees that raising the minimum wage to a livable wage is long overdue and has repeatedly supported bills that would raise the wage. However, the Department is without authority to raise the minimum wage. Only the General Assembly can pass legislation to raise the minimum wage.

XVI. SALARY THRESHOLDS

a. Comment

Many commentators stated that Pennsylvania employees should be fairly compensated for their work, and the regulations they work under should be up to date, not based on wage levels from a half a century ago. The proposed changes and clarifications would help achieve these goals by modernizing regulations governing tipped workers, increasing workers' earnings, and ensuring that tips for those who work primarily as tipped workers are not unfairly siphoned off by businesses and managers. Specifically, they asked the Department to restore the threshold for salaried employees (56-145, 149-168, 170-188, 192-213, 223-225, 231, 240-244, 258, 273).

Department Response

The Department appreciates this comment. On October 3, 2020, the Department published regulations which raise the thresholds for employees who are exempt from overtime pursuant to the executive, administrative or professional exemptions (50 Pa.B. 5459). On July 9, 2021, these regulations were abrogated. 71 P.S. § 575.1. The Department cannot address this issue in the final-form rulemaking

because it would be outside the purpose of the proposed rulemaking. The Department continues to study this issue and may act in the future.

ID	Name	Affiliation	Address
1	National Federation of Independent Businesses, Pennsylvania Camp Owners Association, Pennsylvania Chamber of Business and Industry, Pennsylvania Food Merchants Association, Pennsylvania Licensed Beverage & Tavern Association, Pennsylvania Restaurant & Lodging Association, Pennsylvania Retailers Association		417 Walnut St Harrisburg PA 17101
2	Francis Hoenigswald	fhoenigswald@gmail.com	4625 Pine St Apt F505 Philadelphia PA 19143
3	Geri Collecchia	gericollect@aol.com	360 E South Water St, Apt 518 Chicago IL 60601-4117
4	Clifford Johnston	clijo77@gmail.com	3147 Grahamom Rd Morrisdale PA 16858-7833
5	Edward Thomson	ert@sas.upenn.edu	7 Swarthmore Pl Swarthmore PA 19081
6	Daniel Safer	saferdan@hotmail.com	3305 Hamilton St Philadelphia PA 19104
7	Joe Glaston	vidiot49@yahoo.com	16400 Bubbling Wells Rd Hot Springs CA 92240
8	Ed Leidy	b450772ejl@gmail.com	833 E Main St Trlr 12 Ephrata PA 17552
9	Dawn Albanese	dawnie_angel@hotmail.com	156 Basswood Dr Grove Village IL 60007
10	Char Esser	314CJE@gmail.com	505 Van Lears Run Villanova PA 19085
11	Carolyn Cooper	Cooperlasalle@aol.com	7175 N Uber St Philadelphia PA 19138
12	John Nickey	jnickey@centurylink.net	178 Saint Michaels Way Hanover PA 17331
13	John Nickey	jnickey@outlook.com	178 Saint Michaels Way Hanover PA 17331
14	E Worthington	kworthing@aol.com	10299 Lindale Ave Greencastle PA 17225
15	Susan Babbitt	philad49@att.net	319 S 10th St Philadelphia PA 19107
16	William Gordon	wcharlesgo@verizon.net	226 Sharon Ave Fl 1 Collingdale PA 19023
17	Matthew Tarlpey	matthewtarlpey@msn.com	PO Box 818 McDonough GA 30253
18	Robert Janusko	janusko@rcn.com	1329 Eaton Ave Bethlehem PA 18018
19	Charles Valenza	chuckyv5000@yahoo.com	19 Mary Fran Dr West Chester PA 19382
20	George Stradman	gstradman@juno.com	700 Elkins Ave Apt 83 Elkins Park PA 19027
21	Paul Palla	paulpalla69@yahoo.com	45 N Carlisle St Greencastle PA 17225
22	Michael Lombardi	mike.lombardi@rcn.com	19 Morning Glory Lane Levittown PA 19054
23	Sarah Reese	sreeseuse@gmail.com	68 Old Pioneer Rd Camp Hill PA 17011
24	Cindy Dutka	mdmsass@aol.com	6547 Haverford Ave Apt 4 Philadelphia PA 19151
25	Peter Gunther	avengethecathars@juno.com	5628 Spaulding Ave Chicago IL 60659
26	Doug Herren	dougherren@me.com	2132 N Hancock St Philadelphia PA 19122
27	Hugh Tague	hvtague@yahoo.com	2162 Schultz Rd Lansdale PA 19446
28	Charles Clarke	chclkg@gmail.com	1999 Ridge Ave Apt 408 Philadelphia PA 19121
29	Jennifer Ivers	jivers27@yahoo.com	15 Rose St Forty Fort PA 18704
30	Margo Wyse	bodica6086@yahoo.com	110 El Otro Rd Mimbres NM 88049
31	Eileen Junc	eileenjunc@att.net	511 Adams St Raleigh NC 27605
32	Daniel Aunsht	dan1955@windstream.net	36 Dans Lane Watertown PA 17777
33	Stacey Marchig	hoodmarchig@yahoo.com	2321 Ferncroft Cir Upper Chichester PA 19601
34	Darrin Woodruff	Darrin.Woodruff@metro.com	
35	Craig O'Brien	alberto_terry@yahoo.com	3421 W Chester Pike Newtown Square PA 19073
36	Daniel Dayton	danieldayton19020@yahoo.com	2151 Brown Ave Bensalem PA 19020
37	Kyle Mauthe	kylequinn32@gmail.com	224 W Cooper St Slippery Rock PA 16057
38	Karey David	karey.hagner@yahoo.com	PO Box 6 Leckrone PA 15454
39	Kate Skolnick	krs1123@gmail.com	545 Washington Ave Apt 704 Brooklyn NY 11238
40	Barbara Gilhousen	bjgilhousen@windstream.net	620 Lenwood Rd Summerville PA 15864
41	Larisa Mednis	larisa@pghrwa.org	4418 Woolslayer Way Pittsburgh PA 15224
42	Sylvia Brown	bastet11191967@yahoo.com	1115 Grosvenor Rd Grass Lake MI 49240
43	Denise Lytle	centaureas6@live.com	3207 Plaza Drive Woodbridge NJ 7095
44	Helene Rosen	hrosen80@hotmail.com	92 Grandview Dr Warminster PA 18974
45	Jean Bails	swimbails@aol.com	21221 Thiele Ct Saint Clair Shores MI 48081
46	Sarah Payo	spayo5403@gmail.com	Whitney St Pittsburgh PA 15213
47	Ilse Sakheim	G.SAKHEIM@VERIZON.NET	1614 Foulkeways Gwynedd PA 19436
48	Sue E	egerts058@gmail.com	1918 E 22nd St Cheyenne WY 82001
49	Harold Watson	watsonh1956@gmail.com	2223 W Farm Rd 98 Springfield MO 65803
50	Mike Wiener	gr8brclaw@verizon.net	1150 Delene Rd Jenkintown PA 19046
51	K Danowski	silver_kd@yahoo.com	668 Artvue Dr Pittsburgh PA 15243
52	C Casey	omni_girl@hotmail.com	9317 Guenevere Pl Mechanicsville VA 23116
53	Ann Pehle	apehle@outlook.com	71 Presidents Dr Mechanicsburg PA 17050
54	Elizabeth Moore	bfly2@bflies.org	1935 Pennerton St Philadelphia PA 19146
55	Judi Whitesell	judiwhitesell@icloud.com	
56	William Conklin	bill.conk13@gmail.com	410 Washington St Susquehanna PA 18847
57	Stephanie Gregor	slgregor333@gmail.com	63 N Schuylkill Ave Leesport PA 19533
58	Lisa Ditalia	lzditalia@gmail.com	536 E Locust Ave Bethlehem PA 18018
59	Shannon Van Wert	slynkefox@hotmail.com	1853 S Church Allentown PA 18104
60	Carol Duncan	carol.duncan8031@gmail.com	503 W Springer St Philadelphia PA 19119
61	Maria Norella	norella.maria@gmail.com	24 Old Gravity Rd Carbondale PA 18407
62	Florence Buckley	twinself@aol.com	421 Earham Terrace Philadelphia PA 19144
63	Lucille Snayberger	dollysnay@gmail.com	46 Walnut St Apt 6 Mifflinburg PA 17844
64	Bruce MacCullough	bmaccullough@gmail.com	727 Valley Green Court Philadelphia PA 19128
65	Natalie Ramos	naturally0723@gmail.com	127 Marshall Ave Johnstown PA 15905
66	Ahmad Mitchell	asmitchell001@gmail.com	1324 Kings Place Philadelphia PA 19122
67	Laura Horowitz	l2newmoons@gmail.com	6544 Darlington Rd Pittsburgh PA 15217

68	Tashia James	tashiajames7@gmail.com	724 Rowe Lane Harrisburg PA 17112
69	Dan Rauscher	rausch173@gmail.com	346 Elucid Ave Ambler PA 19002
70	Terry Brown	tbalex5006@gmail.com	5006 New Falls Rd Levittown PA 19056
71	David Way	way_david_m@yahoo.com	2315 Romig Rd Pottstown PA 19464
72	Kareema Brown	kareemabrown2@gmail.com	223 Lardner Philadelphia PA 19111
73	M Dugan	mdugan1952@gmail.com	222 Maypole Rd Upper Darby PA 19082
74	Daniel Safer	saferdan@hotmail.com	3305 Hamilton St Philadelphia PA 19104
75	Karen Stickney	kstick35@gmail.com	27 Barn St 1 Lewistown ME 4240
76	Kathleen Rueppel	k_rueppel@hotmail.com	515 MacArthur St McKees Rocks PA 15136
77	Greta Englund	gmerhe@gmail.com	374 Lake Meade Dr East Berlin PA 17316
78	Joseph Josefowski	josephjosefowski@gmail.com	Marion St Aliquippa PA 15001
79	Katherine Gulick	kdgulick@gmail.com	1601 Spring Garden St Apt G107 Philadelphia PA 19130
80	Barbara Langan	barbaralangan@hotmail.com	16051 Greenwood Rd Huntington PA 16652
81	John Six	jon6er@gmail.com	21 W High St Middletown PA 17057
82	Leo Kucewicz	j14lion@gmail.com	201 Black Walnut Dr Phoenixville PA 19460
83	Barbara Turner	bturn@hotmail.com	339 Knob Rd Brownsville PA 15417
84	Wolfe Fang	wolfe_fang910@gmail.com	930 Grove St Wilhamsport PA 17701
85	Karen Schmererhorn	facfedkrs@aol.com	2011 Moravian St Philadelphia PA 19103
86	Resident	g49hop@gmail.com	49 W Oaklane Ave Doylestown PA 18901
87	John Margerum	jmargerum1@gmail.com	3232 W Penn St Philadelphia PA 19129
88	Timothy Dunleavy	duntim77@yahoo.com	537 Cricklewood Dr State College PA 16803
89	Dennis Keller	dakell318@gmail.com	1429 Old Reliance Rd Middletown PA 17057
90	Joann Spitek	joannspitek@gmail.com	695 High St California PA 15419
91	Nick Hammer	hydnick@gmail.com	10 Treasure Lake DuBois PA 15801
92	Robert Wetherington	robwetherington@gmail.com	1900 E Harold St Philadelphia PA 19125
93	Robin Greene-Toler	rgreenetoler2014@gmail.com	904 Mountainview Dr Wayne PA 19087
94	Brian Murray	brianmurray72@gmail.com	1133 Annin St Philadelphia PA 19147
95	Shannon Telenko	Telenko@gmail.com	230 S Gill St State College PA 16801
96	Sage Freeman	sage_ssf@gmail.com	1719 Penn St Harrisburg PA 17102
97	Bill Schill	wild_bill_schill@gmail.com	1502 Chelton Ave Pittsburgh PA 15226
98	Linda Meyers	horsefarm85@gmail.com	9075 Playhouse Rd Petersburg PA 16669
99	Alisa Appgar	alisa_apgar@gmail.com	2202 Kater St Philadelphia PA 19146
100	Janny Sterrett	jannysterrett@gmail.com	157 Kendal Dr Kennett Square PA 19348
101	Randall Tenor	tenor3@verizon.net	410 Center Pointe Dr Apt 103 Mechanicsburg PA 17050
102	Diane DiFante	dvelmad505@gmail.com	193 Wildwoods Lane West Decatur PA 16878
103	Chris Squire	csquire1003@hotmail.com	Chris Squire Pittsburgh PA 15209
104	Nicole O'Hara	nicoleohara@gmail.com	1845 Augusta Dr Jamison PA 18929
105	Cristina Codario	cristina_laipple@gmail.com	5218 Duncan St Pittsburgh PA 15201
106	Resident	dg2503044@gmail.com	5307 Lena St Philadelphia PA 19144
107	Boris Dirmbach	bdirmbac@gmail.com	6350 Lancaster Ave Philadelphia PA 19151
108	Joe Bitzer	jobitzer88th@gmail.com	607 Keswick Ct Mechanicsburg PA 17055
109	JB Yoder	jbyoder77@gmail.com	2248 Hilltop Rd Manheim PA 17545
110	John Cooper	jcooper@bucknell.edu	36 N 7th St Lewisburg PA 17837
111	James Keenan	jimkeenan48@icloud.com	108 Madison Rd Lansdowne PA 19050
112	Barbara Curtus	barbc647@gmail.com	2 Franklin Town Blvd, Apt 1712 Philadelphia PA 19103
113	James Swenson	jrsawenson@prodigy.net	308H Vairo Blvd State College PA 16803
114	Ronald Hobbs	rhobbs1949@gmail.com	10124 4th St Highland IN 46322
115	Glenn Gawinowicz	glenn@gawinowicz.com	806 Hunters Lane Orelan PA 19075
116	Albert Ruminski	stulldagoneit@yahoo.com	705 Citadel Dr Monroeville PA 15146
117	Susan Thornton	srt920@aol.com	3009 Poplar St Philadelphia PA 19130
118	Janet Milstead	jemagain@hotmail.com	7289 N Sentinel Lane York PA 17403
119	Doug Ross	dougross1964@gmail.com	914 Old Lancaster Rd Bryn Mawr PA 19010
120	David Clowney	davidclowney65@gmail.com	235 West Hortter St Philadelphia PA 19119
121	Jack Roberts	ragume_willi@hotmail.com	307 W Grant St Lancaster PA 17603
122	Helene Rosen	hrosen80@hotmail.com	92 Grandview Dr Ivyland PA 18974
123	Laura Fake	lfake456@gmail.com	443 W Hight St Womelsford PA 19567
124	Susan Worrell	Rev_s_worrell@gmail.com	406 Columbine Dr Kennett Square PA 19348
125	Frances Campo	fran_campo1@gmail.com	1028 Lawrence Rd Lawrenceville NJ 8648
126	Christopher Lilienthal	clilienthal@psea.org	240 Indian Creek Dr Mechanicsburg PA 17050
127	Richard Tregidgo	norslope@gmail.com	1146 Sunnyside Dr Holtwood PA 17532
128	Nancy Kleinberg	nancykleinberg1@gmail.com	506 Conshohocken State Rd Narbeth PA 19072
129	William Haegele	terrabil19@gmail.com	13032 Townsend Rd Philadelphia PA 19154
130	Thom Fister	tfister@gmx.com	620 S Bergen St Bethlehem PA 18015
131	Rick Kearns	ricardokearns@gmail.com	3022 N Fifth St Harrisburg PA 17110
132	Margery Race	mraceop@gmail.com	6008 Club Terrace Austin TX 78741
133	Barbara Bui	barbbui260@gmail.com	260 Arch St Carlisle PA 17013
134	Laura White	laura_jamie@gmail.com	9892 Old Hawn Rd Huntington PA 16652
135	J White	jwhite@smart-union.org	1110 Hecks Dr Dauphin PA 17018
136	Cheryl Muller	cjmuller1230@gmail.com	406 Jennifer Dr Dresher PA 19025
137	Donna Pancari	donna Pancari@gmail.com	403 Queen St Philadelphia PA 19147
138	Cheri Velto	cvelto@gmail.com	318 Wilson Rd Clinton PA 15026
139	Kathryn Stevens	kcarrollstevens@gmail.com	52 Garetta St Pittsburgh PA 15217
140	Mark White	saabson@yahoo.com	845 Lovington Dr Pittsburgh PA 15216
141	Joseph Gregorio	joseph_gregorio@gmail.com	1105 Timberland Dr West Chester PA 19380
142	Resident	dianesosgood@yahoo.com	803 Hedge St Hollidaysburg PA 16648
143	Marlene Piasecki	mpias@aol.com	110 Overlook Ave Washington Crossing PA 18977
144	Marianne Miller	damyon24@rcn.com	748 Chestnut St Emmaus PA 18049

145	Beverly DeMotte Santella	demottesantella@gmail.com	60 Areford Blvd Uniontown PA 15401
146	Kathrine Ziegler	katie3501@gmail.com	447 S Atlantic Ave Pittsburgh PA 15224
147	Alford Richman	hhowcouncvzjfsgeq@bvhkr.com	610 S Millvale Ave Pittsburgh PA 15224
148	Ostap Lutsiv	ostap.lutsiv@yahoo.com	225 Maxwell St Pittsburgh PA 15025
149	Linda Wineman	speedster89@comcast.net	19 Byers Rd Shippensburg PA 17257
150	Robert Smith	robasmith1@comcast.net	445 Quaker Dr York PA 17402
151	Ronald Ennis	local268@ptd.net	9865 Old 22 Breinigsville PA 18031
152	David Hinkes	merlindave@usa.com	845 Breckinridge Court New Hope PA 18938
153	Resident	saundra26@comcast.net	205 Walnut St Beaver PA 15009
154	Dennis Kelly	dnkelly963@msn.com	120 Steeplechase Circle Gibsonia PA 15044
155	Andrew Stover	asmakeup@comcast.net	247 West Queen St Chambersburg PA 17201
156	Resident	astehle@zoominternet.net	218 Cecelia St Butler PA 16001
157	Resident	sjohn85887@comcast.net	839 Meadowood Lane Warminster PA 18974
158	Resident	popwalters@comcast.net	805 Ridgewood Rd York PA 17406
159	Kevin Hefty	heftyk@scihealthcarepa.org	401 Reading Ave West Reading PA 19611
160	Robeta Conrad	rmconrad@msn.com	2716 Charlesville Rd Mohrsville PA 19541
161	Resident	scheeren@comcast.net	1680 Sturbridge Dr Sewickley PA 15143
162	Marie Travitz	bamtravitz@comcast.net	908 Poplar Lane Lebanon PA 17046
163	Vladimir Beaufils	vlad@scsinc.org	71 Queen Ave Enola PA 17025
164	William Wexselman	billwesq@mail.com	5624 Hempstead Rd Apt 3 Pittsburgh PA 15217
165	Kathryn Lesage	kathrynlesage@comcast.net	PO Box 1089 Skippack PA 19474
166	Mary Bellman	mjbellman@yahoo.com	457 Sierra Lane State College PA 16803
167	Resident	2cmarie@gmail.com	2825 Four Mills Drive Montoursville PA 17701
168	Gloria Merlino	gloski@rcn.com	1950 Ferry St Easton PA 18042
169	Steve Hansen	gfgsinc@comcast.net	
170	Ruth Lotz	ruth.lotz@juno.com	3020 N 2nd St Harrisburg PA 17110
171	Lisa Foley		220 E Commons Drive Cranberry Twp PA 16066
172	Rachael Green	rachealgreenpgh@gmail.com	3449 Pittsburgh PA 15201
173	Katherine Bigstaff	Kayteroz@gmail.com	467 Irvin Ave Rochester PA 15074
174	Caroline Ewing	carolineewing4@gmail.com	451 S Aiken Ave Apt 2 Pittsburgh PA 15232
175	Lisa Cotter	Lcatter46@yahoo.com	2033 Dartmore St Pittsburgh PA 15210
176	Patricia Runyon	triciarunyon76@gmail.com	307 MacFarlane Dr Penn Hills PA 15235
177	Lei Cluckey	leiannecluckey20@gmail.com	9410 Babcock Blvd Allison Park PA 15101
178	Sarah Williams	sarahwilliams412@gmail.com	3201 Orleans St Pittsburgh PA 15214
179	Aubrey Pratt	aubdawg85@gmail.com	218 Alder Drive Pittsburgh PA 15202
180	Brendan Gillis	bcgillis@gmail.com	412 S Winebiddle St Pittsburgh PA 15224
181	Bethany Jameson	bjameson62@gmail.com	412 S Winebiddle St Pittsburgh PA 15224
182	Daniel Patt	danielpatt@msn.com	7021 Crease Lane Philadelphia PA 19128
183	Melissa Peters	petersmelissa695@gmail.com	417 Fieldstone Drive Monroeville PA 15146
184	Sally Simpson	sally.simpson@sbglobal.net	326 Crooked Crk Garland TX 75043
185	Resident	rquinlan@att.net	299 Square Circle Pittsburgh PA 15212
186	James Mackey	jimmackeyjr1@gmail.com	2700 Chestnut St Suite 1016 Chester PA 19013
187	James Young	jyoung17102@gmail.com	2038 Susquehanna St Harrisburg PA 17102
188	Elizabeth Weaver	elizabeth.v.weaver@gmail.com	46 Moore Ave Jeannette PA 15644
189	Robert Smeigh	bbob4x4@aol.com	310 Berkshire Rd Mechanicsburg PA 17055
190	Peter Eibeck	pweibeck@geminimachining.com	316 E Center St Wind Gap PA 18091
191	Amy Watt	amy.wattstruck.com	100 Mount Carmel Rd New Alexandria PA 15670
192	Mary Ann Sheldon	macsheldon@gmail.com	1245 Greentree Lane Narbeth PA 19072
193	Jessica Brittain	jessica.steward.brittain@gmail.com	6805 Old Berwick Rd Bloomsburg PA 17815
194	Joyce Crock	penelope59@msn.com	624 Wenzell Ave Pittsburgh PA 15026
195	John Meyersown	jmeyerson1776@gmail.com	508 W Mounty Airy Ave Philadelphia PA 19119
196	Kay Reinfried	kmreinfried@gmail.com	797 Scott Lane Lititz PA 17543
197	Peter Hecht	prhecht@comcast.net	704 Montrose St Philadelphia PA 19147
198	Slima Ellis	salimaellis780@gmail.com	7932 Provident St Philadelphia PA 19150
199	Susan Miner	smalamed@comcast.net	617 Nancy Jane Lane Downingtown PA 19335
200	Resident	bmoyer1952@gmail.com	713 Scenic Drive Harleysville PA 19438
201	Donna Lucas	donna139@gmail.com	205 Stump Rd North Wales PA 19454
202	Fred Hixson	fredchixsonjr@gmail.com	225 Nicol Lane Derry PA 15627
203	Shari Johnson	mommyone405@yahoo.com	320 Sinkler Rd Wyncote PA 19095
204	Alan Vandersloot	alvandy1852@gmail.com	1120 West Poplar St York PA 17404
205	Mary Sharp	angelmoon2783@yahoo.com	424 Spruce Ave Altoona PA 16601
206	Margaret Goodman	messgw@gmail.com	51 Broomall Lane Glen Mills PA 19342
207	William Bader	williambader@hotmail.com	1402 Loraine Ave Bethlehem PA 18018
208	Donna Varcoe	dmdv45@hotmail.com	78 McKee Circle Bellefonte PA 16823
209	Resident	mjmleczyński@gmail.com	15 Florida Ave West Wyoming PA 18644
210	Resident	wormond56@gmail.com	3109 W 25th St Erie PA 16506
211	Resident	padefibaugh@gmail.com	434 Locust St Roaring Springs PA 16673
212	Resident	pegomalley88@gmail.com	121 North Creed Rd PO Box 642 Landenberg PA 19350
213	Robin Agerton	robinagerton@gmail.com	423 W Simpson Mechanicsburg PA 17055
214	Julie Stead	govfvehds@msn.com	3240 Leechburg Rd Pittsburgh PA 15239
215	Bob McCafferty	digger@northcountrybrewing.com	
216	Susan Babbitt	philad49@att.net	319 S 10th St Philadelphia PA 19107
217	Kathleen Riordan	kathleen.riordan@att.net	633 E Allens Lane Philadelphia PA 19119
218	Harry Hochheiser	hshoch@duck.com	5742 Woodmont St Pittsburgh PA 15217
219	Stephanie Mory	pocanthill@yahoo.com	1210 Fords Pond Rd Clarks Summit PA 18411
220	Robert Gibb	rngbb@earthlink.net	5036 Revenue St Homestead PA 15120
221	Laura Horowitz	l2newmoons@gmail.com	6544 Darlington Rd Pittsburgh PA 15217

222	George Stradman	gstradman@juno.com	700 Elkins Ave Apt 83 Elkins Park PA 19027
223	Paige Magidson	pammagidson@hotmail.com	629 Overhill Rd Ardmore PA 19003
224	Margaret Sheridan	peggysh@netscape.net	1640 Oakwood Drive Apt W320 Narbeth PA 19072
225	Gail Jones	gmpjones@gmail.com	70 Windbnar Lane Gettysburg PA 17325
226	Christine Talley	Talley christine@gmail.com	29 S 14th St Allentown PA 18102
227	Maureen McDonough	mcdonough m123@gmail.com	1927 Chapman St Pittsburgh PA 15215
228	Linda Stetson	gijitney@gmail.com	Pittsburgh PA 15203
229	Marc Mancini	wolfgang2286@yahoo.com	1529 Berryman Ave South Park PA 15129
230	Quinn S	bejtwi@gmail.com	5437 Ellsworth Ave Pittsburgh PA 15232
231	Janet Jesteadt	janejesteadt@gmail.com	118 Harbison Rd Valencia PA 16059
232	Lisa Ann Goldsmith	lagoldsmith@optonline.net	581 Kilbourne St Pittsburgh PA 15207
233	Taylor Steasney	taylor@rocunited.org	2504 Columbia Ave Pittsburgh PA 15218
234	Lynn Lantosh	l.lantosh@rcn.com	1522 Ferry St Easton PA 18042
235	Diane Feliciano	boady59@gmail.com	2431 Woodstock St Philadelphia PA 19145
236	Michele Cepparulo	Michele Cepparulo@gmail.com	111 S Dudley Ave #108 Ventnor City NJ 8406
237	Jordan Romanus	jordan.romanus@gmail.com	1712 Atkinson Pl Pittsburgh PA 15235
238	Erika Lanoale-Arters	erika@satyajuce.com	12104 Elam Drive Glen Mills PA 19342
239	Paula Adams	paula.adams@yahoo.com	6940 McPherson Blvd Pittsburgh PA 15208
240	Linda Mitala	lmitala13@gmail.com	13 Taylor Drive Fallsington PA 19054
241	John Stuckey	stuckeyjohn49@gmail.com	3042 Mark Twain Drive Pinetop AZ 85935
242	Allison Feldman	alifeldman@verizon.net	1426 Jonathan Way Ambler PA 19002
243	Lauren Cortesi	laurenmcortesi@gmail.com	1 Rabbit Run Lane Glenmoore PA 19343
244	Jeanne Mann	cats0107@rcn.com	706 Foss Ave Drexel Hill PA 19026
245	Kacy McGill	kacy a mcgill@gmail.com	143 Virginia Ave Mount Washington 15211
246		info@pghrwa.org	
247	Resident	billy@casasanjose.org	2116 Broadway Ave Pittsburgh PA 15216
248	Resident	billy@casasanjose.org	2116 Broadway Ave Pittsburgh PA 15216
249	Resident	billy@casasanjose.org	2116 Broadway Ave Pittsburgh PA 15216
250	Resident	billy@casasanjose.org	2116 Broadway Ave Pittsburgh PA 15216
251	Corey Lash	corey.walnut@hotmail.com	226 Maryland Ave Pittsburgh PA 15209
252	Robert Pritchard	RPritchard@littler.com	EQT Plaza, 625 Liberty Ave, 26th Floor Pittsburgh PA 15222
253	Rhiannon DiClemente	rdiclemente@claphila.org	1424 Chestnut St Philadelphia PA 19102
254	Teófilo Reyes, PhD	teo@rocunited.org	275 7th Ave, Suite 1504 New York NY 1001
255	Alex Halper		417 Walnut St Harrisburg PA 17101
256	Jack Leiss	leissjack@gmail.com	4328 Haldane St Pittsburgh PA 15207
257	Honorable Gerald Mullery		114 Irvis Office Building, PO Box 202119 Harrisburg PA 17120
258	Mardys Leeper	malleeper@gmail.com	245 Broughton Lane Villinova PA 19085
259	Zak Pyzik	zpyzik@prla.org	100 State St Harrisburg PA 17101
260	Fred Gaffney	fgaffney@columbiamontourchamber.com	238 Market St Bloomsburg PA 17815
261	Senator Christine Tartaglione		458 Main Capitol Building Harrisburg PA 17120
262	Tina Harris	chalkhillmarketllc@yahoo.com	331 Middle Ridge Rd Ohiopele PA 15470
263	Mark Belinda	bigsid54@yahoo.com	304 N High St Port Matilda PA 16870
264	Keren Gifford	kvoogood@gmail.com	504 Cherry St Pittsburgh PA 15237
265	Leigha Lamont	leighalamont@gmail.com	1712 Atkinson Pl Pittsburgh PA 15235
266	Jennifer Kennedy	jenny@pittsburghunited.org	533 Hastings St Pittsburgh PA 15206
267	Anne Chopyak	annechopyak@yahoo.com	89 Pocahontas St Buckhannon WV 26201
268	Zachary Lau	zach.lau.is@gmail.com	4703 Kincaid St Pittsburgh PA 15224
269	Elizabeth Ussery	saraquael@msn.com	15 Fairview Rd Pittsburgh PA 15221
270	Daniel Davis	dan@pittsburghunited.org	3221 Mary St Pittsburgh PA 15203
271	Olivia Perfetti	or.perfetti@gmail.com	522 Ivy St Pittsburgh PA 15232
272	Alyssa Snyder	alyssaella@hotmail.com	848 Kennedy St, Apt 1 Carnegie PA 15106
273		lindasue19020@yahoo.com	917 Park Ave Bristol PA 19007



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY

February 17, 2022

George D. Bedwick, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Notice of Final Rulemaking
Department of Labor and Industry
34 Pa. Code, Part XII, Chapter 231; No. 12-114

Dear Chairman Bedwick:

Enclosed is a final rulemaking package consisting of a Face Sheet, Preamble, Annex A and Regulatory Analysis Form.

The Department of Labor and Industry is submitting this rulemaking to amend Part XII, Chapter 231 of 34 Pa. Code to update regulations regarding tipped workers and calculating the regular rate for salaried employees.

Written comments, recommendations or objections should be directed to Bryan M. Smolock, Director, Bureau of Labor Law Compliance, 651 Boas Street, Room 1301, Harrisburg, PA 17121, telephone no. (717) 787-0606, email address: bsmolock@pa.gov.

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,

A handwritten signature in black ink that reads "Jennifer L. Berrier".

Jennifer L. Berrier
Secretary

cc w/encl: The Honorable Allison Jones, Secretary of Planning and Policy
William L. Trusky, Executive Deputy Secretary
Basil L. Merenda, Deputy Secretary for Safety and Labor Management
Relations
Neil Cashman, Director of Legislative Affairs
Julia M. Grubbs, Policy Director
Kelly K. Smith, Acting Chief Counsel
Robert C. Schramm, Deputy Chief Counsel
Bryan M. Smolock, Director, Bureau of Labor Law Compliance

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 12-114

SUBJECT: Minimum Wage

AGENCY: DEPARTMENT OF LABOR & INDUSTRY

RECEIVED

TYPE OF REGULATION

FEB 17 2022

Proposed Regulation

X Final Regulation

Independent Regulatory
Review Commission

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

2/17/22 Jennifer Dodge
2/17/22 Paul C. Jones

HOUSE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIR Representative Jim Cox

MINORITY CHAIR Representative Gerald J. Mullery

SENATE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIR _____

MINORITY CHAIR _____

INDEPENDENT REGULATORY REVIEW COMMISSION

ATTORNEY GENERAL (for Final Omitted only)

LEGISLATIVE REFERENCE BUREAU (for Proposed only)

Kathy Cooper

From: Erwin, Noah <Noah.Erwin@pasenate.com>
Sent: Thursday, February 17, 2022 9:02 AM
To: Mueller, Janet (LI-OCC)
Subject: RE: Electronic Delivery - Final Rulemaking 12-114

Received thanks!

RECEIVED

From: Mueller, Janet (LI-OCC) <jamueller@pa.gov>
Sent: Thursday, February 17, 2022 8:55 AM
To: Erwin, Noah <Noah.Erwin@pasenate.com>
Subject: Electronic Delivery - Final Rulemaking 12-114

FEB 17 2022

**Independent Regulatory
Review Commission**

■ EXTERNAL EMAIL ■

Good morning,

Please respond to this email that you have received delivery of Final-Form Regulation #12-114.

Thank you!

Jan Mueller | Legal Office Administrator 1
PA Department of Labor & Industry | Office of Chief Counsel
651 Boas Street | Harrisburg, PA 17121
Phone: 717.787.4186 | Fax: 717.787.1303
www.dli.pa.gov

This message and any attachment may contain privileged or confidential information intended solely for the use of the person to whom it is addressed. If the reader is not the intended recipient then be advised that forwarding, communicating, disseminating, copying or using this message or its attachments is strictly prohibited. If you receive this message in error, please notify the sender immediately and delete the information without saving any copies.

Kathy Cooper

From: Kratz, Eric <ekratz@pasen.gov>
Sent: Thursday, February 17, 2022 9:24 AM
To: Mueller, Janet (LI-OCC)
Subject: RE: Electronic Delivery - Final Rulemaking 12-114

RECEIVED

FEB 17 2022

Received. Thanks Jan.

From: Mueller, Janet (LI-OCC) <jamueller@pa.gov>
Sent: Thursday, February 17, 2022 8:48 AM
To: Kratz, Eric <ekratz@pasen.gov>
Subject: Electronic Delivery - Final Rulemaking 12-114

**Independent Regulatory
Review Commission**

© CAUTION : External Email ©

Good morning Eric,

Please respond to this email that you have received delivery of Final-Form Regulation #12-114.

Thank you!

Jan Mueller | Legal Office Administrator 1
PA Department of Labor & Industry | Office of Chief Counsel
651 Boas Street | Harrisburg, PA 17121
Phone: 717.787.4186 | Fax: 717.787.1303
www.dli.pa.gov