

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p><i>(All Comments submitted on this regulation will appear on IRRC's website)</i></p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <p>RECEIVED</p> <p>NOV - 5 2021</p> <p>Independent Regulatory Review Commission</p>
<p>(1) Agency Department of Labor and Industry</p>		
<p>(2) Agency Number: 12 Identification Number: 114</p>		<p>IRRC Number: 9322 .</p>
<p>(3) PA Code Cite: 34 Pa. Code, Chapter 231</p>		
<p>(4) Short Title: Amendments to 34 Pa. Code, Chapter 231 regarding Tipped Employees and Regular Rate</p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>Primary Contact: Bryan Smolock, Director, Bureau of Labor Law Compliance, (717) 787-0606 bsmolock@pa.gov</p> <p>Secondary Contact: Robert Schramm, Deputy Chief Counsel, Office of Chief Counsel, (717) 787-4186 rschramm@pa.gov</p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation <input type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>The Department of Labor and Industry (Department) proposes amendments to Chapter 231 of 34 Pa. Code to update the regulations governing tipped employees. This new 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 a daily work shift performing tipped duties. The regulation also limits tip pooling to employees who spend at least 80% of a daily shift performing tipped duties. Employers would be required to notify employers to tip pools and keep records regarding tip pools. The regulation also prohibits employers from deducting credit card processing fees from tips and requires employers to inform patrons that service charges are not tips.</p> <p>In addition, the regulation clarifies that to calculate the base hourly rate for overtime of salaried employees, employers must divide weekly earnings by 40.</p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>The Department proposes this 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).</p>		

(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 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, these tips pools would 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. 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 which tips and failed requirement 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 employees who traditionally perform tipped work to participate in tip pools with employees who do not typically perform tipped work. On September 24, 2021, USDOL clarified that while supervisors may keep tips provided directly to them, they 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 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.”

There is also relevant state law regarding the determination of a base rate for salaried employees. The Pennsylvania Supreme Court addressed the issue of the 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 considered that the unmistakable intent of the General Assembly to use the Commonwealth’s police power to increase wages to combat the “evils of unreasonable and unfair wages,” 43 P.S. § 333.101, to conclude that the rules of statutory construction favor Plaintiffs’ interpretation requiring 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 regulation is necessary because of recent uncertainty surrounding federal regulations pertaining to these issues; because of ambiguity regarding the meaning of “regular rate;” and because the tip threshold in the definition of “tipped employee” should be updated after 44 years to reflect inflation and wage growth. In the past several years, federal administrations have differed greatly in policies that affect tipped workers, including their proposed, final, postponed final, and amended final regulations, as well as in their subregulatory opinions and guidance. Pennsylvania employers and workers deserve to have stable, consistent laws and regulations they can depend on as they plan their work operations. This proposed regulation seeks to alleviate the uncertainty persistent at the federal level and provide 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.

The Definition of “Tipped Employee”

Under the current but badly 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. The Department last updated this 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. By updating this threshold, the regulation will ensure that the monetary threshold found in the definition of tipped workers reflects the effect of 44 years’ worth of inflation and that tipped employees’ wages reflect current market values.

Under current regulations, once an employee customarily and regularly receives \$30/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 employe, the amount paid such employe by his or her employer shall be an amount equal to: (i) the cash wage paid the employe which for the purposes of the determination shall be not less than the cash wage required to be paid the employe on the date immediately prior to the effective date of this subparagraph; and (ii) an additional amount on account of the tips received by the employe which is equal to the difference between the wage specified in subparagraph (i) and the wage in effect under section 4 of this act. The additional amount on account of tips may not exceed the value of tips actually received by the employe.¹

Accordingly, employer 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. By keeping the threshold of tipped worker definition at \$30/month, the state essentially allows an employer

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

to collect \$4.42 each hour in the employee's tips after the 30th dollar in tips has been collected by the employee.

By increasing the tipped worker threshold to \$135 per month, as much as an additional \$105 would directly go into the pockets of tipped workers per month, or \$1,260 per year, 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 Department estimates that this regulation will benefit the approximately 199,285 tipped workers in Pennsylvania, as defined by current MWA regulations.

80/20 Rule

This proposed 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 to be a tipped employee as 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, currently until December 31, 2021. Despite USDOL's actions to cease enforcement of the 80/20 rule, federal courts have continued to apply it when interpreting and enforcing the FLSA. On October 29, 2021, USDOL published a final rule which would codify the 80/20 interpretation in federal regulation for the first time. Specifically, 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."

Although the Department's proposed regulation mirrors USDOL's proposed regulation, there are several reasons that make it prudent for the Department to issue its own regulation on the 80/20 rule. First, USDOL has proposed two very different regulatory packages within the past year regarding the 80/20 rule. This creates uncertainty at the federal level and the Department wishes to remove the uncertainty at the state level. Second, the Department has examined USDOL's final regulation and has concluded that it 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. Finally, in *Chevalier*, the Court criticized the Department for failing to enact regulations which explain whether the Department is complying with or departing from federal guidance. The Department's proposed regulation provides clarity on its position regarding tipped workers performing non-tipped work.

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

According to calculations using methodologies from EPI and the Center for American Progress, there 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 regulation will ensure that

employers do not misclassify these workers as tipped employees when they do not spend the majority of their daily shift performing tipped work.

Credit Card Deductions

Deducting credit card service fees from employees' tips is a common practice among employers who accept credit card transaction to pay for a service and provide gratuity to tips. Frequently, credit card companies will charge businesses a percentage of each transaction for the ability to charge that credit card company for services rendered. A credit card deduction from tips occurs when an employer deducts the credit card transaction fee percentage from a tip that the patron charged to a credit card. For example, if

- a service bill is \$100; and
- an employer chooses to allow patrons to pay for that service with a credit card; 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 by the credit card company,

it is typical for the employer to remove 2% of the \$20 tip to pay for the credit card transaction fee that the credit card company charges the employer, or \$0.40.

This essentially means the employee who receives the tip receives \$19.60 in tips and helps pay for the credit card transaction 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 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, and it should be the responsibility of the employer to cover operational costs.

Section 3 of the MWA, states that "the gratuity shall become the property of the employee." 43 P.S. § 333.103. In the current practice of credit card deductions, employers are taking part of employees' property to use to pay off operational costs.

It is possible that all 199,285 tipped workers in Pennsylvania would benefit from this regulation, but it is impossible to know the exact number of workers, employers, or establishments affected by this 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.

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. While some patrons may believe that "service charges" may be used for or are a euphemism for gratuity, the USDOL has issued subregulatory guidance stating the employers cannot use revenue derived from service charges to pay

tips to employees.² Businesses that charge service charges should educate the consumer and clearly identify that these charges are different than tips.

This 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.

Prohibit Tip Pooling with Employees Who Are Not Traditionally Tipped

This proposed regulation is needed because without it, tipped workers, such as waitstaff, will lose control over their earned tips if forced to participate in tip pooling with non-tipped workers because the tip pooling effectively subsidizes the wages of non-tipped employees. This results in a loss of wages for the tipped worker and creates an incentive for employers to lower the hourly wage for non-tipped workers because those workers would not experience a loss in income.

Tip pooling is problematic because it masquerades as benefitting back-of-house employees (dishwashers, line cooks, etc.). However, there is no regulation that stops an employer from establishing a shared tip pool to lower the wages of the workers who are not traditionally tipped and rely on the tip pool to replace the reduced wages. Such a practice would reduce the cost of labor to the establishment by cutting cash wages but allowing access to tips earned by employees who customarily or regularly earn tips, even while the employer does not take a tip credit. In this scenario, the take-home wages of tipped employees could decrease, take-home wages for traditionally non-tipped employees could decrease or stay relatively the same (albeit a new combination of tips and wages) while labor costs for employers could decline (Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, "Women would lose \$4.6 billion in earned tips." Economic Policy Institute, January 17, 2018).

This regulation will benefit the approximately 199,285 tipped workers employed in Pennsylvania as it will afford them greater control over their earned tips, which typically comprise the majority of their wages. Additionally, this regulation will benefit traditionally untipped workers who may otherwise see their base wages decrease as their share of tips generated by traditionally tipped employees may increase.

Fluctuating Work Week "Regular Rate" Calculation

This regulation would address the omission in existing regulations highlighted by the Pennsylvania Supreme Court and clarify that "regular rate" in all cases including 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.

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 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

² <https://www.dol.gov/agencies/vhd/fact-sheets/15-flsa-tipped-employees>

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. 4.³ 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.⁴ 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, the Department is proposing to enact a 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 all cases including fluctuating 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. 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 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 the proposed regulation.

³ See Interpretive Bulletin No. 4 ¶¶ 10, 12 (Nov. 1940)

⁴ *Id.* at 573-74, 580-81

(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 proposed regulation appropriately includes 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 Minimum Wage Act does here, 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 regulation was narrower than the exemption provided by the federal FLSA, as that statute does not control the interpretation of the Minimum Wage Act); *In Re Amazon.com, Inc.*, 2021 WL 30597773 (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

This regulation proposes § 231.111 to codify the so-called "80/20 rule" for tip credits and is not more stringent than federal standards. It 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 and do not exceed 30 minutes of continuous work. 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 proposed rule would codify in Pennsylvania regulation USDOL's subregulatory guidance and would mirror USDOL's final regulation on the 80/20 rule published on October 29, 2021. Pennsylvania's proposed 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.

Tip Pooling

This regulation allows for employers to establish tip pooling arrangements among tipped employees so long as the tip pools do not include 1) individuals with an ownership or partnership interest in the business; 2) employees who meet any part of the executive employee duties test in 29 C.F.R. Part 541.100(2)-(4) of the FLSA regulations, or 3) any employee who does not spend at least 80% of their daily work performing duties that customarily or regularly generate tips. Prohibiting these employees from participation is necessary to fulfill the MWA's limitation that restricts tip pooling to individuals that customarily and regularly receive tips. *See* 43 P.S. § 333.103.

Currently, federal regulations allow employers to require that tipped employees share tips with non-tipped employees in a tip pooling arrangement so long as the employees generating the tips are paid the non-tip minimum wage rather than the tipped minimum wage. USDOL published a final rule on

December 30, 2020 that allowed an employer to require tip pooling for employees for whom the employer does 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 additional time to review and consider the rule. On March 26, 2021, the USDOL published a notice 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 and these regulations are currently in effect

A regulation more stringent than USDOL’s new regulation is necessary to ensure that the tips earned by employees performing duties that customarily or regularly generate tips are not available to employers through mandatory tip pools to subsidize the wages of employees engaged for duties that do not customarily or regularly generate tips. It also will ensure that the tipped minimum wage is payable only to employees whose duties customarily and regularly generate tips, and that employees who do not perform duties that customarily and regularly generate tips are not paid the much lower tipped minimum wage solely because they receive tips through a tip pooling arrangement.

Credit Card Deductions

This provision of the proposed regulation will prohibit employers from deducting a percentage of credit card surcharges from employees’ tips when a customer pays a bill and gives a tip using a credit card. This provision, which is more stringent than federal regulation, is compelled by the express language of the Act coupled with its underlying policy protective of 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, 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 subregulatory guidance, 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 silence of federal regulation 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 surcharge—an operational expense unrelated to the purpose and intent of a tip.

The Department proposes this regulation to ensure that gratuities earned by employees remain the property of said employees.

The Definition of “Tipped Employee”

The proposed regulation amends the definition of tipped employee as those who earn \$135 or more in tips per month, an increase from \$30 or more 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. This proposed Pennsylvania regulation would increase the tip threshold by using the Consumer Price Index to adjust the threshold for inflation.

This regulation is in the interest of Pennsylvanians because failing to adjust the tipped employee threshold for inflation will mean that tips could constitute a far lower percentage of employees' earnings than when the regulation was adopted in 1977. The logical result would frustrate the purpose of the MWA of protecting workers by misclassifying employees as tipped employees.

Service Charges

This provision of the proposed regulation stipulates that an employer that charges for the administration of a banquet, special function, or package deal who choose to use services charges in their billing to patrons clarify with 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 has issued subregulatory guidance by stating in Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), 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 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 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 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 permits 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 Interpretive 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.⁵ The quotient of the weekly salary

⁵ *Id.* at 573-74, 580-81

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.

This regulation would address the omission in existing regulations and clarify that “regular rate” in all cases including 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 week 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?

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. This regulation proposes to adjust the 1977-established definition 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, including Pennsylvania, 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).

A different 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.⁶

Tip Credits and the 80/20 Rule

This regulation proposes to codify what is colloquially referred to as the 80/20 rule for tip credits. 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 the proposed Pennsylvania regulation. Other neighboring states including Ohio and Maryland have both examined federal modifications to the 80/20 rule in their courts.

- 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 80/20 rule in Pennsylvania regulation will not make Pennsylvania less competitive with other states since other states have also long been subject to federal enforcement of the 80/20 rule. Furthermore, codifying the 80/20 rule in Pennsylvania will provide employers and employees long term consistency regarding the 80/20 rule by enshrining the long-standing USDOL standard, the current interpretation of federal courts, and the final regulation codifying the 80/20 rule in the Commonwealth's own regulations. Pennsylvania will enjoy long term consistency by codifying long-standing federal guidance regarding the 80/20 rule.

Tip Pooling

The regulation proposes allowing employers to establish tip pooling arrangements among tipped employees as long as the tip pools do not include: 1) individuals with an ownership or partnership interest in the business; 2) employees who meet any part of the executive employee duties test in 29 C.F.R. Part 541.100(2)-(4) of the FLSA regulations, or 3) any employee who does not spend at least 80% of their daily work performing duties that customarily or regularly generate tips. By applying any

⁶Julia 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>

part of the federal executive employee duties test to the prohibition from participation in a tip pool, this proposed regulation will ensure that only tipped employees may participate in a tip pool. 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 this the December 30, 2020 final rule have been suspended from implementation, the tip pooling provisions went into effect on April 30, 2021.

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. The proposed Pennsylvania regulation would be less stringent than California but offer similar circumstantial guidance like Indiana.

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 regulation on tip pooling will not make Pennsylvania less competitive than other states because the proposed regulation is similar to the requirements in some neighboring states and non-neighboring states and is less stringent than other states such as California.

Credit Card Deductions

While Pennsylvania law and regulations currently are silent on deducting credit card 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 regulation which clarifies that a gratuity paid to an employee for duties performed is the property of that employee will make Pennsylvania less competitive with other states.

Service Charges

This provision of the proposed regulation concerning service charges will educate the consumer and clearly identify what these charges are used for. They 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 proposed regulation, New York's Hospitality Wage Order⁷ 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."

⁷ <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 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 proposed 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 proposed 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 regulation will not affect other regulations of the Department or 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 Minimum Wage Act 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 has also conducted meetings with private stakeholder groups.

(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

Persons

Using data from EPI's Minimum Wage Simulation Model for 2021 and the Center for American Progress, we project that 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 may have their earnings protected by this provision of the regulation.

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. 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, 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:

- 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, there are workers beyond these occupations that 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:

- 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 regulation. However, not all the individuals employed in these occupations that often receive tips and may meet the definition of tipped employee have an employer who takes a tip credit. According to data derived from EPI’s economic modeling approximately 93,479 tipped workers will be earning \$12/hour or less as of July 2021. Individuals earning \$12/hour or more, wages and tips inclusive, are less likely to be 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.

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 reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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. However, SBA states that 98.2% of businesses in Pennsylvania classify as “small businesses, meaning that a high percentage of the affected businesses are likely small.

Tip Pooling, Definition of Tipped Employee, and Credit Card 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 proposed regulation that address tip pooling, the definition of tipped employee, and credit card deductions.

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. 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, 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:

- 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, there are workers beyond these occupations that 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:

- 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 regulation. Considering the reality that there are additional occupations where employees may customarily or regularly earn tips but typically do not earn the tipped minimum wage, 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 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 tipped workers, whether or not they earn the tipped minimum wage. 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.

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 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 a conservative estimate; many of these establishments likely do not employ any or enough tipped workers to implement a tip pool or tip sharing arrangement. 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.

Small Businesses

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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. 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 businesses.

Service Charges

Persons

The provision of the proposed 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. It will also affect anyone who is a patron of businesses that provide such services.

Businesses

The provision of the proposed 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 (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 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 regulation is conservative and is likely an overestimate.

Small Businesses

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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. 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 affected by this 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 proposed 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 reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed regulation. 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.

(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

Persons

The Department estimates that between 93,479 and 159,707 Pennsylvania workers will benefit from this part of the proposed regulation pertaining to tip credits. This includes employees who work in the occupations and establishments described in the response to Question 15.

Businesses

The Department estimates that approximately 21,508 establishments across the commonwealth will have to comply with modified regulations on tip crediting. 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 using 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 reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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. 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.

Tip Pooling, Definition of Tipped Employee, and Credit Card 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 proposed regulation that address tip pooling, the definition of tipped employee, and credit card deductions. This includes employees who work in the occupations and establishments described in the response to Question 15.

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

Small Businesses

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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. 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.

Service Charges

Persons

The provision of the proposed 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. It will also affect anyone who is a patron of businesses that provide such services.

Businesses

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 proposed 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 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 regulation is conservative and is likely an overestimate.

Small Businesses

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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 proposed regulations. 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.

Businesses

The Department estimates that approximately 1,303 establishments in Pennsylvania will be required to comply with this provision of the proposed 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 reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed regulation. 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.

(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

USDOL enforced the 80/20 rule for 30 years as an important protection for the time and wages of tipped workers covered by the FLSA. In November 2018, USDOL moved to eliminate the “80/20” rule in a subregulatory opinion letter⁸ and updated field assistance bulletin.⁹ The Pennsylvania Attorney General and other states’ Attorneys Generals filed a comment opposing this change.¹⁰ Federal courts have continued to uphold the 80/20 rule in interpreting the FLSA, including as recently as February 2021 in *Wintjen*. In its final rule of December 30, 2020, USDOL moved toward codifying its 2018 opinion letter, but this implementation of this final rule has been postponed until December 31, 2021. On October 29, 2021, the USDOL issued a final rule on 80/20.

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.¹¹ This proposed regulation would enable Pennsylvania tipped workers whose employers stopped abiding by the 80/20 rule after November 2018 to file claims against their employers. This Pennsylvania proposed regulation would align the state regulations with the final federal regulation. As such, then the total impact of this regulation on individuals will be de minimis.

The Department cannot project the actual financial impact on individuals from this regulation because wage data for tipped employees is unreliable and difficult to access because of tax data confidentiality. However, the Department does know that workers will continue to enjoy greater protection of their time and wages as it 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 more stable and consistent incomes. It also prevents the costs to individuals that would be borne by the full elimination of the 80/20 rule as has been proposed by past federal administrations. An EPI analysis found that elimination of the 80/20 rule would transform 243,000 jobs nationally from non-tipped to tipped, increasing the income volatility for workers newly reliant on the whims and subjectivity of patrons for a significant portion of their income.¹² Additionally, by codifying the 80/20 rule in Pennsylvania regulations, Pennsylvanian workers can rest assured that they will not be required to do untipped labor at a tipped wage, a scenario that would result in cost savings for employers and lost wages for employees. This regulation will protect the wages and time of Pennsylvania tipped employees while providing consistency that both employers and employees can depend on.

⁸ <https://www.xperthr.com/news/dol-withdraws-8020-rule-for-tipped-employees/35832/>

⁹ https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2019_2.pdf

¹⁰ <https://www.attorneygeneral.gov/wp-content/uploads/2019/12/2019-12-10-Comment-of-19-State-Attorneys-General-re-RIN-1235-AA21.pdf>

¹¹ 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>

¹² Heidi Shierholz and David Cooper, “Workers Will Lose More than 700 Million Dollars Annually Under Proposed DOL Rule,” November 30, 2019, *Economic Policy Institute*. <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>

Finally, by codifying the 80/20 rule in Pennsylvania regulations, this 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, 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 indirectly related to earning tips, this Pennsylvania proposed regulation preserves the status quo and aligns with proposed federal regulations 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 provision of the proposed regulation is not anticipated to have any financial, economic, or social impacts on labor communities or other public or private organizations.

Tip Pooling

Individuals

This portion of the proposed regulation protects employees' wages that are generated from tips. It restricts tip pooling to employees whose work directly generates tips at least 80% of the time and prohibits tipped workers from having to pool or split tips with other employees who have job power over them, such as owners, people in charge of hiring and firing, assigning schedules, among other work/power differences. Research has shown that 12 percent of tipped workers have had tips stolen from them by their employer or supervisor.¹³ Financially, employees who largely do tipped work will keep more of those tips because of this regulation. Socially, ending tip pooling among lower-level employees and managerial or owner individuals is likely to reduce social pressure on lower-level workers to give up the tips they've earned to workers who perform little or no tipped work. Lower-level workers maintain more of a financial separation from other employees who have employment power over them.

Restricting tip pooling only to employees who perform duties that customarily and regularly generate tips and 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

¹³ 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/>

(69.1% nationally¹⁴) and are more likely to earn lower wages than their male counterparts.¹⁵ 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. The challenges of tip pooling extend along racial lines as well, as there is occupational segregation between tipped and untipped worker often by race, with persons of color over-represented in occupations that are lower-paying and back-of-house such as dishwashers and line cooks.¹⁶ Research demonstrates that while workers of color are disproportionately impacted, Hispanic workers in particular are deeply impacted tip pooling, as they represent a disproportionate percentage of back-of-house employees.¹⁷ The practice of tip pooling is often marketed as an effort to distribute funds towards lower-paid back-of-house employees; however, in practice, there are often no baseline limits on back-of-house wages, which ultimately reduces workers' base pay. Further, tip pooling in practice rarely transfers additional earnings to non-tipped workers, instead transferring it to employers.¹⁸ Research on USDOL tip regulations published on December 30, 2020 and effective April 30, 2021, that rolled back tip pooling regulations at the national level estimated that expanded tip pooling would net a loss of \$5.8 billion a year in tips for tipped workers, and much of that loss would have been experience directly by both women and Hispanic workers.¹⁹

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 business, will be small.

Labor Communities

1.2% of servers and 3.2% of bartenders are covered by union collective bargaining agreements.²⁰ As these are two of the occupations most densely populated with tipped workers and impacted by this regulation, the impact of this provision of the proposed regulation on labor communities will be small. No impacts on other public or private organizations are anticipated.

Credit Card Deductions

Individuals

¹⁴ <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v2.pdf>

¹⁵ <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/>

¹⁶ <https://laborcenter.berkeley.edu/pdf/2015/racial-gender-occupational-segregation.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 Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, "Women would lose \$4.6 billion in earned tips if the administration's 'tip stealing' rule is finalized," January 17, 2018, *Economic Policy Institute*.

<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/>

¹⁹ Shierholz, et al. "Women would lose \$4.6 billion," *EPI*

<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/>

²⁰ http://unionstats.com/Occ_U_2020.htm

Under the FLSA, where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage so long as the percentage deducted from the employee's tip to pay the percentage of the credit card transaction fee does not reduce the employee's hourly compensation below minimum wage.²¹ This 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 proposed regulation, employers would be prohibited from taking credit card surcharges from employee tips when a customer pays with a credit card. 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 transaction 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 processing fee. 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 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 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 card, a greater number of tips may be given on cards, and taxes might be collected on a larger share of tips because there is a better paper trail with credit card tips.²² The actual financial and economic impacts of this regulation on such public organizations cannot be calculated because the Department cannot accurately predict the degree to which method of payment choices or tipping habits of patrons might change due to this regulation and thus increase wage tax collections.

The Definition of Tipped Employee

Individuals

²¹ <https://www.dol.gov/agencies/whd/fact-sheets/15-flsa-tipped-employees>

²² 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.

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 proposed regulation, any worker earning under \$135 in tips per month can no longer be considered a tipped employee. 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. 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" (Federal Register Vol. 85, No. 250, pp 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 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 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 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. 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, but there is an unknown percentage who are salaried or otherwise do not meet the definition of tipped employee.

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 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 will 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 regulations, as most 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 proposed 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 regulation on individuals is that patrons 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.

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.

This provision of the proposed 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 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 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:

$$\frac{((\text{Total Hours Worked} - 40 \text{ Hour Work Week}) / 40 \text{ Hour Work Week}) * 100}{1} = \text{percent of increase in overtime pay}$$

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 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 45 hours per week and a weekly salary of \$844.

Without the proposed regulation:

\$844 weekly salary/45-hour work week = \$18.75 hourly regular rate

\$18.75 hourly regular rate x 1.5 overtime multiplier = \$28.13 overtime hourly rate

5 overtime hours worked x \$28.13 overtime hourly rate = \$140.67 overtime pay

\$844 weekly salary + \$140.67 overtime pay = \$984.67 weekly pay for a 45-hour fluctuating workweek.

With the proposed regulation applied:

\$844 weekly salary/40-hour work week = \$21.10 hourly regular rate

\$21.10 hourly regular rate x 1.5 overtime multiplier = \$31.65 overtime hourly rate

5 overtime hours worked x \$31.65 overtime hourly rate = \$158.25 overtime pay

\$844 weekly salary + \$158.25 overtime pay = \$1,002.25 weekly pay for a 45-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 regulation in the least costly way possible. Small business response to the 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 proposed 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 proposed regulation benefits the regulated community by providing regulatory stability. 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 proposed Pennsylvania regulation endeavors to mirror. The fact that there is now a proposed federal regulation in line with what Pennsylvania has proposed does not negate the fact that this is the latest phase in years of uncertainty at the federal level.

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 proposed regulation would mirror that USDOL's final regulation.

This proposed Pennsylvania regulation would codify the tip credit rule that has long been in effect in Pennsylvania under federal guidance and which federal courts currently apply in interpretations of the FLSA. This proposed 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 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. A job advertised as one with significant opportunities to earn a significant amount in tips could quickly turn into a minimum wage or sub-minimum wage job without the 80/20 rule. 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/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 proposed 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 proposed 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

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 provision of the proposed regulation allows for employers to establish tip pooling arrangements among tipped employees so long as the tip pools do not include 1) individuals with an ownership or partnership interest in the business; 2) employees who meet any part of the executive employee duties test in 29 C.F.R. Part 541.100 of the FLSA regulations, or 3) any employee who does not spend at least 80% of their daily work performing duties that customarily or regularly generate tips. By applying any part of the federal executive employee duties test to the prohibition from participation in a tip pool, this proposed regulation will ensure that only tipped employees may participate in a tip pool.

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 the non-tip minimum wage (\$7.25/hour) and not the tipped minimum wage (\$2.83/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 regulation are outweighed by the benefits because this regulation provides regulatory consistency and stability to an area of FLSA interpretation that has been the subject of uncertainty at the federal level. This regulation will also benefit workers who are customarily and regularly tipped, both those who receive the tipped minimum wage (\$2.83/hour) and those who receive at least the non-tipped minimum wage of \$7.25/hour, by ensuring that the gratuities they earn by their labor remain part of their income. While one might construe this regulation as having an adverse effect on “back of the house” staff who are not customarily tipped but would, under the December 30, 2020 USDOL final rule, potentially have access to tip pooling income without contributing to the pool, the Department does not consider this an adverse effect or cost. The benefits of ensuring wages earned as tips remain the property of the earner outweigh the costs or adverse effects of not requiring those tips to be shared with employees who do not contribute to the tip pool. Additionally, the benefits of this provision of the proposed regulation outweigh potential costs and allay adverse effects because it will also ensure that the tipped minimum wage is payable only to employees whose duties customarily and regularly generate tips, and that employees who do not perform duties that customarily and regularly generate tips are not paid the much lower tipped minimum wage solely because of their mandatory participation in a tip pooling arrangement.

Credit Card Deductions

The benefits of this provision of the proposed 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 the cost for processing credit card borne by the employer who opts to provide such a

service to patrons. Additionally, this provision of the proposed 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 whether an employer can deduct any portion or the entirety of a credit card transaction fee for the patron's bill from the tip paid to an employee by a patron using a credit card. 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 a subregulatory guidance document 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.

The benefit of this provision of the proposed regulation outweighs the costs and adverse effects because it codifies this interpretation of the FLSA into Pennsylvania regulations and removes the persistently high degree of uncertainty—a Wage and Hour Division Opinion Letter can be rescinded and/or reversed quickly and with little warning—surrounding this interpretation. Additionally, the Department considered the benefits of ensuring an employee's wages are their property and subject to their own discretion and not seizure by an employer to pay for a service offered to patrons in which the employee had little to no say is greater than the costs and adverse effects. Employers who opt to offer their customers the option to pay for services with a credit card already pay—or should pay under prevailing USDOL interpretations—the vast majority of credit card transaction 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 regulation to provide certainty to employers and protection for employees.

The Definition of "Tipped Employee"

The benefits of this provision of the proposed 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 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 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.

Service Charges

This provision of the proposed regulation stipulates that employer 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 proposed 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 proposed 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 proposed 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 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 proposed 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 proposed 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 more hours under forty 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.

(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 two types of total direct costs related to compliance: 1) regulatory familiarization and 2) adjustment. Regulatory familiarization and adjustment costs will occur primarily in Year 1. The Department does not anticipate ongoing managerial costs. The methodology used to calculate the costs to align with USDOL's method of calculating compliance is included in the 2020 Final Rule published December 30, 2020.

Regulatory Familiarization Costs

Regulatory familiarization cost is the cost for an employer to review the new regulation. The regulatory familiarization cost to the regulated community in Pennsylvania in FY 2021-2022 is \$1,958,580 (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, 36,270). 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 estimated time needed to review this Pennsylvania proposed regulation is conservative and longer than the time USDOL estimates since this regulation contains multiple parts, though not all will affect all employers required to comply with the regulation.

Adjustment Costs

Adjustment costs are the costs for an employer to determine how they will comply with the regulation and make one-time adjustments to scheduling, staffing, printed materials, and/or payroll. The adjustment cost to the regulated community in Pennsylvania in FY 2021-2022 is up to \$15,303,060 (based on an average hourly wage of \$33.13 for a human resources specialist in Pennsylvania plus benefits cost equaling 46% base salary plus overhead cost at 17% base salary multiplied by 1.25 hours multiplied by the total number of affected workers in Year 1 who are customarily and regularly tipped—up to 199,285—and who are paid for overtime using a fluctuating work week method, 27,427).

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, as such materials are typically produced specific to patron for whom the services are contracted.

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 proposed regulation.

This estimate of adjustment costs is a high estimate. If employers who utilize the fluctuating work week method of paying overtime have the option under the FLSA to calculate the regular rate based on a 40-hour work week, as this regulation would require, or to calculate the regular rate based on all hours worked in a week. For employers who already calculate the regular rate based on a 40-hour work week, they will have minimal alignment costs, however we cannot estimate the number of employers who do so currently since such information is not required to be reported to either commonwealth or federal agencies. Additionally, this estimate is based on an employer spending 1.25 hours on adjustment per employee. If an employee has more than one employee who would be affected by the provisions of this regulation, they will spend less time on adjustment for each additional employee.

Managerial Costs

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

There is no ongoing managerial cost from this 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 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.

For businesses that take a tip credit for tipped employees who are paid a tipped minimum wage, they will not bear any ongoing managerial costs since federal courts have continued to interpret the FLSA using the 80/20 rule. As such, these businesses should already be monitoring employee activities as part of regular business practices.

Further, there is no ongoing managerial cost for the other provisions of this regulation affecting tipped workers and their employers. Employers have a range of options they do not want to bear added costs posted by their compliance to this 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 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 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 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 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 regulation or because of human resources staffing realities.

The regulated community in Pennsylvania may incur some transfer costs related to this regulation but the Department does not have the predictive economic modeling to simulate business decision-making by employers as a result of this regulation. Employers who do not abide by the tip credit provision of this 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.

(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 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 Minimum Wage Act’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 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 proposed 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.

(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					
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	Not calculable					
COSTS:						
Regulated Community	\$17,261,640	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	\$17,261,640	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	Not calculable					
State Government	Not calculable					
Total Revenue Losses	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 Pennsylvania Minimum Wage Act of 1968. 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, Minimum Wage Act enforcement accounts for the following percentage of the Bureau’s workload:

	FY 16-17	FY 17-18	FY 18-19	FY 19-20	TOTAL
Minimum Wage/Overtime	388	382	322	234	1326
All other cases	4517	4923	4991	5006	19,437
Percentage of Case load	8%	7%	6%	5%	7%

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



Program	FY -3 (FY2017-2018)	FY -2 (FY2018-2019)	FY -1 (FY2019-2020)	Current FY (FY2020-2021)
Bureau of Labor Law Compliance	\$4.8 million	\$4.0 million	\$4.0 million	\$2.8 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 cannot estimate the number of affected businesses that 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. 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.

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

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)

The reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation are de minimis. For employers that require tipped employees to participate in a tip pool or tip sharing arrangement, this proposed 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.

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

Tip Credits

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.

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as "small businesses," and therefore would be required to comply with the proposed 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. However, SBA states that 98.2% of businesses in Pennsylvania classify as "small businesses, meaning that a high percentage of the affected businesses are likely small.

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 proposed 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 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 regulation is conservative and is likely an overestimate.

Small Businesses

The Department cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed 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.

Tip Pooling and Credit Card 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 regulation because they have a high likelihood of employing workers who customarily or regularly receive tips. These industries include the following:

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 proposed 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 cannot reliably estimate with confidence the number of affected businesses that are likely classified as “small businesses,” and therefore would be required to comply with the proposed regulation. 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.

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

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 proposed regulation, which is based on a workweek instead of a daily shift, 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 proposed 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 proposed 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 proposed 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 proposed 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 regulation benefits all employees including those who are minorities or elderly.

While this 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).

(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 work if it exceeds 80 percent of their daily shift. The proposed regulation, which is based on a workweek instead of a daily shift, 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 proposed 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 proposed 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 proposed 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 proposed 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

The provisions of this regulation related to tip credits, service charges, the definition of tipped employee, tip pooling, and credit card transaction deductions, and the definition of regular rate as it pertains to fluctuating workweek payment methods do not require the regulated community to complete any additional forms or reports, 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 these proposed regulations 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.

The Department anticipates that some commenters may suggest that the provision of this proposed regulation related to tip credits imposes a greater responsibility on an employer for tracking the hours worked by a tipped employee on duties that do not directly or indirectly generate tips. Given the 80/20 rule remains in force since federal courts (as discussed in Question 10) continue to apply the 80/20 rule when interpreting the FLSA, employers who take a tip credit should still be monitoring and tracking employees' time and duties. Since this proposed Pennsylvania regulation codifies a provision of federal law that is currently enforced by federal courts, the added cost is de minimis.

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 proposed 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 proposed 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 proposed regulation would take effect in its final form and will publish educational information on its website.

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

The proposed 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 regulation, but data only served as the basis for this 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 must earn just over four times the minimum wage in tips before their employer can 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 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.

(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. |
| C. The expected date of delivery of the final-form regulation: | March 2022 |
| D. The expected effective date of the final-form regulation:
in the <i>Pennsylvania Bulletin</i> . | 60 days after publication |
| E. The expected date by which compliance with the final-form regulation will be required:
in the <i>Pennsylvania Bulletin</i> . | 60 days after publication |

F. The expected date by which required permits, licenses or other approvals must be obtained:

Not applicable.

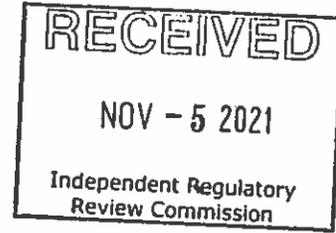
(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

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*. During this outreach and educational sessions, the Department will solicit comments on the 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)



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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>Amy M. Elliott <small>Digitally signed by Amy M. Elliott DN: cn=Amy M. Elliott, o=Pennsylvania Office of Attorney General, ou=Chief Deputy Attorney General, email=ae101@attorneygeneral.gov, c=US Date: 2021.10.29 14:26:15 -0400</small></p> <p>BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p><u>10/29/2021</u> 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><i>Jennifer L. Berrier</i></p> <p>BY: _____ Jennifer L. Berrier</p> <p>Title: <u>Secretary</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <i>[Signature]</i></p> <p>October 1, 2021 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>
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NOTICE OF PROPOSED RULEMAKING

TITLE 34

PART XII BUREAU OF LABOR LAW COMPLIANCE

CHAPTER 231 MINIMUM WAGE

PROPOSED RULEMAKING

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

In accordance with Sections 4 and 9 of the Minimum Wage Act of 1968 (43 P.S. §§ 333.104(c) and 333.109), Act of January 17, 1968, P.L. 11, No. 5, the Department of Labor and Industry (Department) is submitting this proposed rulemaking for the purpose of carrying out the purpose of the Minimum Wage Act and to safeguard the minimum wage rates established thereby.

The Department proposes the following regulations for minimum wages under the Minimum Wage Act of 1968 (Act) (43 P.S. §§ 333.101-333.115) as set forth in Annex A.

Statutory Authority

This proposed 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.”

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

The existing regulation 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 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.

The United States Department of Labor (USDOL) also does not have a regulation addressing this issue. However, USDOL has long enforced the "80/20 rule" which was outlined in a USDOL subregulatory policy. WHD Field Operations Handbook (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 86771 (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. FR 52973 (September 24, 2021).

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

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

2. Overtime for Salaried Employees

The Act requires that "Employees shall be paid for overtime not less than one and one-half times the employe's regular rate as prescribed in regulations promulgated by the secretary." 43 P.S. § 333.104. The Department has regulations defining the term "regular rate." 34 Pa. Code § 231.43. However, these regulations do 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.

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

In December 2020, the department solicited input about the Act’s regulations from a wide range of stakeholders, including members of the Minimum Wage Advisory Board, by email. This solicitation included:

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

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

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

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

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

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

The Department has also conducted meetings with private stakeholder groups.

Purpose

This proposed regulation amends the Department's existing minimum wage regulations in Title 34 at Sections 231.1 (relating to definitions), 234.34 (relating to tipped employees), 231.43 (relating to regular rate) and 231.101 (relating to minimum wage increase). This regulation also adds the following new sections: 231.111 (relating to tip credit for non-tipped duties), 231.112 (relating to tip pooling), 231.113 (relating to credit card fees) and 231.114 (relating to service charges).

Summary of Proposed Rulemaking

34 Pa. Code § 231.1. Definitions.

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

The Department proposes to add a definition for “tip credit” to provide clarity to its regulations. This definition will make it clear that a tip credit is the difference between the statutory minimum wage outlined in section 4 of the Act, 43 P.S. § 333.104, and the base hourly rate that employers pay to tipped employees.

The Department proposes to amend the definition for “tipped employee” to raise the tipped employee threshold from \$30 per month to \$135 per month. The tipped salary threshold was set in 1977. When the \$30 tip threshold was last updated, a tipped employee had to earn over 13 times the minimum wage in tips before an employer could claim a tip credit for that employee. Today, a tipped employee in 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.

34 Pa. Code § 231.34 Tipped Employees.

The Department proposes to amend subsection 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.

The Department proposes to add new subsection (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 employees are complying with the proposed tip pooling regulations.

34 Pa. Code § 231.43. Regular Rate.

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

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

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

The Department proposes to add new subsection “g” which provides, “the regular rate of pay is determined by totaling all remuneration for employment to or on behalf of the employee received in a workweek except those enumerated in § 403.43(a) divided by 40 hours.”

The Department’s regulation had been silent on how to calculate the regular rate of pay for employees who are paid a salary. This updated regulation addresses the omission in existing regulations and clarifies that the “regular rate” in all cases should be calculated based on a regular, 40-hour 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.

34 Pa. Code § 231.101. Minimum Wage Increase.

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

The Department proposes to amend subsection (b)(2) to reflect the proposed increase of the tipped employee threshold to \$135.00 per month.

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

The Department proposes to add this section to its regulations because, other than record keeping requirements outlined in 34 Pa. Code § 231.34, the Department has no regulations governing tipped employees. This regulation would also eliminate confusion for Pennsylvania employers that may have resulted from USDOL’s frequently changing guidance.

Subsection (a) would provide that an employer can only take a tip credit if that employee spends at least 80% of that employee’s workweek performing duties that directly generate tips and if the other duties that the employee performs support the duties that directly generate tips. This proposed regulation is needed because 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 at least \$2.83 per hour. The proposed regulation will ensure that employees who receive the lower tipped minimum wage are actually performing duties that generate tips. Finally, the Department provides that an employer cannot take a tip credit if an employee spends more than 30 continuous minutes performing duties that do not directly generate tips. The Department’s proposed regulation is in accordance with section 4 of the Act which requires employees to receive the minimum wage. It also mirrors a final regulation and longstanding guidance from USDOL that in order to be classified as a tipped employee, an employee must spend 80% of the employee’s time performing tipped work and must spend no more than 30 continuous minutes performing duties that do not directly generate tips.

Although the Department’s proposed regulation mirrors USDOL’s proposed regulation, there are several reasons that make it prudent for the Department to issue its own regulation on the

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

Subsection (b) provides that employers have to pay the minimum wage for any time where an employer cannot take a tip credit. The Department is proposing this to clarify and reinforce that the lower tipped minimum wage is an exception to the requirement that employers pay employees the minimum wage required by section 4 of the Act, 43 P.S. § 333.104.

34 Pa. Code § 231.112. Tip Pooling.

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

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

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

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

The Department is declining to adopt USDOL's rule because it does not align with the Act's remedial purpose. "It is permissible for a state to enact more beneficial wage and hour laws.

Indeed, the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded.” *Bayada Nurses, Inc. v. Com., Dep’t of Labor & Indus.*, 8 A.3d 866, 883 (Pa. 2010). Tipped workers, such as servers, lose control of their earned tips if forced to participate in tip pooling with non-tipped workers because the tip pooling effectively subsidizes the wages of non-tipped employees. This results in a loss of wages for the tipped worker and creates an incentive for employers to lower the hourly wage for non-tipped workers because those workers would not experience a loss in income.

34 Pa. Code § 231.113. Credit Card Fees.

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

The proposed regulation provides greater protection than found in federal law. The proposed regulation implements and is compelled by the express language of the Act. Section 3 of the Act states “the gratuity shall become the property of the employee.” 43 P.S. § 333.103. The FLSA does not contain this language, which evidences an intent for the Act to provide greater protection than the FLSA.

34 Pa. Code § 231.114. Service Charges.

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

The Department proposes 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 proposes this regulation to clarify to patrons that a service charge is different than a tip.

The Department proposes 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 proposes this regulation to clarify to patrons that a service charge is different than a tip.

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

Affected Persons

This 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 the approximately 199,285 tipped workers in Pennsylvania, as defined by the Act's current regulations.

Fiscal Impact

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

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

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

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 60 days after publication of the final-form regulation in the *Pennsylvania Bulletin*.

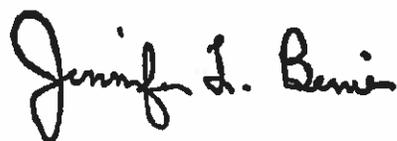
Contact Person

Interested persons are invited to submitted written comments, suggestions, or objections regarding the proposed regulation 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 within 30 days of publication in the *Pennsylvania Bulletin*.

Regulatory Review

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

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



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.

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

* * * * *

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

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

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

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

* * * * *

§ 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 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.

* * * * *

(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 determined by totaling all remuneration for employment to or on behalf of the employee received in a workweek except sums, payments, contributions, and compensation enumerated in subsection (a) divided by 40 hours.

§ 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.

TIPPED EMPLOYEES

§ 231.111 Tip Credit for Non-tipped Duties.

- (a) An employer may take a tip credit for any time in which an employee performs duties that do not directly generate tips if all of the following conditions are met:
- (1) The employee spends at least 80% of the employee's workweek performing duties that directly generate tips.
 - (2) The duties that do not directly generate tips support the duties that directly generate tips.

- (3) The employee spends less than 30 continuous minutes performing duties that do not directly generate tips.
- (b) If an employer 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.
- (b) Tip pools may not include:
 - (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)-(4) (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 Fees.

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

§ 231.114 Service Charges.

- (a) An employer that charges for the administration of a banquet, special function, or package deal shall notify patrons of this charge by providing notice:
 - (1) In the statement in a contract or agreement with the patron.

- (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.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY

November 5, 2021

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

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

Dear Chairman Bedwick:

Enclosed is a proposed 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 cursive script that reads "Jennifer L. Berrier".

Jennifer L. Berrier
Secretary

cc w/enc1: 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
Marsha A. Sajer, Chief Counsel
Kelly K. Smith, Executive Deputy Chief Counsel
Robert C. Schramm, Deputy Chief Counsel
Bryan M. Smolock, Director, Bureau of Labor Law Compliance

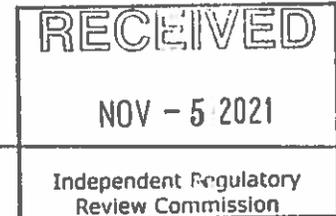
Sen.

Kathy Cooper

From: Erwin, Noah <Noah.Erwin@pasenate.com>
Sent: Friday, November 5, 2021 11:59 AM
To: Mueller, Janet (LI-OCC)
Subject: Re: Electronic Delivery - Proposed Regulation Minimum Wage - 12-114

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Sent: Friday, November 5, 2021 11:52:46 AM
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■ EXTERNAL EMAIL ■

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Here is the second Regulation for delivery. Please respond to this email that you have received delivery of Proposed Regulation Minimum Wage #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

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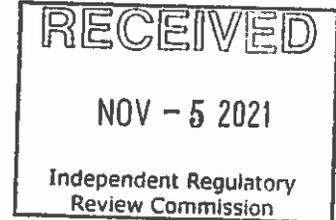
Sen.

Kathy Cooper

From: Kratz, Eric <ekratz@pasen.gov>
Sent: Friday, November 5, 2021 11:56 AM
To: Mueller, Janet (LI-OCC)
Subject: RE: Electronic Delivery - Proposed Regulation Minimum Wage - 12-114

Received. Thank you Janet.

Eric Kratz
Executive Director | Senate Labor and Industry Committee
Senator Camera Bartolotta
19 East Wing | Harrisburg, PA 17120
Phone: 717.783.6832 | Cell: 717-215-1259
ekratz@pasen.gov



From: Mueller, Janet (LI-OCC) <jamueller@pa.gov>
Sent: Friday, November 5, 2021 11:51 AM
To: Kratz, Eric <ekratz@pasen.gov>
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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

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

I.D. NUMBER: 12-114	<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> RECEIVED NOV - 5 2021 Independent Regulatory Review Commission </div>
SUBJECT: Minimum Wage	
AGENCY: DEPARTMENT OF LABOR & INDUSTRY	

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation

a. With Revisions	b. Without Revisions
-------------------	----------------------

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<i>HOUSE COMMITTEE ON LABOR & INDUSTRY</i>
11/5/21	<i>Jennifer Dodge</i>	MAJORITY CHAIR <u>Representative Jim Cox</u>
11/5/21	<i>Jennifer Dodge</i>	MINORITY CHAIR <u>Representative Gerald J. Mullery</u>
		<i>SENATE COMMITTEE ON LABOR & INDUSTRY</i>
		MAJORITY CHAIR _____
		MINORITY CHAIR _____
		<i>INDEPENDENT REGULATORY REVIEW COMMISSION</i>
		<i>ATTORNEY GENERAL (for Final Omitted only)</i>
		<i>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</i>

November 5, 2021

LRB

Kathy Cooper

From: Leah Brown <lbrown@palrb.us>
Sent: Friday, November 5, 2021 3:22 PM
To: Mueller, Janet (LI-OCC)
Cc: Code&Bulletin
Subject: [External] RE: Proposed Regulation 12-114

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Hello Jan!

Thank you for sending this proposed rulemaking. We can publish this in our November 20th Bulletin. Please let me know if you have any questions!
Have a great weekend!

Leah D. Brown
Legal Assistant
Pa. Code and Bulletin
647 Main Capitol Building
Harrisburg, PA 17120
(717) 783-2272



From: Mueller, Janet (LI-OCC) <jamueller@pa.gov>
Sent: Friday, November 5, 2021 3:12 PM
To: bullegin@palrb.us
Cc: Leah Brown <lbrown@palrb.us>
Subject: Proposed Regulation 12-114
Importance: High

Hello,

Please respond to this email that you have received delivery of Proposed Regulation Minimum Wage #12-114 and confirm the date of publication for this regulation.

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
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