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VIA E-MAIL

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Bryan M. Smolock, Director
Department of Labor & Industry
Bureau of Labor Law Compliance
651 Boas Street, Room 1301
Harrisburg, PA 17121

IRRC@IRRC.STATE.PA.US

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: IRRC Number 3322
Department of Labor and Industry
Regulation #12-114: Minimum Wage

Dear Director Smolock and Commissioners:

I write on behalf of the Workplace Policy Institute (WPI) of the law firm Littler Mendelson, P.C. with respect to Final Rulemaking #12-114 (IRRC #3322) of the Pennsylvania Department of Labor and Industry (DLI), which would update the regulations regarding tipped employees and the regular rate under the Pennsylvania Minimum Wage Act of 1968 (PMWA). WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. With more than 1,500 lawyers, Littler is the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters. More than fifty of our employment attorneys practice in the Commonwealth of Pennsylvania. On a regular basis, we advise Pennsylvania employers with respect to their compliance with the PMWA and represent Pennsylvania employers in disputes arising under the PMWA. I write to address three concerns about the final rule.

A. The Rule on Credit Card Transaction Fees Requires an Amendment to the PMWA.

The rule prohibits 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. 34 Pa. Code § 231 DLI contends that this rule is consistent with the PMWA, which it claims already states that gratuities are the property of the employee, citing 43 P.S. § 333.103. That is not correct. In fact, the rule would require an amendment to the PMWA. The Act currently provides:

> 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. **The previous sentence shall not apply with respect to any tipped employe unless:**
>
> (1) Such employe has been informed by the employer of the provisions of this subsection;
>
> (2) **All tips received by such employe have been retained by the employe** and shall not be surrendered to the employer to be used as wages to satisfy the requirement to pay the current hourly minimum rate in effect; **where the gratuity is added to the charge made by the establishment, either by the management, or by the customer, the gratuity shall become the property of the employe**; except that this subsection shall not be construed to prohibit the pooling of tips among employes who customarily and regularly receive tips.

43 P.S. § 333.103(d) (emphasis added). DLI relies on the phrase "the gratuity shall become the property of the employe" to justify its rule. DLI's rationale is flawed, for two reasons:

First, the phrase "the gratuity shall become the property of the employe" does not preclude an employer from passing along to an employee who earns a gratuity paid via credit card the obligation to pay the corresponding processing fee associated with that gratuity (and thus, the right to handle the transaction upfront by paying the fee and distributing the net gratuity to the employee). Indeed, despite its assertion that section 333.103 already precludes employers from paying credit card transaction fees from the amount charged by patrons before distributing the balance to the employees, DLI admits that "Pennsylvania law and regulations currently are **silent** on deducting credit card and other payment processing fees from tips." (Regulatory Analysis Form at § 12, p.20) (emphasis added).

Second, the phrase "the gratuity shall become the property of the employe" only applies as a condition precedent to whether the "previous sentence" applies with respect to the tipped employee. That "previous sentence" is about an employer's right to take a tip credit. If an employer does not take the tip credit, section 333.103(d) (including its requirement that "the gratuity shall become the property of the employe") does not apply. Quite simply, an employer can satisfy its obligations under the minimum wage provisions of the PMWA by paying employees (even those who customarily receive tips) a cash wage of at least the minimum wage set forth in 43 P.S. § 333.104(a). If the employer pays a tipped employee a cash wage of at least $7.25 per hour (the current minimum wage established by § 333.104(a)), then the "additional amount on account of the tips" contemplated by the PMWA (in the definition of "wage" found in § 333.103(d)) is $0. In that scenario, the employer is not claiming any tip credit, and the subsequent

requirements of § 333.103(d) that might justify regulatory action (including that the "gratuity shall become the property of the employe") do not apply.

"Deducting credit card and other processing service fees from employees' tips is a common practice among employers who accept credit cards and other fee-bearing non-cash methods of payment to pay for a service and provide gratuity." (Regulatory Analysis Form at § 10, p.9). "The practice of deducting a percentage of employee's tip to pay a portion of the credit card or other payment transaction fee is permitted by USDOL under the FLSA." (*Id.* at p.10). In this letter, WPI expresses no position on the policy decision of ***whether*** the law should be amended to prohibit an employer from paying credit card transaction fees from the amount charged by patrons before distributing the balance to the employees. Rather, it is a question of ***who*** is empowered to make that policy decision. If this common and lawful practice is going to be outlawed under the PMWA, it should be the result of legislative policy deliberation.

Notably, the Pennsylvania Legislature ***has*** considered whether to amend the PMWA to prohibit employers from deducting credit card payment processing fees (reflecting that the PMWA doesn't currently prohibit this practice), but such legislation has not become law (reflecting that the policy debate about whether to prohibit the practice should occur in the appropriate *legislative* forum). *See, e.g.*, Senate Bill No. 79 (2019) (enclosed).

43 P.S. § 333.109 grants to the Secretary the authority to make and revise regulations "which shall be deemed appropriate to carry out the purposes of [the PMWA] and to safeguard the minimum wage rates thereby established." Particularly where an employer complies with the minimum wage rates established by the PMWA without relying on the tip credit, the Secretary does not have authority to regulate an employer's decision to pay the credit card transaction fee from the amount charged by the patron. Until the Legislature acts, employers should be permitted to pay credit card transaction fees from the amount charged by patrons before distributing the balance to the employees (or allocating the balance according to a valid tip pool arrangement).

The Regulatory Review Act makes clear that the IRRC must determine "whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based." 71 P.S. § 745.5b(a). The Commission should issue a disapproval order and encourage DLI to resubmit a revised regulation that: (a) strikes the portion of the rule that prohibits 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; or (b) at minimum, clarifies that the rule only applies when an employer relies on the tip credit.

B. The Rule on Notice to Patrons Exceeds DLI's Authority.

The final rule imposes cumbersome notice requirements on employers that levy a service charge for a banquet, special function, or package deal. According to the final rule, the employer must notify patrons of the charge in the contract or agreement with the patron and on any menu provided to the patron. The notice must state that the 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 provide service to the guests. The billing

statement must contain separate lines for service charges and tips. 34 Pa. Code § 231.114. Notably, DLI does not include any ***consequences*** for an employer's failure to comply with these onerous notice requirements.

43 P.S. § 333.109 grants to the Secretary limited authority to make and revise regulations "which shall be deemed appropriate to carry out the purposes of [the PMWA] and to safeguard the minimum wage rates thereby established." The notice provisions of the final rule exceed the Secretary's authority. Communications between businesses and consumers are regulated by the Unfair Trade Practices and Consumer Protection Law (UTPCPL) and enforced by the Office of Attorney General (OAG). The notice requirements included in the final rule do not "carry out the purpose" of the PMWA or "safeguard minimum wage rates." The purpose of the PMWA is to establish "***minimum*** fair wage rates." 43 P.S. § 333.101 (emphasis added). The PMWA sets that minimum at $7.25 per hour. DLI's service charge notice requirements do not carry out that minimum wage rate or safeguard it. That is because employees must receive at least $7.25 per hour ***whether or not*** patrons understand the difference between a service charge and a gratuity or receive multiple notices about it. It is readily apparent that DLI anticipates that its notice rule will increase tips by "ensuring patrons who intend to leave tips realize they are not leaving a tip simply by paying a service charge." (Regulatory Analysis Form § 10, p.11). While it may be a laudable goal to facilitate higher tips from patrons, it is not an authorized regulatory purpose. It is for the Legislature to determine the minimum fair wage rate.

The Regulatory Review Act makes clear that the IRRC must determine "whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based." 71 P.S. § 745.5b(a). The Commission should issue a disapproval order and encourage DLI to resubmit a revised regulation that strikes the portion of the rule that imposes a notice requirement on employers that levy a service charge.

C. The "Regular Rate" Rule Would Make Pennsylvania a Complete Outlier.

The final rule purports to clarify that the regular rate "in all cases for salaried workers should be calculated based on a regular, 40-hour work week and not the total hours worked including overtime, which may be irregular and inconsistent from week to week." (Notice of Final Rulemaking § 9, p.19). Specifically, the regulation adds new subsection "g" to 34 Pa. Code § 231.43:

> The regular rate for salaried employees who are not exempt from overtime is the amount of remuneration determined under subsection (a), divided by 40 hours.

34 Pa. Code § 231.43(g). DLI claims that its regulation is like the laws in California, Connecticut, New Jersey, and New Mexico. (Regulatory Analysis Form § 12 at p.22). ***That is wrong.*** The final rule will make Pennsylvania a complete ***outlier*** and will impose an unprecedented burden on Pennsylvania employers that is not shared by employers in any other state, forcing multi-state employers to adopt a complex single-state Pennsylvania carve-out to their payroll processes.

DLI focuses its discussion on its policy decision to eliminate the so-called "fluctuating workweek" with respect to fixed weekly salaries. WPI expresses no opinion on that decision. Rather, WPI's concern involves DLI's treatment of variable incentive compensation (including commissions and variable bonuses). Even California recognizes a distinction between "flat sum" compensation (including fixed weekly salaries and flat-sum bonuses) and variable incentive pay (including commissions and variable bonuses).

California Labor Code § 515(d)(1) provides that for the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, "the employee's regular hourly rate shall be 1/40th of the employee's weekly salary." In *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal.5th 542 (2018), the California Supreme Court extended this principle to other "flat sum" incentive amounts paid to nonexempt employees. Because a "flat sum" incentive cannot increase as an employee's hours worked increase, the Court held that "flat sum" incentive compensation "is properly treated as if it were fully earned by only the nonovertime hours in the pay period, and therefore only nonovertime hours should be considered when calculating the bonus's per-hour value." *Id.* at 562. Thus, the regular rate associated with "flat sum" incentive compensation is determined by dividing such compensation by the non-overtime hours worked during the pay period. *Id.* at 565-66. Then, because the "flat sum" incentive has not yet provided any compensation for the overtime hours worked, the additional overtime compensation owed is equal to one and one-half times (rather than one-half times) that rate times all overtime hours worked. *Id.*

The California Supreme Court recognized that ***a "different analysis" is warranted when the incentive may increase in size as the employee works more hours, including overtime hours (such as in the case of a production bonus or a commission)***. *Alvarado*, 4 Cal.5th at 561 n.6. Calling this an "***important distinction***," the Supreme Court explained that when incentive compensation rewards each hour of work (including overtime hours), the incentive already "constitutes base compensation, including base compensation for overtime work." *Id.* at 568 (emphasis added). Logically, the regular rate associated with such a variable incentive is calculated by dividing the amount earned "by the total number of hours worked, including overtime hours." *Id.* at 570. Then, the additional overtime compensation that is payable because of the bonus, is that corresponding rate "multiplied by 0.5 (not 1.5) and by the number of overtime hours." *Id.* That makes sense. When an incentive payment already compensates an employee for all hours worked, including overtime hours, then the regular rate associated with that incentive payment is the amount of the payment divided by all hours worked. Then, because that regular rate has already been paid for all hours worked (i.e., at "one times the regular rate"), the only amount needed to bring the employee's compensation for overtime hours to "one and one-half times" the regular rate is an additional one-half that regular rate, for all overtime hours.

No other state (not even California) requires that the regular rate associated with variable incentive compensation is to be determined by dividing that compensation only by non-overtime hours. Every other state (even California and the few other states that prohibit the so-called "fluctuating workweek" with respect to fixed weekly salaries) recognize that the regular rate associated with variable incentive pay should be determined by dividing that pay by all hours worked.

For example, if a salaried nonexempt employee in California earned a $500 weekly salary and also earned $100 in variable commissions in a week in which the employee worked 50 hours, the employee's compensation would be calculated as follows:

- **Overtime on Salary:** In California (and in a few other states and DLI's rule), the salary is compensation only for 40 hours of work. Thus, the regular rate associated with the salary is $12.50/hour ($500 ÷ 40), and the employee is entitled to an additional overtime premium of $187.50 ($12.50 x 1.5 x 10).

- **Overtime on Commissions:** In California (and under the FLSA and in every other state, but not under DLI's rule), it is recognized that the $100 in variable commission was earned based on the employee's efforts across all 50 hours worked. Thus, the regular rate associated with that commission is $2/hour ($100 ÷ 50). Then, because the commission already compensated the employee at a rate of $2/hour for all 50 hours worked (including the 10 overtime hours), the additional overtime premium owed to bring the employee to "time and a half" overtime on those overtime hours is $10 ($2 x 0.5 x 10).

- **Total Compensation:** $797.50 ($500 + $100 + $187.50 + $10).

Even though DLI concluded that Pennsylvania should join California and the few other states prohibiting the "fluctuating workweek" method with respect to the salary component of a salaried nonexempt employee, it failed to recognize that variable incentive compensation is different. WPI respectfully submits that the following proposal would appropriately recognize the distinction between fixed and variable compensation (applicable in "all cases" and not just as to salaried workers):

> The regular rate associated with a fixed salary or any fixed-sum incentive compensation shall be determined by dividing the fixed amount by all non-overtime hours worked during the relevant period; the corresponding overtime due on that amount shall be determined by multiplying that rate by one and one-half times the number of overtime hours worked during that period.
>
> The regular rate associated with variable compensation shall be determined by dividing the variable amount by all hours worked during the relevant period; the corresponding overtime due on that amount shall be determined by multiplying that rate by one-half times the number of overtime hours worked during that period.

DLI rejected this proposal because, in its view, "using two different methodologies to calculate overtime pay for salaried employees who receive incentive pay will be confusing for employers and will be difficult to enforce." (Comment and Response Document at p.19). This is wrong and reflects a fundamental misunderstanding of how employers currently calculate overtime on variable incentive pay. For decades, employers throughout Pennsylvania and across the United States have been calculating overtime pay based on the formula applicable to the various component parts of an employee's compensation. DLI's decision to treat variable incentive pay as only being earned in 40 hours – even if the reality is that the

employee earned the variable incentive based on all hours worked – will cause confusion for employers and force them to design a completely unique single-state payroll system to calculate overtime for their Pennsylvania employees.

DLI also claimed that the proposal "would treat salaried employees differently than employees who are paid hourly, monthly or by piece rate. For these employees, the regular rate is determined by totaling all remuneration even remuneration earned pursuant to a variable incentive plan." (Comment and Response Document at p.19). DLI misrepresents the issue. WPI agrees that remuneration earned pursuant to a variable incentive plan needs to be included in the regular rate (for hourly ***and*** salaried workers alike). The question is ***how*** it should be included in the regular rate.

The error in DLI's approach becomes obvious when considering the scenario of an employee paid $10 per hour for all hours worked. If that employee worked 50 hours, there would be widespread consensus that the employee is entitled to $550 (i.e., $10/hour plus an extra $5/hour for the 10 overtime hours worked). According to DLI's logic, however, the employer would first have to total "all remuneration" and divide that amount by 40 hours. In this case, "all remuneration" totals $500 (i.e., $10 x 50). The regular rate would therefore be $13.75 (i.e., $500 / 40), and the additional overtime owed would be $206.25 (i.e., $13.75 x 1.5 x 10). Clearly, that is not correct.

Because hourly pay is a form of variable compensation (in that it varies by the number of hours worked), the correct approach would be the approach described in WPI's proposal, above: take all remuneration ($500) and divide it by all hours worked (50), to achieve a regular rate of $10 per hour. Then, pay the employee an additional ½ that amount ($5/hour) for all overtime hours worked. The employee would receive $550 (i.e., $10 x 50 + $5 x 10) – exactly what common sense dictates the employee should be paid. Yet the final rule generates confusion and uncertainty for the regulated community.

The Regulatory Review Act makes clear that the IRRC must determine "whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based." 71 P.S. § 745.5b(a). The Commission should issue a disapproval order and encourage DLI to resubmit the regulation to clarify that the regular rate associated with variable incentive compensation shall be determined by dividing the variable amount by all hours worked during the relevant period and that the corresponding overtime due on that amount shall be determined by multiplying that rate by one-half times the number of overtime hours worked during that period.

Sincerely,

/s/ Robert W. Pritchard

Robert W. Pritchard

Enclosure
4877-4796-0085.1 / 098794-1000

PRIOR PRINTER'S NO. 54 PRINTER'S NO. 1389

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 79 Session of 2019

INTRODUCED BY TARTAGLIONE, FONTANA, SCHWANK, STREET, HUGHES, COSTA, BREWSTER, BROWNE, HAYWOOD, YUDICHAK, LEACH, IOVINO AND L. WILLIAMS, JANUARY 23, 2019

SENATOR BARTOLOTTA, LABOR AND INDUSTRY, AS AMENDED, NOVEMBER 18, 2019

AN ACT

Amending the act of January 17, 1968 (P.L.11, No.5), entitled "An act establishing a fixed minimum wage and overtime rates for employes, with certain exceptions; providing for minimum rates for learners and apprentices; creating a Minimum Wage Advisory Board and defining its powers and duties; conferring powers and imposing duties upon the Department of Labor and Industry; imposing duties on employers; and providing penalties," further providing for definitions~~.~~; PROVIDING FOR FEDERAL COMPLIANCE; AND FURTHER PROVIDING FOR MINIMUM WAGES AND FOR EXEMPTIONS. <--

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 3(d) of the act of January 17, 1968 (P.L.11, No.5), known as The Minimum Wage Act of 1968, is amended to read:

Section 3. Definitions.--As used in this act:

* * *

(d) "Wages" mean compensation due to any employe by reason of his or her employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges or

allowances as may be permitted by regulations of the secretary under section 9.

"Wage" paid to any employe includes the reasonable cost, as determined by the secretary, to the employer for furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his or her employes: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employe to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employe: Provided, further, That the secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employes and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employes, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employe.

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. The previous sentence shall not apply with respect to any tipped employe unless:

(1) Such employe has been informed by the employer of the provisions of this subsection;

(2) All tips received by such employe have been retained by the employe and shall not be surrendered to the employer to be used as wages to satisfy the requirement to pay the current hourly minimum rate in effect; where the gratuity is added to the charge made by the establishment, either by the management, or by the customer, the gratuity shall become the property of the employe; except that this subsection shall not be construed to prohibit the pooling of tips among employes who customarily and regularly receive tips. An employer that permits a customer to pay a gratuity by credit card shall pay the employes the full amount of the gratuity that the customer indicated on the credit card slip without deduction for any credit card payment processing fee or cost that may be charged to the employer by the credit card company. Payment of a gratuity made by a customer using a credit card shall be made to the employe not later than the next regular payday following the date the customer authorized the credit card payment.

* * *

~~Section 2. This act shall take effect in 60 days.~~ <--

SECTION 2. THE ACT IS AMENDED BY ADDING A SECTION TO READ: <--

SECTION 3.1. FEDERAL COMPLIANCE.--THE MINIMUM WAGE AND OVERTIME REQUIREMENTS UNDER THIS ACT SHALL BE APPLIED IN ACCORDANCE WITH THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 (29 U.S.C. §§ 201-219) AND THE REGULATIONS PROMULGATED UNDER THE FAIR LABOR STANDARDS ACT OF 1938, EXCEPT WHEN A HIGHER STANDARD IS SPECIFIED UNDER THIS ACT

OR REGULATIONS PROMULGATED UNDER THIS ACT.

SECTION 2.1. SECTION 4(A) OF THE ACT IS AMENDED BY ADDING PARAGRAPHS TO READ:

SECTION 4. MINIMUM WAGES.--EXCEPT AS MAY OTHERWISE BE PROVIDED UNDER THIS ACT:

(A) EVERY EMPLOYER SHALL PAY TO EACH OF HIS OR HER EMPLOYES WAGES FOR ALL HOURS WORKED AT A RATE OF NOT LESS THAN:

* * *

(9) EIGHT DOLLARS ($8.00) AN HOUR BEGINNING JULY 1, 2020.

(10) EIGHT DOLLARS FIFTY CENTS ($8.50) AN HOUR BEGINNING JANUARY 1, 2021.

(11) NINE DOLLARS ($9.00) AN HOUR BEGINNING JULY 1, 2021.

(12) NINE DOLLARS AND FIFTY CENTS ($9.50) AN HOUR BEGINNING JANUARY 1, 2022.

* * *

SECTION 3. SECTION 5(A)(3), (4), (5) AND (11) OF THE ACT ARE AMENDED AND THE SECTION IS AMENDED BY ADDING A SUBSECTION TO READ:

SECTION 5. EXEMPTIONS.--(A) EMPLOYMENT IN THE FOLLOWING CLASSIFICATIONS SHALL BE EXEMPT FROM BOTH THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THIS ACT:

* * *

[(3) DELIVERY OF NEWSPAPERS TO THE CONSUMER;

(4) IN CONNECTION WITH THE PUBLICATION OF ANY WEEKLY, SEMIWEEKLY, OR DAILY NEWSPAPER WITH A CIRCULATION OF LESS THAN FOUR THOUSAND, THE MAJOR PART OF WHICH CIRCULATION IS WITHIN THE COUNTY WHERE PUBLISHED OR COUNTIES CONTIGUOUS THERETO;]

(5) IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY EMPLOYE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN

ELEMENTARY OR SECONDARY SCHOOLS) [OR IN THE CAPACITY OF OUTSIDE SALESMAN (AS SUCH TERMS ARE DEFINED AND DELIMITED FROM TIME TO TIME BY REGULATIONS OF THE SECRETARY, EXCEPT THAT AN EMPLOYE OF A RETAIL OR SERVICE ESTABLISHMENT SHALL NOT BE EXCLUDED FROM THE DEFINITION OF EMPLOYE EMPLOYED IN A BONA FIDE EXECUTIVE OR ADMINISTRATIVE CAPACITY BECAUSE OF THE NUMBER OF HOURS IN HIS OR HER WORKWEEK WHICH HE OR SHE DEVOTES TO ACTIVITIES NOT DIRECTLY OR CLOSELY RELATED TO THE PERFORMANCE OF EXECUTIVE ADMINISTRATIVE ACTIVITIES, IF LESS THAN FORTY PERCENT OF HIS OR HER HOURS WORKED IN THE WORKWEEK ARE DEVOTED TO SUCH ACTIVITIES);] OR IN THE CAPACITY OF OUTSIDE SALESMAN, A HIGHLY COMPENSATED EMPLOYE, COMPUTER SYSTEMS ANALYST, COMPUTER PROGRAMMER, SOFTWARE ENGINEER OR OTHER SIMILARLY SKILLED WORKER;

* * *

[(11) IN EMPLOYMENT AS A SWITCHBOARD OPERATOR EMPLOYED BY AN INDEPENDENTLY OWNED PUBLIC TELEPHONE COMPANY WHICH HAS NOT MORE THAN SEVEN HUNDRED AND FIFTY STATIONS;]

* * *

(D) THE FOLLOWING SHALL APPLY TO SUBSECTION (A)(5):

(1) WHEN THE CLASSIFICATIONS UNDER SUBSECTION (A)(5) ARE REQUIRED TO BE COMPENSATED ON A SALARY OR FEE BASIS IN ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT OF 1938 (29 U.S.C. §§ 201-219) AND 29 CFR PT. 541 (RELATING TO DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES), AS AMENDED, EMPLOYERS MAY USE THE PAYMENT OF NONDISCRETIONARY BONUSES, INCENTIVES AND COMMISSIONS, PAID ANNUALLY OR MORE FREQUENTLY, TO DETERMINE UP TO TEN PERCENT OF THE SALARY OR FEE AMOUNT. AN EMPLOYER MAY DESIGNATE ANY FIFTY-TWO-WEEK PERIOD IN DETERMINING ANNUAL PAYMENTS. IF AN EMPLOYER FAILS TO DESIGNATE IN WRITING

THE ANNUAL PAYMENT TIME PERIOD IN ADVANCE, A CALENDAR YEAR WILL APPLY.

(2) EFFECTIVE JANUARY 1, 2023, THE SALARY OR FEE BASIS UNDER PARAGRAPH (1) MAY BE UPDATED AND DELIMITED FROM TIME TO TIME BY REGULATIONS OF THE SECRETARY.

(3) THE TERMS UNDER SUBSECTION (A)(5) SHALL BE DEFINED IN ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT OF 1938 AND 29 CFR PT. 541, AS AMENDED, EXCEPT AS OTHERWISE PROVIDED UNDER THIS ACT OR UPDATED AND DELIMITED FROM TIME TO TIME BY REGULATIONS OF THE SECRETARY AFTER THE EFFECTIVE DATE OF THIS SECTION.

SECTION 4. THIS ACT SHALL TAKE EFFECT IN 90 DAYS.