



Labor & Industry Committee

State Representative Gerald J. Mullery
Democratic Chairman

3322

114 Irvis Office Building • P.O. Box 202119 • Harrisburg, PA 17120-2119 • (717) 783-4893 • Fax: (717) 780-4782

December 20, 2021

Bryan Smolock, Director
Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas St, Room 1301
Harrisburg, PA 17121



RE: Proposed Rulemaking- Minimum Wage Act #12-114 (IRRC# 3322)

Dear Director Smolock:

As the Democratic Chairman of the House Labor and Industry Committee, I am writing to express my support for the Pennsylvania Department of Labor and Industry's proposed rulemaking regarding tipped employees and regular rate under the Pennsylvania Minimum Wage Act.

The proposed rulemaking sets forth several changes to modernize the Minimum Wage Act of 1968, all of which are long past due and have my full support. The proposed rulemaking is consistent with the remedial intent of the Minimum Wage Act of 1968 and would, therefore, largely benefit Pennsylvania's working class.

This rulemaking is consistent with the intent of the Minimum Wage Act of 1968

The Pennsylvania Department of Labor and Industry's proposed rulemaking is consistent with the strong declaration of policy contained in Section 1 of the Minimum Wage Act of 1968, which has recently been reaffirmed by The Supreme Court of Pennsylvania and underlines the importance of the act's protections for working Pennsylvanians:

Employees are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to the public interest and public policy commands its regulation. Employees employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Judged by any reasonable standard, wage in such occupation are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employes, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduce the purchasing power of the workers and threatens the economy. The evils of unreasonable and unfair wages

as they affect some employees employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and the employees employed therein and of the public interest of the community at large.

The intent of the Minimum Wage Act is unambiguous—the act is designed to protect workers. As such, any regulatory changes should be consistent with that fundamental goal. The department's proposed rulemaking demonstrates that these changes are not only consistent with the act, but necessary to fulfill the act's intent and provide stability at a time where federal changes over the years have been inconsistent, at best and harmful, at worst.

This rulemaking will benefit Pennsylvania workers

Pennsylvania's Minimum Wage Act is woefully out of date and, taken together, these changes represent a significant step forward for Pennsylvania's workforce. Although I support the entire proposed rulemaking, I am addressing several of the specific proposals separately, below:

1. Updating the definition of tipped employee to increase the amount of tips an employee must receive before being eligible for the tipped minimum wage from \$30 to \$135.

Under the current regulations, last updated in 1977, an employee could be paid the \$2.83/hour tipped minimum wage if they earn just \$30 of tips in a month. Updating the threshold will account for 44 years of inflation, which is not only reasonable, but also absolutely necessary to keep the regulations consistent with the intent of the Minimum Wage Act.

The additional requirements for employers are minimally burdensome. Meanwhile, nearly 200,000 tipped workers will directly benefit from these regulations and affected businesses will benefit from the additional clarity and consistency the new regulations provide.

2. Codifying the 80/20 rule, which allows employers to take the tipped minimum wage credit only if an employee spends 80 percent of their time doing activities that produce tips.

For over 30 years, Pennsylvania has been subject to federal enforcement of the "80/20 rule," which "ensures that an employer may only assign non-tipped duties for twenty percent or less of the tipped employee's work time in order to benefit from the tip credit against its minimum wage obligations."¹ In December of 2020, however, The United States Department of Labor (USDOL) published a final rule that would have eliminated that 20% cap, essentially allowing employers to require more work for less pay.

¹ Commonwealth of Pennsylvania et al. v. Scalia et al., No. 2:21-cv-00258 (E.D. Pa., Jan. 19, 2021).

Although this rule is no longer an immediate threat and, in October, USDOL published a final regulation codifying the “80/20 rule,” this rule should be codified in Pennsylvania’s regulations to guard against the uncertainty at the federal level.

3. Allowing for tip pooling for those customarily engaged in tipped work, requiring employers to pay the full tipped amount on credit cards to the employee, and prohibiting employers from deducting credit card fees or other charges.

These proposed rules are consistent with the remedial purpose of the Pennsylvania Minimum Wage Act and uphold its intent by ensuring that employers cannot take the property of an employee to subsidize non-tipped workers’ wages through a mandatory tip pool or pay the employer’s operational costs.

USDOL, in the same final rulemaking eliminating the “80/20 rule,” declared that it was changing regulations to allow employers to institute mandatory tip pools with employees who do not customarily and regularly receive tips if the employer does not take a tip credit and maintains adequate records. Unlike other portions of the final rule, this change went into effect on April 30, 2021.

The Pennsylvania Department of Labor’s proposed rulemaking addresses the gap in our regulations by allowing for tip pooling under certain circumstances but intentionally diverges from the new federal rule by limiting participation in the tip pool to workers that spend at least 80% of their work week performing duties that customarily or regularly generate tips and excluding those with ownership stakes or meet the executive duties test. As the department explains in the Regulatory Analysis Form (RAF): “The practice of tip pooling is 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.”²

The department’s proposed rulemaking removes the incentive for employers to lower the hourly wage for non-tipped workers by subsidizing their wages via the tip pool and protects the hard-earned tips that comprise majority of tipped-workers’ pay.

4. Updating the calculation of the regular rate for salaried employees who are not exempt from overtime.

USDOL allows employers to use the fluctuating work week method for calculating overtime for salaried non-exempt employees meaning an employer can pay a flat weekly salary, or “regular rate,” regardless of weekly hours and only use a .5 multiplier to calculate the employee’s overtime pay. Additionally, USDOL allows employers to calculate the “regular rate” using either the 40-hour work week or total hours worked including overtime. Ultimately, this results in significant savings for employers but

² PA Department of Labor and Industry, Regulatory Analysis Form (RAF), P. 31, Para. 1.

disadvantages employees because it results in a lower regular rate and, thus, less overtime pay than they would otherwise receive under the standard method calculation.

Unlike the FLSA, the Pennsylvania Supreme Court, in *Chevalier v. General Nutrition Ctrs., Inc.*, ruled that the Pennsylvania Minimum Act requires a 1.5 multiplier be applied to determine an employee's overtime rate when the employee works a fluctuating work week.³

As for the question of the "regular rate" calculation, The Supreme Court agreed with the Superior Court's observation that "because Pennsylvania 'borrowed' the term 'regular rate' directly from the FLSA and its regulations which at the time were 'clearly understood' to allow employers to utilize actual hours worked rather than forty to calculate the regular rate"⁴ but acknowledge that the limited guidance from Pennsylvania's Secretaries of Labor and Industry on this question created ambiguities.⁵

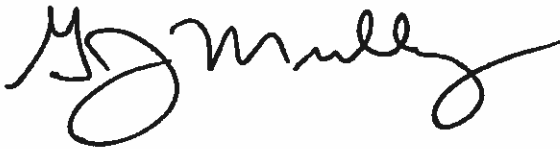
As such, the proposed rulemaking would address the gap in our regulations by clarifying that the "regular rate" in all cases, including fluctuating work week agreements, should be calculated based on a 40-hour work week. This will result in greater take home pay for employees working overtime.

This rulemaking should be adopted

The Pennsylvania Department of Labor and Industry has demonstrated that the proposal is consistent with the original intent and purpose of the Minimum Wage Act and that it would benefit Pennsylvania's working families. As such, I support the changes outlined in the proposed rulemaking and look forward to favorable action on this package in the future.

In closing, I thank you for this opportunity to offer comments on this truly significant and timely rulemaking. I will be glad to offer further support for this measure should any additional information be required.

Sincerely,



Gerald J. Mullery, Democratic Chairman
Labor and Industry Committee
Pennsylvania House of Representatives

³ *Chevalier v. General Nutrition Ctrs., Inc.*, 220 A.3d. 1038 (Pa. 2019).

⁴ *Ibid.*

⁵ *Ibid.*

cc: Independent Regulatory Review Commission (via email)