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APPOINTMENTS
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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

RECEIVED

MAR 16 2022

March 16, 2022

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

**Independent Regulatory
Review Commission**

Re: Final Rulemaking (DLI 12-114 and IRRC #3322)

Dear Commissioners:

As members of the House Labor and Industry Committee, we submit these comments for the Commission's review prior to its consideration of final-form regulation DLI 12-114 (Minimum Wage – Tipped Workers).

Regulatory Review Process

First, we must note that, while we still question the timing and necessity of this rule, we believe that the Department of Labor and Industry (DLI) has approached this rulemaking process with more cooperative behavior than we have seen in recent years (see e.g., DLI 12-106 - Minimum Wage/Overtime Pay). DLI appears to have reviewed the comments received about the proposed regulation in good faith - and they made some important changes in response to critics of this proposal in the final-form regulation.

Under the current statutory regulatory review framework, which we are working with many of our colleagues to reform, a strident agency can disregard its critics and eventually promulgate a highly controversial rule. We saw DLI do this with the regulation on overtime pay, which had to be abrogated by statute, and we are watching the Environmental Quality Board attempt do this with its regulation on the CO2 budget trading program. This type of go-it-alone approach by unelected bureaucrats, especially when clear majorities of elected lawmakers object, is antithetical to a republican form of government.

Therefore, it is imperative that agencies resist the urge to force highly controversial regulations through the review process. Rather, agencies should approach the current review process in good faith, with an open mind and a willingness to seek compromise - even if they cannot always satisfy every dogged critic or please a proposal's most fervent supporters. This is how the regulatory review process is supposed to work. Although we do have some outstanding concerns about this final-form regulation, we also recognize that DLI has adhered more closely to the spirit of the regulatory review process with this rule than it has in the past.

Notification of Affected Communities and Initial Enforcement

We were encouraged to see that DLI took some of our advice when they closely mirrored the federal regulations on two major provisions of this final-form regulation (the 80/20 rule and the tip pooling rule). However, it must be noted that there are still some minor discrepancies between this regulation and the parallel federal regulations (notably, the increase of the amount of tips an employee must receive each month to be considered a tipped worker and the requirement to notify employees in writing of a tip pooling arrangement), although these discrepancies are relatively minor. Even in the areas where federal standards are adopted, state-level enforcement of these matters will be new to the regulated community.

Therefore, it is our hope that DLI will consider the following when implementing an enforcing this final-form regulation:

- The regulated community should be notified directly. We believe that DLI should not only make efforts to publicize the new rule and communicate with groups representing affected businesses when it becomes effective, they should make proactive efforts to identify businesses impacted by this and provide them with notification of the new rules.
- If it is not feasible to identify every single affected business, we note that the Unemployment Compensation Tax Office within DLI has email addresses for the vast majority of employers in Pennsylvania. Using this email directory, it should be relatively simple and inexpensive for DLI to send electronic notice to Pennsylvania employers to summarize the provisions of the new rule and explain which employers may be affected.
- Initial enforcement should be considerate of the newness of the rule. It may take some time for some employers to digest the new rule and implement compliance procedures in their workplaces. DLI should provide warnings and compliance tips when an unintentional violation is found. If a warned employer does not make good faith attempts to comply or a violation is intentional, DLI should only then proceed to official enforcement.

As we understand it, DLI's intention with this regulation is to implement stronger protections for tipped employees. We hope that the Bureau of Labor Law Compliance will remember that and take the least forceful approach possible with employers who are getting used to a new rule.

Statutory Authority to Regulate Service Charge Disclosures

There is one issue that we do believe merits additional consideration by the commission prior to granting approval for this final-form regulation. We are unconvinced that the Minimum Wage Act (MWA) grants authority for DLI to require disclosure (from a business to the consumer) of the nature of a service charge. As DLI notes in its regulatory filing, the Unfair Trade Practices and Consumer Protection Law (UTPCL) may not prohibit the agency from promulgating regulations authorized under the MWA, but we question whether DLI even has the statutory authority to regulate consumer disclosures (about service charges) under the MWA.

Ideally, DLI will withdraw this final-form regulation and resubmit it with amendments that clearly conform to its authority under the MWA. However, if they will not do that, we believe the commission should insist on more complete reasoning from DLI before granting its approval.

Specifically, we hope that commissioners will consider the following when deciding whether the MWA grants the authority to require the disclosure of the nature of a service charge:

- DLI cites authority under Section 9 of the MWA to issue regulations regarding “allowances for gratuities.”
- The MWA defines “gratuities” as *“voluntary, monetary contributions received by an employee from a guest, patron or customer for services rendered.”*
- Regulations under the MWA use the term “tips” to refer to “gratuities.” The regulations define “tips” as *“Voluntary monetary contributions received by an employee from a guest, patron, or customer for services rendered.”*
- The final-form regulation adds a definition to define “service charge” as *“A mandatory fee an employer may charge to a patron for services that an employee renders.”*
- The final-form regulation adds a new subsection 231.114(d) to the language of the proposed rule on service charge disclosures to provide that:
 - An employer may distribute a service charge to the employees,
 - The amount distributed must count as remuneration under Section 231.43(a) (related to regular rate), and
 - The amount may not count as a tip.
- DLI argues that the rule has the purpose of “ensuring that patrons do not wrongly assume that a service charge includes a gratuity.”
- A service charge is clearly not a gratuity, so a requirement to disclose the nature of a service charge to a customer to avoid confusion is a consumer disclosure, not an “allowance for gratuities.”
- If confused customers do not tip service staff who earn the tipped minimum wage, the MWA and regulations already require the employer to make up the difference between the tipped minimum wage and ensure that the employee receives at least the full minimum wage for the time worked, so a rule about disclosing the nature of a service charge is not relevant to enforcing employer compliance with the requirements of the MWA.
- The MWA does not contain any language authorizing DLI to issue regulations requiring disclosure to consumers of the nature of a service charge.

To be clear, we do believe DLI has the authority to clarify that amounts paid to employees from service charges must be counted as part of the employee’s regular remuneration, and not as a tip (in the new subsection 231.114(d)). We also note that the service charge disclosure rule is relatively uncontroversial. However, a lack of controversy does not justify an agency in issuing regulations that it does not have the authority to issue. We can find no statutory authority under the MWA for DLI to regulate disclosures about service charges (in subsections 231.114(a), (b) and (c)), and we strongly encourage the commission to carefully consider this matter before voting to approve this final-form regulation.

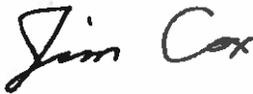
Finally, we note that Section 5.2(a) of the Regulatory Review Act requires that this determination be the "first and foremost" duty of the commission when undertaking review of regulations:

Section 5.2. Criteria for review of regulations.

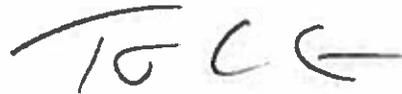
(a) In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General.

In closing, thank you for your careful consideration and the opportunity to submit these comments. The regulatory review process is intended to be a give-and-take process with the object of achieving consensus or, at least, mitigating the most serious concerns. We trust that the commission and DLI will carefully review these comments and the issues raised as this process moves towards completion.

Sincerely,



Representative Jim Cox
129th Legislative District



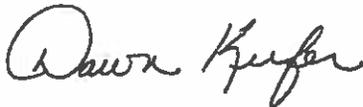
Representative Torren Ecker
193rd Legislative District



Representative Barbara Gleim
199th Legislative District



Representative Mike Jones
93rd Legislative District



Representative Dawn Keefer
92nd Legislative District



Representative Kate Klunk
169th Legislative District



Representative Ryan Mackenzie
134th Legislative District



Representative David Maloney
130th Legislative District



Representative Eric Nelson
57th Legislative District



Representative Mike Puskatic
39th Legislative District

cc: The Honorable Jennifer Bertier, Secretary
Representative Gerald Mullery, Democratic Chairman, House Labor & Industry
Committee