

3322

46TH DISTRICT
CAMERA BARTOLOTTA

- SENATE BOX 203046
HARRISBURG, PA 17120-3046
(717) 787-1483 • FAX (717) 772-2108
- WASHINGTON OFFICE
95 WEST BEAU STREET, SUITE 107
WASHINGTON, PA 15301
(724) 225-4380 • FAX (724) 225-4386
- GREENE COUNTY OFFICE BUILDING
93 EAST HIGH STREET, SUITE 308
WAYNESBURG, PA 15370
(724) 627-9802 • FAX (724) 627-5066
- MONONGAHELA OFFICE
208 2ND STREET
MONONGAHELA, PA 15063
(724) 258-3365 • FAX (724) 258-3368
- SATELLITE OFFICE
B.F. JONES MEMORIAL LIBRARY
663 FRANKLIN AVENUE
ALIQUIPPA, PA 15001



Senate of Pennsylvania

- COMMITTEES
- LABOR & INDUSTRY CHAIR
 - LOCAL GOVERNMENT
 - RULES & EXECUTIVE NOMINATIONS
 - TRANSPORTATION
 - VETERANS AFFAIRS & EMERGENCY PREPAREDNESS
- senatorbartolotta.com

RECEIVED

MAR 16 2022

Independent Regulatory
Review Commission

March 15, 2022

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

RE: Regulation #12-114, Final Rule, Amendments to Part XII, Chapter 231 of 34 Pa. Code

Dear Director Smolock,

As Chair of the Senate Labor and Industry Committee, I am writing to provide my feedback on final rulemaking #12-114, which proposes updates to the regulations governing tipped workers and overtime pay requirements for salaried employees. Overall, I appreciate the Department's willingness to accept stakeholder input and mirror several provisions of the final regulation with the federal Fair Labor Standards Act (FLSA). Consistency with federal regulations will make it easier for employers to comply and for employees to understand their rights under the respective laws.

While the final regulation is a significant improvement from the proposed regulation, there are two provisions that still cause some concerns.

- **34 Pa. Code § 231.43. Regular Rate.** The final regulation includes a method for calculating the "regular rate" in fluctuating work week arrangements consistent with the 2019 Pennsylvania Supreme Court decision in *Chevalier v. General Nutrition Ctrs., Inc.* The court interpretation was necessary because existing state regulations do not address the calculation of the "regular rate" for salaried employees entitled to overtime. While I understand the need to add a definition to the regulation, unfortunately, the definition proposed is not consistent with how the United States Department of Labor allows the "regular rate" to be calculated.

Federal regulations allow the "regular rate" to be calculated based on either a 40-hour work week or the total hours worked, including overtime hours. The federal regulations also allow the overtime to be paid at 0.5 times the regular rate. The proposed regulation would only allow the "regular rate" to be calculated based on 40 hours worked and would require it to be paid at 1.5 times the regular rate. This inconsistency with federal regulation makes Pennsylvania an outlier

among most states. It appears only Alaska, California, and New Mexico prohibit the use of both federal methods to calculate the regular rate.

The Department argues that its regulation is more beneficial to the employee. While on the surface the second federal option may seem unfair to the employee, it is important to note that a fluctuating work week arrangement must be agreed to by the employee and the arrangement benefits the employee in weeks where they work less than 40 hours since they receive a base amount of pay. The fluctuating work week is meant to be a give and take between employers and employees that work irregular hours, where the employee has a consistent weekly salary even in weeks that they work less than full-time. The final proposed regulation may encourage Pennsylvania employers to end the practice of salary employees subject to overtime and instead convert those employees to hourly employees.

- **34 Pa. Code § 231.114. Service Charges.** The final regulation includes a new section that would require employers who charge patrons service fees to provide notice in the contract and on a menu provided to the patron that a service fee is not a tip. While I support the concept of trying to ensure patrons are not confused about service fees, I do not believe the Department has the authority to require such a consumer disclosure under the Minimum Wage Act regulations. The Department cites general authority to issue regulations regarding tipped employees and to protect employees from unreasonably low wages as justification for including this provision. While I agree that an outcome in which a patron fails to provide a tip due to confusion over what a service charge covers is an undesirable outcome, the tipped employee still must receive at least the minimum wage as required by the Minimum Wage Act once tip credits are included. Without obvious regulatory authority to include this provision, I believe the Department should have instead worked with the General Assembly on the issue of service fee disclosures, if desired. Going forward, I would encourage the Department and other agencies under the Governor's jurisdiction to refrain from legislating by regulation in cases where regulatory authority is unclear.

Thank you for the opportunity to provide comments on this final rulemaking. I would be happy to further discuss the concerns raised above with the Department.

Sincerely,



Camera Bartolotta, Chairwoman
Senate Labor & Industry Committee
46th Senatorial District