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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

December 22, 2021

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

Re: Proposed Rulemaking – Minimum Wage Act of 1968 – IRRC Number 3202

Dear Director Smolock:

We are writing these comments, as members of the House Labor and Industry Committee, to express our thoughts and concerns about the proposed rulemaking concerning the tipped workers under the Pennsylvania Minimum Wage Act (MWA).

*General Comments*

**Timing**

It is no secret that the pandemic has not been kind to the hospitality industry. Restaurants, bars, and hotels - which employ a large portion of the Commonwealth's tipped workforce - provide in-person services to guests. During the pandemic, these businesses have weathered forced closures, restricted capacity, costly COVID-19 mitigation efforts, and public reluctance. Although this letter is not the forum for a lengthy criticism of Governor Wolf's mitigation policies, it is fair to note that pandemic-related restrictions were the most severe and costly for the hospitality industry, and this industry is still struggling to recover its pre-pandemic customer base and workforce levels.

This proposed rulemaking would implement a long list of new rules, duties and restrictions for employers who employ tipped workers. We believe that, considering the severe impact of the pandemic on so many of the businesses in the hospitality industry, it is not in the public interest to promulgate additional regulations at this time. The appropriate course of action for the department would seem to be a delay – until the impact of the pandemic to the hospitality industry has fully stabilized – before additional regulations are proposed.

**Differences between state and federal standards**

As the department is aware, the federal Fair Labor Standards Act (FLSA) provides for a variety of federal labor protections. Under the FLSA, states can enforce labor laws that provide greater protection for employees than federal law. However, when state labor standards differ from the FLSA and the related federal regulations, it can be unnecessarily burdensome for employers. Federal

regulations and U.S. Department of Labor (USDOL) guidance and resource materials tend to be much more detailed and helpful than state regulations and the labor law resources provided by the department. Therefore, when an employer is faced with a separate state standard on a topic, the employer must 1) review two separate standards, 2) determine which aspects of each standard the employer is required to apply, and 3) create workplace policies and procedures to comply with a hybrid standard.

Put simply, it is rarely in the public interest to place additional administrative burdens on employers, especially in situations where the additional protection provided to employees is relatively minor. Neither the department nor the General Assembly can affect federal standards under the FLSA, so any potential disparity between state and federal labor standards should weigh heavily in the decision-making process. To avoid confusion and administrative headache for employers, we believe that department regulations should align as closely as possible to federal standards in the same areas, except in situations where the General Assembly has acted to create a higher standard.

This proposed rulemaking diverts from federal standards in several instances, and we will offer specific thoughts on each of these differences below.

*Specific Comments*

**Section 231.1 (Definitions) – Amendments**

The proposed rulemaking would amend the definition of "tipped employee" to increase the threshold of tips a worker must receive each month (from $30/month to $135/month) to be considered a tipped employee. The amount of the increase appears to fall within the amount of inflation experienced since 1977, when this regulation was last updated – and we commend the department for the reasonable level of the increase. However, we must note that the federal threshold for a tipped employee will remain at $30/month, creating a wide disparity of standards.

In circumstances where a worker earns $31-$135/month in tips (most likely, an employee who works occasional shifts to supplement a primary household income), this rulemaking has the potential to create confusion for employers. If the department is determined to create a disparity with federal standards, we would strongly encourage that strenuous efforts be made to inform employers of the new threshold – and we sincerely hope that the department will initially enforce this standard with a light touch, especially when it is clear that the employer was not aware of the disparity between state and federal standards.

**Section 231.34 (Tipped Employees) – Amendments**

See comments below on proposed Section 231.112 (Tip Pooling).

**Section 231.43 (Regular Rate) – Amendments**

In addition to technical and clarifying amendments, the proposed rulemaking would amend this section to provide for the calculation of the "regular rate" for salaried employees who are not exempt from overtime. In the case *Chevalier v. General Nutrition Centers, Inc.*, the PA Supreme Court ruled that

under the Minimum Wage Act, a non-exempt salaried employee who works a fluctuating workweek must be paid one and one-half times their regular rate for hours worked over 40 hours. Federal regulations specifically provide for a fluctuating workweek and allow such employees to be paid one-half their regular rate for hours worked over 40 hours. Thus, we note that the court cemented a difference between state law and federal regulations with its ruling in *Chevalier*.

Although it may be appropriate to provide for the regular rate for salaried employees who are not exempt from overtime, we encourage the department to revise the rulemaking to provide additional clarity. In cases where a full-time employee receives only a salary, simply dividing the employee's renumeration by forty is relatively straightforward. However, some employees may regularly earn varying amounts of compensation that is counted as renumeration for the purposes of calculating the regular rate. In these cases, the employer would be required to calculate a varying regular rate on a weekly basis – even if the employee is not paid on a weekly basis. To avoid confusion and minimize the compliance burden on employers, we recommend that the department allow an alternative calculation of the regular rate to factor the ebb and flow of an employee's renumeration, perhaps on a quarterly or annual basis.

**Section 231.101 (Minimum Wage Increase) – Amendments**

See comments above on Section 231.1 (Definitions) regarding the threshold to be considered a tipped employee.

**Section 231.111 (Tip Credit for Non-tipped Duties) – New Section**

The proposed rulemaking would implement an "80/20 rule" to provide for the circumstances where an employer may (and may not) take a tip credit for the time a tipped employee spends performing duties that do not directly generate tips. The department's stated intention is to mirror a pending federal rule, which was only proposed at the time the rulemaking packet was prepared. The final federal rule was published on October 29, 2021, and it will take effect on December 28, 2021. The 80/20 rule on tipped employees appears in 29 CFR, Section 531.26(f) (engaged in a tipped occupation).

The proposed rulemaking is indeed very similar in spirit to the final federal rule. However, the federal rule provides much more clarity, common examples, and uses different terminology than the proposed rule. For example, federal rule defines terminology, such as: "work that is part of the tipped occupation," "tip-producing work," "directly supporting work," "substantial amount of time" (related to the 20% threshold for related work that does not produce tips), and "work that is not part of the tipped occupation."

To be clear, we view the imposition of an 80/20 rule to be administratively burdensome. We believe that many employers and employees will struggle with the strict recordkeeping that will be necessary to calculate the amount of time employees spend on duties that support their tip-generating work, and it may be onerous to begin running a 30-minute clock every single time an employee begins a task that supports their tip-generating work. However, we recognize that employers will be required to comply with the final federal rule, beginning on December 28, and the absence of a state rule will not prevent that burden on employers.

Therefore, we recommend that the department focus its efforts on ensuring that the state's 80/20 rule be drafted as closely as possible to the more detailed federal 80/20 rule to avoid any additional disparities between the two – and to prevent the possibility that the different rules are interpreted and enforced differently as time passes. To ensure parity between how the state and federal 80/20 rules are enforced, the department could simply reference the provisions of 29 CFR, Section 531.26(f) to determine when employers may take a tip credit for an employee who is a tipped employee. Indeed, the proposed rulemaking references the duties test in federal regulations in proposed Section 231.112 (Tip Pooling) to define executive employees who may not participate in a tip pool. Alternatively, if the department does not believe that they can simply adopt the federal rule, the department should consider drafting the state 80/20 rule as closely as possible to the federal rule – and then include a provision to reference 29 CFR, Section 531.26(f) and provide a safe harbor for any employer who complies with the federal 80/20 rule.

**Section 231.112 (Tip Pooling) – New Section**

Although we believe that the department has the authority to promulgate a rule on tip pooling, the language of the proposed rulemaking is very problematic. A strong and comprehensive federal rule on tip pooling took effect on December 1, 2020, and a clarification to that rule took effect on November 23, 2021 so, there is an up-to-date federal standard on tip pooling. Specifically, since November 23, 29 CFR, Section 531.54 provides for:

- Which monies count as tips for specific employees.
- Prohibitions against employers keeping employee tips and against requiring employees to share tips with managers and supervisors.
- A requirement for full and prompt distribution of tips.
- Employers who take a tip credit. These employers:
    - May only require employees to contribute to a tip pool if it is limited to employees who "regularly and customarily" receive tips.
    - Must notify employees of the tip pool contribution amount, may only take a tip credit for what an employee receives, and may not retain employees' tips for any other purpose.
    - May not receive tips or allow managers or supervisors to receive tips.
- Employers who do not take a tip credit. These employers (who pay at least the full minimum wage to tipped employees) may impose a tip pooling arrangement that includes employees who do not customarily/regularly receive tips (cooks, dishwashers, etc.). These employers may not receive tips or allow managers or supervisors to receive tips.

The proposed rulemaking would create a major disparity in how tip pooling is regulated, given the major differences with the federal rule on the same topic – and this is likely to lead to major confusion for employers who utilize tip pools. Many employers with tipped employees are small businesses, and it will be especially difficult for those employers to review both standards and determine which pieces of each standard is more favorable to employees.

The department cites a provision in the federal rule (allowing non-tipped workers to participate in tip pools) as an incentive for employers to lower wages on non-tipped employees and subsidize them with tips. The department fails to mention that the federal rule only allows tip pools to include non-tipped employees if the employer does not take a tip credit. In other words, the employer may only

institute this arrangement, if the tipped employees are being paid at least the full minimum wage. For a server working full time, the difference between the tipped minimum wage and the full minimum wage is about $9,200/year in additional wages – which means that the benefits for an employer who chooses to reduce the pay of non-tipped workers are going to be offset by the significant additional amount the employer must pay to the tipped workers. The federal rule will not allow a tip pooling arrangement with non-tipped workers if the employer takes a tip credit (and pays the tipped workers less than the full minimum wage).

Given the department's specious reasoning for failing to adopt the federal rule, we strongly urge the department to revise the proposed rule on tip pooling to allow them to simply enforce the standards on tip pooling that the federal government has recently adopted. The department could accomplish this by either referencing the federal tip pooling standard as the rule or a safe harbor in the state rule or drafting the tip pooling rule to mirror the federal standard (which is reasonably concise for a federal rule). There is no reason to create a major disparity on how tip pooling is regulated, when an up-to-date federal rule – crafted under two Presidential administrations – exists on this topic.

**Section 231.113 (Credit Card Fees) – New Section**

The proposed rulemaking requires an employer that permits patrons to pay by credit card to pay the tipped employee the full amount of the tip authorized by the patron (and not deduct credit card payment processing fees or costs that the credit card company charges the employer). The department cites language in Section 3 of the MWA, which states that when a gratuity is added to the charge made by the establishment, "the gratuity shall become the property of the employee."

The vast majority of credit card transactions at restaurants (and other businesses that provide services where employees are customarily tipped) are very straightforward. The credit card slip to be signed by the customer includes a blank space for the customer to write a tip amount – and that full tip amount is intended as a gratuity for the employee(s) who served the customer. Given the clear language of the statute that gratuities are the property of the employee and the straightforward nature of these transactions, it is not clear why this additional section is necessary. Indeed, we would question why the department has not <u>already</u> enforced the Minimum Wage Act to prohibit the deduction of payment processing fees from an employee's tips. However, there does not appear to be any harm in this clarification, and it does not appear to exceed the department's regulatory authority.

We do want to note that, in the case of this portion of the proposed rulemaking, federal regulations do not provide for a prohibition on deducting credit card processing fees from employee tips. However, the disparity is not concerning in this case, because it was the General Assembly that decided to provide this additional protection for employees in state statute.

Finally, we note that the department did not include a prohibition on deducting similar processing fees for debit cards (or other forms of payment) from an employee's tips. Although we believe the statute is clear that a gratuity is the property of the employee, limiting the new rule to credit card fees may lead some employers to believe that they can deduct any payment processing fees that are not specifically for credit card transaction from an employee's tips. If the department believes it necessary to clarify that an employer may not deduct payment processing fees from the tip amount, we would

encourage the department to ensure that the rule is clear with regard to all the methods of payment which might result in a processing fee.

**Section 231.114 (Service Charges) – New Section**

The proposed rulemaking requires disclosure – from a business to a customer purchasing banquet, special event or package deal services – of the nature of a service charge for administration of the event. This disclosure requirement is obviously well-intended. As a policy matter, it is not nearly the most burdensome or controversial rule the department has proposed – even in this rulemaking packet. However, we believe the department lacks the statutory authority to implement this rule.

The department cites Section 9 of the MWA, which reads:

*"Section 9. Enforcement; Rules and Regulations.--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 employes 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 employes; allowances for gratuities; or allowances for such other special conditions or circumstances which may be incidental to a particular employer-employe relationship."*

Although Section 9 provides relatively broad regulatory authority to the Secretary to carry out the purposes of the act, the proposed rulemaking would regulate the communications between a business and a customer. This proposed section would not "safeguard the minimum wage rates" established in the act, provide "allowances for gratuities" or provide allowances for special conditions or circumstances "incidental to a particular employer-employee relationship." A requirement for a business to disclose the nature of an administrative service charge to a consumer is clearly outside the scope of the MWA.

We note that the communications between a business and a consumer are already regulated by the Unfair Trade Practices and Consumer Protection Law (UTPCPL) and regulations issued under that act by the Attorney General. The UTPCPL contains a "catch-all" provision in Section 2(4)(xxi) to provide the ability to act in response to deceptive conduct by a business.

*"(4) "Unfair methods of competition" and "unfair or deceptive acts or practices" mean any one or more of the following:*

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*(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."*

On February 21, 2021, the PA Supreme Court issued a decision in *Gregg v. Ameriprise Financial*, holding that deceptive conduct under the UTPCPL catch-all provision is a strict liability offense, and that the business's state of mind is irrelevant. Specifically, the majority in *Gregg* stated that, "*The plain language of the current statute imposes liability on commercial vendors who engage in conduct that has the potential to deceive and which creates a likelihood of confusion or misunderstanding. That is all that is required.*"

Given the plain language of the UTPCPL and the PA Supreme Court's ruling in *Gregg*, failing to disclose the nature of a service charge that consumers are likely to confuse for a gratuity may be actionable under the UTPCPL. To be sure, each individual case will be fact-specific, but deceptive conduct (by a business) which creates a likelihood of confusion or of misunderstanding (for a consumer) is already prohibited by Pennsylvania law. Furthermore, the UTPCPL provides the Attorney General with the sole authority to promulgate regulations under the law.

We also note that there is no federal standard under the FLSA to require the disclosure of the nature of administrative service charges. The USDOL Fact Sheet, cited by the department as "subregulatory guidance," is actually based on underlying USDOL regulations at 29 CFR, Section 531.55 (Examples of amounts not received as tips). The cited fact sheet provides insight into how the federal government will handle this type of charge for the purposes of enforcement:

*"Service Charges: A compulsory charge for service, for example, 15 percent of the bill, is not a tip. Such charges are part of the employer's gross receipts. Sums distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit."*

Although it should go without saying at this point, we feel compelled to point out that the proposed section service charges would create yet another point of disparity between state and federal standards for tipped employees.

Given all of this, we urge the following course of action:

- The department should revise the proposed rule to issue a rule consistent with the handling of these service charges by federal regulations (i.e. amounts of service charges distributed to employees are not considered tips, but may be used to fulfill minimum wage and overtime obligations). We believe that this approach would provide protections to employees in situations where a consumer is confused about the nature of a service charge, and more importantly, we believe this approach falls within the department's regulatory authority under Section 9 of the MWA.
- If the department believes that a specific requirement to disclose the nature of a service charge is necessary as a matter of public policy, the department should:
    - Work with the General Assembly on legislation to require the disclosure (Such legislation would likely fall within the purview of the House and Senate Consumer Affairs Committees); or
    - Encourage the Attorney General to promulgate regulations under the UTPCPL to require the disclosure.

Again, we do not believe that the department has the statutory authority to promulgate the proposed rule requiring the disclosure of service charges under the MWA.

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In conclusion, as members of the House Labor and Industry Committee, we urge the department to work with us to address the issues we have raised about this proposed rulemaking prior to submitting a final rulemaking. If the department would like to discuss our position on these regulations, please reach out to the office of Chairman Jim Cox as the primary point of contact. Thank you for your consideration.

Sincerely,

The Honorable Jim Cox
129th Legislative District

The Honorable David Maloney
130th Legislative District

The Honorable Torren Ecker
193rd Legislative District

The Honorable Eric Nelson
57th Legislative District

The Honorable James Gregory
80th Legislative District

The Honorable Mike Puskaric
39th Legislative District

The Honorable Mike Jones
93rd Legislative District

The Honorable Dawn Keefer
92nd Legislative District

The Honorable Kate Klunk
169th Legislative District