Comments on Proposed Title 34, Chapter 231 Regulations
(Updates to Regulations Governing Tipped Employees and Clarifying How the Base Hourly Rate for Overtime of Salaried Employees is Calculated)

Regulation ID # 12-114 (IRRC #3322)

December 20, 2021

Submitted via email to bsmolock@pa.gov

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Dear Mr. Smolock:

We are Pennsylvania worker advocates and litigators (see signatory list below) who have decades of experience in protecting Pennsylvania workers' rights to regular and overtime wages. We submit these comments in support of the Pennsylvania Department of Labor and Industry's (DLI) Notice of Proposed Rulemaking. The proposed regulations will update decades-old rules about how employers pay tipped workers, and ensure that salaried employees who work a fluctuating workweek schedule are appropriately compensated for overtime under the Pennsylvania Minimum Wage Act. In doing so, they will bring needed clarity to laws affecting tipped worker pay and overtime compensation to ensure workers are paid fair compensation for their work, and further the legislative aims of the Pennsylvania Minimum Wage Act.

1. ***Proposed Regulation 34 Pa. Code § 231.43 (g) – Calculating the "Regular Rate" for Overtime-Eligible Salaried Employees***

We support the regulation proposed to be added by the Department at 34 Pa. Code § 231.43(g) that sets forth the calculation of the regular rate for salaried non-exempt workers in the Commonwealth. The proposed regulation will serve the interests of workers in our Commonwealth in several important respects.

At the outset, the regulation will codify the decision of the Pennsylvania Supreme Court in *Chevalier v. General Nutrition Centers, Inc.*, 220 A.3d 1038 (Pa. 2020), which held that the

federal fluctuating workweek method of calculating overtime compensation for salaried employees (as set forth in 29 C.F.R. §778.114) is illegal in Pennsylvania.

In this regard, the proposed regulation will make clear that Pennsylvania salaried employees, not otherwise exempt from overtime, are entitled to overtime hours multiplied by 150% of their regular rate.

Secondly, by furnishing a clear methodology for specifically addressing the calculation of the regular rate in this circumstance, in a separate, stand-alone subsection of 34 PA Code § 231.43, the proposed regulation will eliminate the confusion noted in the case law interpreting the PA Code regarding the correct calculation of the regular rate for salaried, non-exempt workers.

By taking this approach, the proposed regulation has set forth a clear path, in understandable language, for employers to follow in regard to the correct method of calculation of the regular rate in our Commonwealth, without the need to interpolate various other sections of the regulations and the Pennsylvania Minimum Wage Act.

In doing so, the regulation will not only codify the holding in *Chevalier*, but will also serve to accomplish the policy objectives of the Pennsylvania Minimum Wage Act of spreading work hours among more workers by incentivizing employers to hire new employees instead of paying existing ones for overtime.

2. ***Proposed Regulation 34 Pa. Code § 231.1 and § 231.111 – Defining Tipped Employees***

An employer in the Commonwealth can pay a "tipped employee" as little as $2.83/hour, as long as that worker earns enough tips to bring them up to the minimum hourly wage of $7.25/hour. This is commonly referred to as the tip credit. Certain criteria must be met in order for an employer to take advantage of this tip credit and to pay an hourly rate that is below the regular minimum wage. Because of this impact on the hourly wages paid to a worker, we welcome the PA DLI's proposals regarding tipped employees, as discussed below.

a. Tip Threshold

We support the PA DLI's long-overdue update to the amount of tips a worker must receive in order to qualify as a "tipped employee." Under the proposed regulation, a worker must make more than $135 per month in tips to meet this definition. *See* Proposed 34 Pa. Code § 231.1. The current monthly threshold of $30 per month was established 44 years ago, at a time when the federal minimum wage was only $2.30 per hour. We propose the new regulation be modified to read (added language in bold and italics): "An employee engaged in an operation in which the employee customarily and regularly receives more than $135 a month in tips ***directly from patrons***." This will ensure employers do not use funds from tip pools to artificially inflate

the amount of tips received by employees – a practice currently permitted under the FLSA – in order to be able to take the tip credit and reduce their employees' hourly pay to the tipped minimum wage. This is consistent with the PMWA's purpose of combatting "[t]he evils of unreasonable and unfair wages" and with our Supreme Court's recognition that the PMWA can provide more protection for workers' wages than the "national floor" set by the FLSA. *See Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 8 A.3d 866, 883 (Pa. 2010) ("While the Act's exemption for domestic services is more limited than the federal exemption, it is permissible for a state to enact more beneficial wage and hour laws. Indeed, the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded."); *Chevalier v. Gen. Nutrition Ctrs., Inc.*, 220 A.3d 1038, 1055 (Pa. 2019) (rejecting the multiplier used under the FLSA to calculate overtime owed to salaried employees and stating, "[n]otably, this Court and others have emphasized that states have the authority 'to enact more beneficial wage and hour laws' than those provided in the FLSA."); *Heimbach v. Amazon.com, Inc. (In re Amazon.com, Inc., Fulfillment Ctr. Fair Labor Stds. Act (FLSA) & Wage & Hour Litig.)*, 255 A.3d 191, 200 (Pa. 2021) (declining to apply FLSA interpretations of "hours worked" to the PMWA, and stating "our Court recently reaffirmed the principle that the PMWA manifests this Commonwealth's strong public policy protecting an employee's right to be adequately compensated for all hours for which they work").

b. The "80/20" Rule

We are pleased to see the PA DLI's addition of the "80/20" Rule to the PMWA's regulations. *See* Proposed 34 Pa. Code § 231.111. The 80/20 Rule has been utilized by the U.S. Department of Labor (U.S. DOL) since the late 1980s under the FLSA. Until now, the PMWA's regulations have not expressly included the 80/20 Rule. However, courts within the Commonwealth have regularly applied the 80/20 Rule under the PMWA for tipped employees alleging that they performed an impermissible amount of non-tip generating tasks or "sidework." *See, e.g., Belt v. P.F. Chang's China Bistro, Inc.*, 401 F. Supp. 3d 512, 538, 512 n.1 (E.D. Pa. 2019) ("Plaintiffs' claim that it violates the FLSA to take the tip credit for all the hours worked by Plaintiffs, when Plaintiffs spent or spend more than twenty percent of their working time performing untipped related duties, is legally cognizable" and noting that "[t]his opinion will only reference the FLSA, because any result reached under this statue applies equally to Plaintiffs' FLSA claims and Plaintiffs' PMWA claims."); *Sicklesmith v. Hershey Entertainment & Resorts Company*, 440 F. Supp. 3d 391, 405, 396 n.1 (M.D. Pa. 2020) (same); *Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 715 (E.D. Pa. 2014) ("When employees perform both tipped and non-tipped work, employers must pay the full minimum wage for all hours that their employees spend performing non-tipped tasks" under the PMWA); *Williams v. Bob Evans Restaurants, LLC*, 2020 U.S. Dist. LEXIS 145852, *40-41 (W.D. Pa. Aug. 13, 2020) (refusing to dismiss the claim that "Defendants violated Pennsylvania law by paying the Plaintiffs tipped minimum wage for non-tip generating work" and holding that the "Plaintiffs[‘] Pennsylvania non-tipped duty claims are cognizable"); *Reynolds v. Chesapeake & Del. Brewing Holdings, LLC*, 2020 U.S. Dist. LEXIS 83633, *20 (E.D. Pa. May 12, 2020) (holding that "the 20% rule under the FLSA applies equally to claims under the PMWA" "[b]ecause the PMWA and FLSA

provisions regarding the wages to be paid to tipped employees are substantially parallel."); *Wright v. Ristorante La Buca Inc.*, 2018 U.S. Dist. LEXIS 180518, *21-23 (E.D. Pa. Oct. 22, 2018) (granting summary judgement for the plaintiffs and holding that the defendant "violated the [PMWA] by failing to pay [the plaintiff] minimum wage for non-tipped work."). Thus, these regulations regarding the 80/20 Rule will not be breaking any new ground and will merely confirm a common interpretation of the PMWA.

The 80/20 Rule is also consistent with existing PMWA regulations that have been on the books since the 1970s requiring employers to track the hours in which tipped employees receive tips and hours in which they do not. *See* 34 Pa. Code § 231.34(4)-(5). The language of § 231.34(4)-(5) mirrors FLSA regulations for tipped employees. *Compare id. with* 29 C.F.R. § 516.28(a)(4)-(5). Courts both in and outside of the Commonwealth have held that 29 C.F.R. § 516.28(a)(4)-(5) places an affirmative duty under the FLSA on employers to track the amount of time that tipped employees perform non-tip generating tasks. *See, e.g., Marsh v. J. Alexander's LLC*, 905 F.3d 610, 631-32 (9th Cir. 2018); *Belt*, 401 F. Supp. 3d at 537; *Wintijen v. Denny's, Inc.*, 2021 U.S. Dist. LEXIS 35199, *22-30 (W.D. Pa. Feb. 25, 2021).[1] As such, PMWA regulations ***already*** require that employers track the amount of non-tip generating tasks that their tipped employees perform to make sure that the employer's use of the tip credit is legal. *See Belt*, 401 F. Supp. 3d at 537, 512 n.1 (discussing the recordkeeping requirements for tipped employees under 29 C.F.R. § 516.28(a)(4)-(5) and holding that any references to the claims under the FLSA equally apply to the plaintiffs' PMWA claims).

3. Proposed Regulation 34 Pa. Code § 231.112 – Regarding Tip Pooling

a. Excluding individuals with an ownership/partnership interest

We support the PA DLI's proposed tip pooling regulation excluding owners from participating in tip pools. *See* Proposed 34 Pa. Code § 231.112(b)(1). This provision is entirely consistent with FLSA caselaw which has long held that individuals with an ownership interest in the business may not participate in tip pools.[2] *See Whited v. New Café at Greystone Gardens*, 2020 U.S. Dist. LEXIS 45715, *10-13 (M.D. Pa. March 17, 2020); *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2014 U.S. Dist. LEXIS 92801, *8-13 (M.D. Pa. July 9, 2014); *Gionfriddo v. Jason Zink, LLC*, 769 F. Supp. 2d 880, 894 (D. Md. 2011); *Chung v. New Silver Palace Restaurant, Inc.*, 246 F. Supp. 2d 220, 229 (S.D.N.Y. 2002).

[1] As one federal district court observed, "an employer can save $5.12 per hour per employee in decreased wages by classifying a worker as a 'tipped employee'" under the FLSA, thus "it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%." *Irvine v. Destination Wild Dunes Mgmt.*, 106 F. Supp. 3d 729, 731, 34 (D.S.C. 2015).

[2] The FLSA was recently revised in 2018 to explicitly state that an employer may not participate in tip pools. *See* 29 U.S.C. § 203(m)(2)(B) ("An employer may not keep tips received by its employees for any purposes ….."); *see also Benavidez v. Greenwich Hotel, Ltd.*, 2019 U.S. Dist. LEXIS 43945, *32 (D. Conn. March 15, 2019). However, even before this 2018 amendment, courts regularly held that under the FLSA employers could not participate in a tip pool.

Moreover, the PMWA's statutory language already explicitly requires that tip pooling must be limited to individuals that customarily and regularly receive tips. *See* 43 P.S. § 333.103(d) ("this subsection shall not be construed to prohibit the pooling of tips among employes who customarily and regularly receive tips."). The PA DLI has also already promulgated a regulation defining a "tipped employee" as "[a]n employee engaged in an operation in which the employee customarily and regularly receives more than $30 a month in tips." 34 Pa. Code § 231.1(b).[3] As a result, the PA DLI's proposed regulation is simply clarifying the PMWA's exclusion of individuals with an ownership or partnership interest from participating in a tip pool.

b. Excluding individuals who perform managerial/supervisory duties

Similarly, we support the PA DLI's proposed regulation excluding individuals who perform managerial or supervisory duties from participating in tip pools. *See* Proposed 34 Pa. Code § 231.112(b)(2). This provision is likewise consistent with FLSA caselaw that has routinely held that employees serving as managers or supervisors may not participate in tip pools. *See Widjaja v. Kang Yue USA Corp.*, 2011 U.S. Dist. LEXIS 109007, *16-17 (E.D.N.Y. Sep. 26, 2011); *Wajcman v. Inv. Corp.*, 620 F. Supp. 2d 1353, 1359 (S.D. Fla. 2009); *Ayres v. 127 Restaurant Corp.*, 12 F. Supp. 2d 305, 308-09 (S.D.N.Y. 1998).

This provision is also in accordance with the PMWA's statutory language that only allows tip pooling amongst employees who do not "customarily and regularly" receive tips. 43 P.S. § 333.103(d). As noted by the FLSA cases cited, the FLSA has long recognized that individuals who perform managerial and supervisory duties are not the type of employees who can be said to be of the type who "customarily and regularly" receive tips and therefore should be prohibited from receiving funds from tip pools.

c. Excluding individuals who do not perform direct customer interaction

The PA DLI's proposed tip pooling regulation states that tips may not be shared in a tip pool with "[a]ny employee who does not spend at least 80% of that employee's workweek performing duties that customarily or regularly generate tips." Proposed 34 Pa. Code § 231.112(b)(3).

We suggest a slight revision to this proposed regulation language as follows (added language in bold and italics): "Any employee who does not spend at least 80% of that employee's workweek performing duties that ***directly*** generate tips ***and entails direct customer interaction***." We suggest deleting "customarily or regularly" and replacing it with "directly" to mirror the proposed regulation found at 34 Pa. Code § 231.111 for consistency purposes. Moreover, we suggest the addition of the language "and entails direct customer interaction" in

[3] As discussed above, the current proposed regulation would update this threshold to $135 per month.

order to reflect the FLSA caselaw set forth below requiring direct customer interaction as a condition of participation in tip pools.

As such, we support the PA DLI's proposed tip pooling regulation with the modified language because it will require what has long been well-established under the FLSA, that employees must engage in direct customer interaction in order to be included within a tip pool.[4] *See Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 240 (2d Cir. 2011); *Roussell v. Brinker International, Inc.*, 441 Fed. Appx. 222, 231 (5th Cir. 2011); *Myers v. The Copper Cllar Corp.*, 192 F.3d 546, 550 (6th Cir. 1999); *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 301 (6th Cir. 1998); *Conners v. Catfish Pies, Inc.*., 2015 U.S. Dist. LEXIS 18422, *2 (E.D. Ark. 2015); *Ford*, 2014 U.S. Dist. LEXIS 92801, at *12; *Alvarado v. Five Towns Car Wash, Inc.*, 2014 U.S. Dist. LEXIS 132023 (E.D.N.Y. 2014); *Mould v. NJG Food Service, Inc.*, 37 F. Supp. 3d 762, 770 (D. Md. 2014); *Porter v. West Side Restaurant, LLC*, 2014 U.S. Dist. LEXIS 57126, *10 (D. Kan. 2014); *Chhab v. Darden Restaurants, Inc.*, 2013 U.S. Dist. LEXIS 135926, *6 (S.D.N.Y. 2013); *Stewart v. CUS Nashville, LLC*, 2013 U.S. Dist. LEXIS 111802, *41-46 (M.D. Tenn. 2013); *Arango v. Landry's Inc.*, 2013 U.S. Dist. LEXIS 97240, *4 (N.D. Ill. 2013); *Rubio v. Fuji Sushi & Teppani, Inc.*, 2013 U.S. Dist. LEXIS 8469, *2 (M.D. Fla. 2013); *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 730 (W.D. Tex. 2010); *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360, 1369-70 (S.D. Fla. 2009); *Morgan v. SpeakEasy, LLC*, 625 F. Supp. 2d 632, 653 (N.D. Ill. 2007); *Townsend v. BG-Meridian, Inc.*, 2005 U.S. Dist. LEXIS 45200, *16-18 (W.D. Okla. 2005).

This provision is consistent with the PMWA's statutory text requiring that tipped employees may only participate in tip pools with other employees who "customarily and regularly receive tips." 43 P.S. § 333.103(d); *see also Ford v. Lehigh Valley Restaurant Group, Inc.*, 47 Pa. D. & C. 5th 157, 159 (C.P. Lackawanna 2015) ("Like its federal counterpart, the [FLSA], the [P]MWA's 'tip credit' provisions enable employers to implement a tip pooling arrangement among their employees, provided that the sharing of pooled tips to satisfy the minimum wage requirement is restricted to 'employees who customarily and regularly receive tips.'").

Unlike the FLSA, the PMWA does not contain a regulation defining the phrase "customarily and regularly." *Ford v. Lehigh Valley Restaurant Group, Inc.*, 47 Pa. D. & C. 5th at 169 (C.P. Lackawanna 2015). In fact, the Court in *Ford* noted that prior to its decision in April 2015, no other Court had interpreted the phrase "customarily and regularly receives tips" found within Section 333.103(d) of the PMWA. *Id.* at 160. Due to this lack of guidance, at least

[4] The FLSA only permits tip pooling among "employees who customarily and regularly receive tips." 29 U.S.C. § 203(m). Section 203(t) of the FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips," 29 U.S.C. § 203(t), and a U.S. DOL regulation explains that "[t]he phrase 'customarily and regularly' signifies a frequency which must be greater than occasional, but which may be less than constant." 29 C.F.R. § 531.57.

one Pennsylvania employer has argued that the amount of customer interaction is "irrelevant" in determining whether employees "customarily and regularly receive tips." *Id.* The defendant-employer in *Ford* argued that simply because expos often received tips as members of the tip pool, they automatically qualified as employees who "customarily and regularly receive tips" and were thereby eligible to participate in the tip pool. *See id.* at *31-32 n.5 . Such a circular argument runs counter to the overwhelming FLSA caselaw requiring direct customer interaction. The PA DLI's proposed regulation will prevent employers from credibly making similar arguments in the future.

d. Notice requirement

The PA DLI's proposed regulation makes clear that employers must provide employees with notice regarding the "tip pooling arrangement" and such notice must be written and provided at least a week in advance of such tip pooling. *See* Proposed 34 Pa. Code § 231.112(c). Likewise, the PA DLI's proposed regulation is consistent with the FLSA which, via a regulation, is crystal clear that the employer must provide written notice of the "tip pooling arrangement." *See* 29 C.F.R. § 531.59(b); *see also Wintijen v. Denny's, Inc.*, 2021 U.S. Dist. LEXIS 35199, *12-22 (W.D. Pa. Feb. 25, 2021); *Wright v. Ristorante La Buca Inc.*, 2018 U.S. Dist. LEXIS 180518, at *10 (E.D. Pa. Oct. 22, 2018).

The PMWA already requires that employers provide notice to tipped employees of the PMWA's rules, s*ee* 43. P.S. § 333.103(d)(1) (tipped employees must be "informed by the employer of the provisions of this subsection."), and the U.S. DOL has already enacted an explicit FLSA regulation making clear that this notice must discuss the tip pool. The PA DLI's proposed regulation merely makes clear that the employee must be given information regarding the tip pool arrangement.

4. Proposed Regulation 34 Pa. Code § 231.113 and § 231.114 – Credit Cards and Service Fees

We support the regulations proposed to be added at § 231.113 and § 231.114 relating to credit card tips and service charges. These additions will ensure all tips intended for employees are paid to those employees, and will provide clarity to patrons about where their money is going.

Currently, no such PMWA regulations exist. However, in 1977 and 2006 Opinion Letters, the U.S. DOL advised that under the FLSA, employers may deduct transaction fees from tips paid by credit card. The proposed language in § 231.113 makes explicitly clear that this practice is not permissible under the PMWA. *See* Proposed 34 Pa. Code § 231.113. This ensures the employer cannot use tips intended for employees to cover operating costs resulting from the employer's decision to use such a service. Such a clarification is entirely consistent with section 3 of the PMWA, which states "the gratuity shall become the property of the employe[e]," and with our Supreme Court's recognition that the PMWA can provide more

protection for workers' wages than the "national floor" set by the FLSA. *See* p. 3, *supra*. Moreover, other states as well as certain municipalities within the Commonwealth have already banned this practice. *See* Cal. Labor Code Section 351; Philadelphia Gratuity Protection Bill (Phila. Code § 9-614).

Regarding service fees, proposed § 231.114 would require clear notice to patrons—in a contract, bill, or on the menu—that certain administrative fees charged by the employer do not include tips (for example, fees a venue may charge for banquets or special events). *See* Proposed 34 Pa. Code § 231.114. This explicit notification will prevent any potential confusion on the part of the patron as to how much the employees providing services will actually receive in tips. Although no regulations currently exist addressing this issue, a U.S. DOL fact sheet states that such fees cannot be distributed to workers as tips. Thus, the proposed regulation would just require employers to notify patrons that administrative fees will not be passed along to employees as tips. New York regulations already contain a similar provision. *See* New York Hospitality Industry Wage Order § 146-2.19.

5. Conclusion

The regulation proposed by DLI would be incredibly beneficial to low-income residents of Pennsylvania and would appropriately reward them for their long hours and hard work. The proposal also complies with all of the statutory requirements under the Regulatory Review Act and properly effectuates the purpose behind the Minimum Wage Act. We believe these changes to the regulations governing tipped employees and calculation of base hourly rate for overtime of salaried employees are long overdue and we fully support them.

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