Comments of the Independent Regulatory Review Commission

Department of Labor and Industry Regulation #12-114 (IRRC #3322)

Minimum Wage

January 19, 2022

We submit for your consideration the following comments on the proposed rulemaking published in the November 20, 2021 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

1. **Whether the regulation is consistent with the intent of the General Assembly; Possible conflict with or duplication of statutes or existing regulations.**

This proposed regulation updates the regulations governing tipped employees and the calculation of overtime for salaried employees. The Department is acting under the statutory authority of Sections 4 and 9 of The Minimum Wage Act of 1968 (MWA), addressing minimum wages and gratuities, respectively. 43 P.S. §§ 333.104 and 333.109.

The Department explains the need for the rulemaking in Section 10 of the Regulatory Analysis Form (RAF) that was submitted with the rulemaking as follows:

> This regulation is necessary because of recent uncertainty surrounding federal regulations pertaining to these issues; because of ambiguity regarding the meaning of "regular rate;" and because the tip threshold in the definition of "tipped employee" should be updated after 44 years to reflect inflation and wage growth. In the past several years, federal administrations have differed greatly in policies that affect tipped workers, including their proposed, final, postponed final, and amended final regulations, as well as in their subregulatory opinions and guidance. Pennsylvania employers and workers deserve to have stable, consistent laws and regulations they can depend on as they plan their work operations. This proposed regulation seeks to alleviate the uncertainty persistent at the federal level and provide a reliable framework for Pennsylvania workers and employers that is more reflective of current wages and that reflects the inflation and wage growth since these portions of the regulation were last amended in 1977.

Twenty-one Democratic members of the Pennsylvania Senate, the Democratic Chairman of the House Labor and Industry Committee, and organizations representing worker advocates, litigators and restaurant workers (collectively referred to as "proponents") submitted comments in support of the rulemaking. These commentators support the Department's efforts to update its regulations and note that the Department has clear statutory authority to do so. They also provide citations and analysis of numerous court cases that support the Department's decision to implement these changes through the rulemaking process.

The Chairman of the House Labor and Industry Committee and eight members of that Committee (nine members of the Committee), and organizations representing employers, businesses and the restaurant industry (collectively referred to as "opponents") submitted comments in opposition to some or all parts of the rulemaking. We will address specific sections of the rulemaking that these commentators have identified as problematic below. This comment will focus on two related issues that affect several sections of the rulemaking.

The first issue relates to deviation from federal standards established by the United States Department of Labor (USDOL) relating to tipped employees and overtime calculations through its regulations and the problems employers and business owners will encounter as they try to implement two sets of rules. As quoted above, one of the reasons the Department is promulgating this rulemaking is to ". . . alleviate the uncertainty persistent at the federal level and provide a reliable framework for Pennsylvania workers and employers." The opponents of the rulemaking believe any deviation from federal rules will add confusion, not clarity, to their regulatory obligations. It will also add additional cost to an industry already under stress from the ongoing pandemic.

The second issue relates to whether the Department is the proper authority to create a higher standard of protection for Pennsylvania employees and additional compliance obligations for employers. The Department, the proponents and the nine members of the Committee have stated that the federal Fair Labor Standards Act of 1938 does permit states to enforce labor laws that provide greater protection for employees than federal law. 29 U.S.C.A. §§ 201 – 219. However, in their comments to the Department, the nine members of the Committee state the following, "To avoid confusion and administrative headache for employers, we believe that the department regulations should align as closely as possible to the federal standards in the same areas, except in situations where the General Assembly has acted to create a higher standard."

Since current members of the General Assembly have suggested that they should be the authority to create a higher standard of protection for employees, we ask the Department to explain how the promulgation of this regulation, which is more stringent than federal regulations, is consistent with the intention of the General Assembly in the enactment of the MWA.

2. Section 231.1. Definitions. – Implementation procedures.

The definition of "tipped employee" is being amended to raise the tipped employee threshold from $30 per month to $135 per month. The nine members of the Committee commend the Department for the reasonable level of increase. However, they note that the federal threshold for a tipped employee will remain at $30 per month. These members "strongly encourage that

strenuous efforts be made to inform employers of the new threshold." We ask the Department to explain in the Preamble to the final-form regulation how it intends to inform employers of this difference, and other potential differences between this rulemaking and federal standards.

3. Section 231.43. Regular rate. – Need; Reasonableness; Clarity; Implementation procedures.

Subsection (a)

Subsection (a)(1) is being amended to replace "at Christmas time" with "during any holiday." The Department explains in the Preamble that this is being done to reflect that, "sums paid for any holiday should count towards the calculation of the regular rate." The stated intent of this revision conflicts with existing language of Subsection (a), which currently states that the calculation of the regular rate "shall not be deemed to include" this type of pay. We ask the Department to clarify its intent for the implementation of Subsection (a)(1) and how employers are to calculate the regular rate for holiday pay in the Preamble to the final-form regulation.

Subsection (g)

Subsection (g) is a new provision that directs how employers are to calculate the regular rate paid to nonexempt salaried employees. It will require an employer to calculate the regular rate by totaling all remuneration received in a workweek and dividing that number by 40. As explained in the Preamble, the Department's existing regulations do not include a procedure for calculating the regular rate of pay for employees who are paid a salary, the USDOL provides for a fluctuating workweek to determine the regular rate for salaried employees, and the Pennsylvania Supreme Court decided that under the MWA salaried employees are entitled to a 1.5 multiplier when the employee works a fluctuating workweek. We have four concerns with this subsection.

First, existing Subsection (b) addresses the calculation methodology of the regular rate for employees that are paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job. It requires an employer to calculate the regular rate by totaling all the sums received at the day rate or job rate in the workweek and dividing by the total hours actually worked. The calculation methodology of Subsection (b) differs from the calculation methodology being proposed under Subsection (g) for nonexempt salaried employees. The difference between the methodologies creates a disadvantage to employees covered by Subsection (b) when those employees work more than 40 hours per week. We ask the Department to explain the rationale and need for this difference in the Preamble to the final-form rulemaking. We also ask the Department to consider amending Subsection (b) in a manner that is consistent with the methodology used in Subsection (g).

Second, in instances when employees earn varying amounts of remuneration and are paid less frequently than weekly, this subsection would require employers to calculate the regular rate on a weekly basis, as noted by the nine members of the Committee. Did the Department consider an alternative calculation of the regular rate, such as allowing for calculation on a quarterly or annual basis? We ask the Department to consider clarifying this subsection to provide for additional rates of pay.

Third, as addressed by commentators, this subsection "complicates other compensation questions," including calculation of overtime on commissions and bonuses for hourly employees. A commentator stated that the Preamble signals that subsection (g) is intended to clarify the regular rate "in all cases." The Department should explain how this subsection achieves that purpose and how overtime is calculated for all remuneration for hourly employees. Further, the Department should consider clarifying this section to address remuneration for nonsalaried employees.

Fourth, commentators have suggested that this section be amended to mirror federal regulations or to adopt the federal regulations by reference. This suggestion has also been made for Sections 231.111 and 231.112 (relating to tip credit for non-tipped duties; and tip pooling). A cornerstone of the Regulatory Review Act is to "encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." As the Department develops the final-form regulation, we ask them to work with the commentators and legislators that have expressed concerns to determine if their recommendations can be incorporated into this rulemaking.

If the Department decides to adopt the recommendations of commentators and incorporates federal regulations by reference, we caution that while the Department may impose requirements already mandated by the federal government, the automatic incorporation by reference of future, and consequently unknown, requirements may be an improper delegation of the agency's statutory authority. New obligations may be imposed without members of the regulated community and other parties having the opportunity for public comment, which is inconsistent with the Commonwealth Documents Law and the Regulatory Review Act. Additionally, section 1.6 of the *PA Code and Bulletin Style Manual* provides:

> A rule adopting a code, standard or regulation by reference does not include subsequent amendments, rescissions or editions. If an agency wishes to incorporate subsequent amendments, rescissions or editions, the agency **must explicitly** do so by amendment of its existing rules or by rescinding its existing rules and promulgating new rules. [Emphasis added.]

4. Section 231.101. Minimum wage increase. – Implementation procedures.

This proposed rulemaking includes amendments to Section 231.101, a statement of policy pertaining to wage rates and the minimum wage. Statements of policy are nonregulatory documents that provide guidance by which an agency will carry out its duties. Unlike regulations, statements of policy are not enforceable. They are not binding upon third parties and cannot include requirements that would impose penalties for noncompliance.

If these minimum wage provisions are binding on employers and necessary for the implementation of these regulations, we suggest the text of this statement of policy be added as a new regulation in the final-form rulemaking. As part of this process, the Department should rescind Section 231.101 in the *Pennsylvania Bulletin* to coincide with the final-form regulation and show this section as deleted in the final-form annex.

5. Section 231.111. Tip credit for non-tipped duties. – Clarity and lack of ambiguity; Implementation procedures.

This section outlines the requirements for an employer to take a tip credit for times when a tipped employee is performing duties that do not generate tips. This is referred to as the 80/20 rule. As explained in the Preamble, this section is needed because the Department does not have regulations governing the work done by tipped employees. The Department acknowledges the ongoing changes and uncertainly surrounding the USDOL's 80/20 rule and proposes this section to "eliminate confusion for employers in this Commonwealth."

The nine members of the Committee believe that the "federal rule provides much more clarity, common examples, and uses different terminology than the proposed rule." As also echoed by a commentator, this section lacks definitions and examples included in the federal 80/20 rule that are central to its implementation, including "work that is part of the tipped occupation," "tip-producing work," "directly supporting work," "substantial amount of time" and "work that is not part of the tipped occupation."

These members recommended 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 reference 29 CFR 531.56(f) (relating to more than $30 a month in tips) "to determine when employers may take a tip credit for an employee who is a tipped employee" and "provide a safe harbor for any employer who complies with the federal 80/20 rule." We concur with the nine members of the Committee that the clarity of this section, and implementation by the regulated community, would be improved by more closely mirroring the federal 80/20 rule.

6. Section 231.112. Tip pooling. – Need; Clarity.

This section allows an employer to establish a tip pool for tipped employees. The Department intends for this section to eliminate the confusion caused by the USDOL's frequently changing guidance. The regulation is limited to tipped workers so that they do not "lose control of their earned tips if forced to participate in tip pooling with non-tipped workers because the tip pooling effectively subsidizes the wages of non-tipped employees."

As detailed by the nine members of the Committee, this section has "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." They also point out that the federal regulation provides for tip pooling among all workers when the employer does not take the tip credit, thereby paying tipped employees at least the full minimum wage.

We ask the Department to explain why this section is needed in light of the federal regulation. We also ask the Department to explain why it did not include the option for employers to establish a tip pooling system for all employees when the tip credit is not utilized by employers.

7. Section 231.113. Credit card fees. – Need; Clarity; Implementation procedures.

This section directs that an employer shall pay the tipped employee the full amount of tips and may not deduct credit card payment processing fees or costs charged to the employer. We have three concerns.

First, this section guarantees "the employee the full amount of the tip authorized by the patron." This appears to tie amount tipped by the patron directly to one tipped employee. How will an employer implement this provision when employees are required to participate in a tip pool? We ask the Department to consider clarifying this subsection to include employers who may utilize tip pools.

Second, under Section 103(d)(2) of the MWA, "the gratuity shall become the property of the employe." 43 P.S. § 333.103(d)(2). The nine members of the Committee opine that "[g]iven 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." We ask the Department explain why this section is needed given the statutory requirement already placed upon employers.

Third, this section is limited to payment processing fees and costs charged by credit card companies. However, as noted by the nine members of the Committee, customers may utilize a variety of payment methods, including debit cards. Accordingly, if the Department demonstrates the need for this section, we ask it to clarify this section to include all methods of payment that may carry a processing fee or cost.

8. Section 231.114. Service charges. – Statutory authority; Need.

This section requires an employer to disclose to a patron the administrative charge for a banquet, special function or package deal. An employer is further required to state that this charge does not include a tip and also include a line item on billing statements for tips. The MWA safeguards the minimum wage rates and addresses the relationship between an employer and an employee. However, this section addresses the relationship between an employer and a consumer. As noted by the nine members of the Committee "communications between a business and a consumer are already regulated by the Unfair Trade Practices and Consumer Protection Law . . . and regulations issued under that act by the Attorney General." 73 P.S. §§ 201-1 – 201-10. The Department should explain its statutory authority to promulgate this section and why it is needed given the protections under the Unfair Trade Practices and Consumer Protection Law. Should the Department determine that this section is needed, we ask that it be revised for consistency with existing laws and regulations.

9. Economic or fiscal impacts.

The Department explains in RAF Question #19 that over 36,000 businesses of three types will be required to comply with this regulation: those that employ workers who meet the definition of "tipped employee"; those that charge service charges for banquets, package deals or special

events; and those that pay employees under a fluctuating workweek. In addition, the Department estimates that over 199,000 employees will be impacted by this regulation.

The responses to RAF Questions #19 and 23 only contemplate the fiscal impact on over 36,000 employers to review the new regulations and one-time adjustments to scheduling, staffing and payroll. The responses to these questions calculate a one-time cost during the implementing fiscal year of $17,261,640. Yet, the Department acknowledges in RAF Question #19 that employers who take the tip credit and opt to pay the state minimum wage, or are required to do so under the increased tip threshold, will incur an added cost of labor. The shift of credit card fees and the regular rate for salaried employees may also result in a fiscal impact to employers.

While it is understood that computing the fiscal impact of these regulatory provisions is difficult, we ask the Department to provide an estimate of costs for implementing this regulation by updating its responses to the RAF and the fiscal impact section of the Preamble. We will review the Department's responses to this concern in determining whether the regulation is the public interest.