

December 20, 2021

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

Re: Regulation #12-114, Proposed Rule, Amendments to 34 Pa. Code Chapter 231 with respect to tipped employees and overtime pay.

Dear Mr. Smolock:

The Pennsylvania Chamber of Business and Industry (the PA Chamber) submits these comments in response to the Pennsylvania Department of Labor and Industry's (L&I or the Department) proposed rulemaking, published in the Pennsylvania Bulletin on Nov. 20, 2021, which seeks to amend Chapter 231 of 34 Pa. Code to amend regulations governing tipped employees and overtime pay requirements for salaried employees.

The PA Chamber is the Commonwealth's largest broad-based business advocacy association, with close to 10,000 member employers of all sizes, representing every industry sector and region throughout the state and comprising roughly half of the private workforce in Pennsylvania. The PA Chamber advocates for public policy that will improve Pennsylvania's business climate to encourage economic development and private sector job creation. The PA Chamber is dedicated to promoting employer education and awareness and regularly solicits feedback to better understand the impact of laws and regulations, including the complexities of complying with state and federal workplace rules.

The PA Chamber has worked particularly closely with employers during the course of the pandemic. This challenging time has been especially harmful to employers in the food service industry, many of whom were decimated by the pandemic and business shutdown orders, if not shut down entirely. This industry remains in a tenuous state and continues to face daunting challenges and higher costs to comply with regulations and help ensure workplace safety; in addition to labor shortages and supply chain disruptions that are compounding an historically difficult environment for restaurants, taverns and others in the food industry.

Given these dire circumstances we were surprised L&I opted to promulgate a package of regulations targeting this industry, which could raise costs and create further disruption. Whether or not you support the proposed regulations, we firmly believed that all impacted employers and stakeholders deserved the opportunity and time to understand the proposal and provide comment if they so choose. The prescribed regulatory review process provides a minimum of 30 days following publication for the public to submit feedback. That timeframe began on Saturday, Nov. 20, leaving Pennsylvania employers with fewer than twenty work days, including time

around the Thanksgiving holiday, to become aware of the proposed rules, consider their impact, and prepare and submit feedback.

Thankfully the law allows for additional time and we accordingly suggested to L&I that an extension be granted, along with the National Federation of Independent Business, Pennsylvania Campground Owners Association, Pennsylvania Food Merchants Association, Pennsylvania Licensed Beverage & Tavern Association, Pennsylvania Restaurant & Lodging Association and Pennsylvania Retailers' Association.

Unfortunately, this request was rejected, with no rationale provided, on Dec. 1 – a disappointing decision we fear all but guarantees L&I and the Independent Regulatory Review Commission (IRRC) will lack sufficient industry input necessary to render informed decisions on how best to proceed. We urge L&I and IRRC to rectify this situation and commit to an inclusive process going forward that emphasizes outreach to impacted constituencies and acknowledgement of their feedback.

For now, we respectfully request consideration of the following observations and suggestions:

- Among the proposals impacting the restaurant industry is to require that an employee classified as a tipped employee can spend no more than 20 percent of their workweek performing duties that do not generate tips. L&I emphasizes in its proposal that this rule would align Pennsylvania with federal law; however, the 80/20 rule proposed by the U.S. Department of Labor (USDOL) has been challenged in court. We urge L&I to hold off promulgating a state 80/20 rule until the federal challenge has been resolved in order to ensure consistency, should the federal rule come to fruition.
- In the event the federal challenge is unsuccessful and USDOL finalizes its rule, we urge L&I to fulfill its stated objective to “mirror USDOL’s proposed regulation” and truly avoid inconsistencies between the two rules. One of the most common complaints cited by employers are workplace laws imposed by different levels of government that are similar in purpose but different in detail, leaving employers vulnerable to inadvertent violations when they are compliant at one level but mistakenly in violation at another level. Rather than copying the entirety of USDOL’s rule, L&I could simply adopt it by reference, thereby providing employers with confidence that they are compliant with both.
- Similarly, L&I proposes to adopt a federal standard limiting tip pooling to employees who spend at least 80 percent of a daily shift performing duties that generate tips. However, L&I’s proposed rule is different than the federal rule. For example, under federal law, employers that pay employees the full minimum wage and do not utilize the tip credit may establish a tip pool that includes back-of-house employees, an option the L&I proposal does not appear to allow. This is but one example of an inconsistency that could create confusion and we again urge L&I to simply adopt the federal rule by reference.
- Continuing with the theme of addressing inconsistencies between federal and state law, we urge L&I to adopt the federal model of the Fluctuating Workweek (FWW). For years, the FWW has allowed employers and certain nonexempt employees to agree on a compensation

plan that provides the employee with the certainty and flexibility of earning a salary and provides the employer flexibility for complying with overtime requirements. Unfortunately, Pennsylvania workers and employers have been unable to utilize this federal option, which has been embraced by USDOL leaders and administrations from both parties, due to outdated state regulations. We appreciate L&I's attention to this matter; however, their proposed FWW approach differs from the federal counterpart and is unlikely to be utilized by employers, meaning hourly workers who might prefer the flexibility of earning a salary will continue to be out of luck. We urge L&I to adopt the federal approach to the FWW.

- L&I's preference for an alternative approach to overtime and the FWW complicates other compensation questions as well. For example, it is not clear how employers are to calculate overtime on commissions and bonuses for hourly employees. It stands to reason that commissions and bonuses should contribute to overtime pay based on *total* hours worked, as opposed to the strict 40-hour standard suggested in the proposal – particularly when these additional payments can vary based on performance. Should L&I decline to adopt the federal approach, we urge the department clarify in the rule that variable earnings are compensation for all hours worked, as is standard in every other state that deviates from the federal FWW.

We appreciate the Department's consideration of our views on this important matter.

Sincerely,

A handwritten signature in black ink that reads "Alex J. Halper". The signature is written in a cursive, slightly slanted style.

Alex Halper
Director, Government Affairs

cc: The Honorable George Bedwick, Chairman, Independent Regulatory Review Commission