

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2022

PHILADELPHIA, JULY 22, 2022

ALM.

Significant Revisions to PMWA Regulations for Tipped Employees Coming to a Restaurant Near You in August

BY ANDREA M. KIRSHENBAUM

Special to the Legal

The Pennsylvania Department of Labor and Industry's (L&I) amendments to its Pennsylvania Minimum Wage Act (PMWA) regulations are set to take effect on August 5, 2022. Nearly all of the changes relate to tipped employees. While several of the amendments specifically incorporate federal regulatory language, many create additional obligations on Pennsylvania employers above and beyond those in effect under the federal Fair Labor Standards Act (FLSA). For example, in order to qualify as tipped employees under the PMWA, employees must receive \$135 (rather than \$30) per month in tips. The amendments also provide additional recordkeeping requirements and create other obligations regarding credit card fees and service charges.

These PMWA regulations come on the heels of multiple changes involving tipped employees at the federal level. While indicating in the Pennsylvania Bulletin that the rulemaking "provides a long overdue update of the department's

regulations concerning tipped employees," L&I also explains that the rulemaking was animated by a desire to create "bright line rules for employers in this commonwealth who over the last two years have been subject to constantly changing rules regarding tipped employees from the United States Department of Labor."

The regulations also specify that the minimum wage in Pennsylvania remains \$7.25 and the tipped minimum wage also continues to be \$2.83. Of course, as with federal law, employers must make up the difference if tips plus the base hourly rate of \$2.83 per hour do not equal the minimum wage for all hours worked.

Pennsylvania employers with tipped employees should revise their policies and practices in advance of the Aug. 5 effective date of the regulations.

Increase in Minimum Tip Threshold

The regulations amend the definition of "tipped employee," from an employee "customarily and regularly" receiving \$30 a month in tips to \$135 per month. L&I explained that the increase was to account for



Andrea M. Kirshenbaum of Post and Schell

inflation since the \$30 threshold was put in place in 1977. Therefore, while the \$30 requirement remains under the FLSA, Pennsylvania employers must, as of Aug. 5, comply with the \$135 amount. The regulations also adopt a definition for the phrase "customarily and regularly" that aligns more closely with FLSA regulations.

Tip Credit and Tip Pooling

The tip credit and tip pooling amendments largely (although not exclusively) incorporate FLSA regulations. Of note, L&I did not adopt the requirement under the FLSA's recent regulations prohibiting employers from taking a tip

credit if employees perform more than 30 consecutive minutes of non-tipped work, indicating that L&I “felt this requirement would be too difficult for either the department or employers to enforce.”

The regulations also added a recordkeeping sub-section specifically requiring employers that implement tip pools to maintain payroll and other records containing, “the names and position of each participant in the tip pool and the amount distributed to each participant in the tip pool.”

Credit Card and Other Processing Fees

L&I added a new regulation prohibiting employers from deducting credit card or other processing fees from an employee’s tips. In including this provision, L&I relied on section 3 of the PMWA which provides that tips are the property of the employee. The regulation also specifies that employers cannot deduct credit card or other processing fees before distributing tips under a permitted tip pool. Of significant note, there is no analogous provision under the FLSA prohibiting the deduction of processing fees.

Service Charges

The PMWA regulation regarding service charges also is a new addition with no federal analogue. It specifically requires employers that charge “for the administration of a banquet, special function or package deal” to notify patrons in a contract or agreement and “on any menu provided to the patron,” that a service charge is distinguished from a

tip. The notice “must state that the administrative charge is for administration of the banquet, special function or package deal and does not include a tip to be distributed to the employees who provided service to the guests.” L&I’s service charge regulation also mandates that when an employer charges a service fee, “any billing statement must contain separate lines for service charges and tips.” And for employers that decide to distribute service charges to employees, the fees do not qualify as tips and must be included in calculating the regular rate of pay for employees for purposes of determining employees’ overtime rate.

Regular Rate of Pay Calculation for Salaried Employees

In the only significant change that does not relate to tipped employees, L&I has added a new sub-section that clarifies how to calculate the regular rate of pay for salaried, nonexempt employees. The regulation is being added in the wake of the Pennsylvania Supreme Court’s decision in *Chevalier v. General Nutrition Centers*, 220 A.3d 1038 (Pa. 2019) which held that the FLSA’s fluctuating workweek method was not permitted under the PMWA. It specifies that the regular rate for salaried employees who are not exempt from overtime is the amount of pay determined under the regulation divided by 40 hours.

Takeaways for Employers

While some of the PMWA regulatory amendments adopt federal standards, others create added obligations for all employers of tipped

employees in Pennsylvania. This divergence between federal and state wage and hour law in the commonwealth is part of a larger trend over the last several years, including multiple Pennsylvania Supreme Court decisions interpreting the PMWA more expansively than the FLSA.

As is often the case with wage-and-hour regulations, the requirements of the new PMWA rulemaking are very specific and create multiple additional obligations. Pennsylvania employers with tipped employees should work to implement the regulations immediately to ensure compliance and avoid the risk of costly wage-and-hour litigation.

—*Summer associate Amon Younker contributed to the drafting of this article.*

Andrea M. Kirshenbaum is the chair of Post & Schell’s employment and labor practice group, and related subgroups, including employment and employee relations, employment and collective class actions, labor, wage-and-hour, and trade secret and noncompete law, and is a member of the firm’s appellate department. Contact her at akirshenbaum@postschell.com.