

# Pennsylvania Regulatory Commission Approves Expansive Tipped Employee Regulations

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Wage and Hour

Bucking the standard that has existed under federal law and in most states for decades, tipped employees in Pennsylvania soon will have to earn more than four times as much in tips before their employers may take a tip credit and pay those employees less than the standard minimum wage. That revision is but one of several regulatory changes proposed by Governor Tom Wolf's administration and approved by the state's Independent Regulatory Review Commission (IRRC) regarding tipped employees.

The regulation will be submitted to the Pennsylvania Attorney General for legal review and, if approved, published in the *Pennsylvania Bulletin* and become effective 90 days later.

### Minimum Monthly Tip Requirement Increased to \$135

Since 1998, employers in Pennsylvania have been able to pay tipped employees a base rate of \$2.83 per hour if they earn at least \$30 a month in tips, with tips making up the remainder of the employee's wages to reach the standard minimum wage, currently \$7.25 per hour. This difference is commonly known as a "tip credit." The \$30 level is found in both the federal Fair Labor Standards Act (FLSA) and the laws of other states that allow a tip credit.

If a tipped employee's combined base wages and tips do not equal at least \$7.25 per hour for all hours worked, then the employer must make up the difference. Under the new regulations, tipped employees will need to earn at least \$135 in tips before they qualify as tipped employees for whom their employer may pay the \$2.83 per hour tipped rate. The IRRC cited the effects of inflation since the \$30 tip threshold went into effect more than four decades ago as the basis for the increase. According to the regulations, the \$30 tip threshold is so outdated that most tipped employees earn at least \$135 per month in tips anyway, so the IRRC does not anticipate a substantial impact on those businesses with tipped employees.

### Traditional "80/20" Rule Adopted

Until recently, under sub-regulatory provisions enforced by the U.S. Department of Labor (DOL) for the past several decades, an employer could not take the tip credit for an employee who worked "dual jobs" – one traditionally tipped and one traditionally non-tipped – for time the employee spent performing related but non-tipped tasks (e.g., folding napkins or filling dispensers) if those related tasks required more than 20% of the employee's total time in workweek. This limitation is commonly known as the "20%" or "80/20" Rule. By contrast, an employer could take the tip credit for *all* of the time spent on directly tip-producing tasks (e.g., taking customer orders and serving their food), but could *never* take the tip credit for unrelated, non-tip-producing tasks (e.g., cleaning the bathroom).

The DOL under the former administration published a Final Rule that would have

eliminated the 80/20 Rule, thereby allowing an employer to take the tip credit for all time spent on tip-related tasks as long as they occurred within a “reasonable” time before or after tip-producing tasks. The current DOL rescinded that Final Rule and, in October 2021, issued a new Final Rule that reinstated the 80/20 Rule, with a modification that the limit on time devoted to *tip-related* activities must not exceed either 20% of a tipped employee’s workweek *or* a continuous period of time that exceeds 30 minutes.

As approved by the IRRC, the Pennsylvania regulation formally adopts the 80/20 Rule as it existed *prior to* its withdrawal by the Trump DOL and the current DOL’s recently enacted Final Rule. That is, Pennsylvania will not implement or enforce the 30-minute limitation imposed by the current federal Final Rule. In addition, Pennsylvania will not automatically adopt any future revisions to the federal tipped employee regulations, citing the “oscillating,” politically influenced federal law and the need for clarity and consistency in application of state law.

### Tip Pooling Officially Permitted

Although Pennsylvania already permits tip pooling, the IRRC noted that the state currently has no specific regulations addressing the subject. Under the approved regulations, Pennsylvania will formally adopt the federal tip-pooling regulations published in a DOL Final Rule in 2021, but, again, will not automatically adopt any future federal regulation on tip pooling. The federal tip-pooling regulations implemented a 2018 Congressional amendment to the FLSA that permits tipped employees to pool tips with traditionally non-tipped workers, as long as the employer does not take a tip credit and, instead, pays such workers a direct wage equal to or greater than the minimum wage.

However, employers, including managers and supervisors, are prohibited from keeping any tips received by employees, regardless of whether the employer takes a tip credit. The federal regulations define those who qualify as a “supervisor” or “manager,” and therefore are excluded from participating in a tip pool, by reference to the FLSA’s “duties” test for the executive exemption. On the other hand, managers or supervisors may retain or share any tips that are paid *directly* to them by customers for service that the supervisor or manager personally provided.

### Transactional Fee Deductions from Tips Prohibited

While FLSA regulations permit employers to reduce the tips paid to employees by the amount of (but no more than) the transactional fees associated with credit card payments, the approved Pennsylvania regulations do *not* allow such for such fee deductions. While acknowledging that the significant majority of purchase transactions (about 70%) are now paperless and that some business commenters stated that the practice regularly occurs, in formally rejecting the practice the IRRC relied on the state’s explicit statutory language, found in 43 P.S. § 333.103, that gratuities are the property of the employee.

### Written Notice Required for Service Charges

Banquet operators, caterers, and other event-based businesses often impose a service charge, a mandatory fee imposed on customers separate from tips, the latter of which are voluntarily paid by patrons to those providing services at the event. Both federal and Pennsylvania law permit employers to assess service charges, which commonly are

used to cover administrative costs, wages for non-tipped employees, and other expenses. Service charges, however, cannot be used as a form of tips to pay tipped employees.

To ensure that event patrons do not inadvertently elect to forego tipping under the mistaken belief that the service charge is for this purpose, under the approved regulations employers who assess a service charge must provide explicit, written notice to customers that the service charge is not a replacement for, or an offset to, voluntary tips. The written disclosure may be included in the contract with or other statement to the customer, or may be included on the menu provided to patrons. When the invoice or billing statement is presented to the customer, it must include separate line entries for service charges and tips.

### Fluctuating Work Week and the Regular Rate Calculation

While not really a tipped employee issue, the IRRIC included in the approved regulations a formal recognition of state law, as held by the Pennsylvania Supreme Court in *Chevalier v. General Nutrition Centers., Inc.*, 220 A.3d 1038 (Pa. 2019), that the FLSA's fluctuating workweek pay method does *not* apply under Pennsylvania law.

Typically, a non-exempt employee must be paid 1.5 times their regular rate for all hours in excess of 40 in a workweek. A different calculation may be applied if the employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works. The employer can satisfy the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least one-half (0.5 times) the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week.

Citing Pennsylvania statutory law that "[e]mployees shall be paid for overtime not less than one and one-half times the employee's regular rate," 43 P.S. § 333.104(c), and recognizing that states may enact law more beneficial wage laws than those provided under the FLSA, the Pennsylvania Supreme Court in *Chevalier* held that the standard, 1.5 times, multiplier must be used for any overtime calculation, thereby rejecting the FLSA's fluctuating workweek overtime pay calculation method.

### Agency Name Change

Lastly, the approved regulations will change the name of the Pennsylvania agency responsible for maintaining and enforcing the state's labor laws, from the Bureau of Labor Standards to the Bureau of Labor Law Compliance.

Employers in Pennsylvania need to ensure they are prepared to comply with these regulations once they become active. If you have any questions about the regulations or any other wage and hour issue, please contact a Jackson Lewis attorney.

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