

Pennsylvania's New Requirements for Tipped and Salaried Employees: Common Questions

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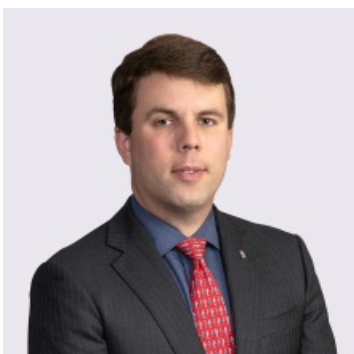
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The Pennsylvania Department of Labor and Industry has implemented new regulations under the Pennsylvania Minimum Wage Act (PMWA) that go into effect on August 5, 2022. The regulations make a number of important changes for employees who receive tips or service charges, as well as to overtime calculations for certain employees.

Some of the most-common questions that employers have asked about these new rules are discussed in this special report. (For an overview, see our article, [Pennsylvania Regulatory Commission Approves Expansive Tipped Employee Regulations.](#))

Which employees do the new regulations cover?

The new rules make a number of changes affecting employees whose pay includes tips or service charges. They also change how regular and overtime rates are calculated for *non-exempt salaried employees only*.

The new regulations provide: “The regular rate for salaried employees who are not exempt from overtime is the amount of remuneration determined under subsection (a), [which provides that all remuneration shall be included, with certain exceptions,] *divided by 40 hours*.” 34 Pa. Code § 231.43(g) (emphasis added). This change essentially codifies the Pennsylvania Supreme Court’s decision in *Chevalier v. General Nutrition Centers, Inc.*, 656 Pa. 296 (2019), prohibiting use of the fluctuating-workweek method to calculate overtime for non-exempt salaried employees under the PMWA. Nothing in the new regulations extends this change to anyone other than non-exempt salaried employees.

Some legal observers have opined that the new regulations apply to *all* non-exempt employees, whether salaried or hourly, but this interpretation is plainly incorrect in light of the regulatory language quoted above. In addition, Department of Labor and Industry representatives rejected this interpretation at a recent presentation on the new regulations. When asked, “Will there be changes to the regular rate calculation for a standard hourly employee?” Director of the Bureau of Labor Law Compliance Bryan Smolock responded, “No, these changes only apply to salaried, non-exempt workers.”

Under the new regulations, do employers need to look at the \$135-per-month threshold on average or from month to month?

The \$135 tip threshold must be met each and every month — averaging does not appear to be permissible under the new rules. The regulations revise the definition of “tipped employee” to “an employee engaged in an operation in which the employee *customarily and regularly* receives more than \$135 a month in tips.” 34 Pa. Code § 231.1(b) (emphasis added). In turn, the rule defines “customarily and regularly” as “a frequency which must be greater than occasional, but which may be less than constant.” At the same time, the regulations provide, “The tip credit only applies if an employee received over \$135 in tips for a month.” 34 Pa. Code § 231.101a(b)(1). Employers should examine the threshold each

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month and pay the difference if the employee's tips fall short. 34 Pa. Code § 231.101a(b)(2).

How do the new regulations affect tip pools?

Under the new rules, employees must receive advance notice of any tip-pooling arrangement. The federal Fair Labor Standards Act (FLSA) tip-pooling regulations, which are incorporated into the new Pennsylvania regulations by reference, require: "The employer must notify its employees of any required tip pool contribution amount[.]" 29 C.F.R. § 531.54(c)(2). The new regulations also require the employer to provide advance written notice of the tip pooling arrangement to all employees in the tip pool. 34 Pa. Code § 231.112(b). A single comprehensive written notice should be sufficient to satisfy both notice requirements.

The new regulations require employers to maintain records of the name, position, and amount distributed to every participant in the tip pool. 34 Pa. Code § 231.34(6).

Do the new regulations affect employees who are paid a percentage of banquet service charges?

Yes, the new regulations affect both banquet team members' compensation and employers' banquet operations.

The regulations define "service charge" as "a mandatory fee an employer may charge to a patron for service that an employee renders." 34 Pa. Code § 231.1(b). Employers that "charge for the administration of a banquet, special function, or package deal shall notify patrons of this charge[.]" 34 Pa. Code § 231.114(a). This notice must appear in both the banquet agreement and on any banquet menu and must state that the charge "is for administration of the banquet ... and does not include a tip to be distributed to the employees who provided service to the guests." *Id.*; 34 Pa. Code § 231.114(b). Similarly, the billing statement for any banquet must include separate lines for service charges and tips. 34 Pa. Code § 231.114(c). That is, it must state the service charge(s) and include a separate line for patrons to tip.

Service charges count toward the employer's minimum-wage obligation, but they may not be treated as tips (that is, service charges may not be used to reach the new \$135-per-month threshold). 34 Pa. Code § 231.114(d).

Is it an issue if a banquet server's hourly rate is under the minimum wage, but they receive additional wages from service charges?

No, this is permissible, so long as the banquet server's regular rate — which includes all service charges — meets or exceeds the minimum wage. *See* 34 Pa. Code § 231.114(d).

How are employees who perform both tipped work and banquet service treated?

For employees who perform both tipped jobs and banquet service (which is also a tipped job given the new requirement that every banquet receipt include a separate tipping line), the employer must ensure the employee's regular rate (which includes service charges) always meets or exceeds the minimum wage. Just as it does for employees who do not perform banquet service, the employer must ensure it does not take a tip credit for these employees, unless their tips exceed the new \$135-per-month threshold. 34 Pa. Code §§ 231.1(b), 231.101a(b)(1).

What notices do the new regulations require?

The regulations require employers to provide several kinds of notice.

First, the FLSA tip-pooling regulations, which are incorporated into the new Pennsylvania regulations by reference, require: “The employer must notify its employees of any required tip pool contribution amount[.]” 29 C.F.R. § 531.54(c)(2). The new regulations also require the employer to provide advance written notice of the tip pooling arrangement to all employees in the tip pool. 34 Pa. Code § 231.112(b). A single comprehensive written notice should be sufficient to satisfy both notice requirements.

Second, employers that use banquet service charges must inform their customers of the charge on every banquet agreement, menu, and receipt. Each receipt must provide separate lines breaking out the amount of the service charge and providing an additional space for the customer to tip. 34 Pa. Code § 231.114(a), (b), (c).

Finally, the [mandatory PMWA poster](#) has been updated to [reflect the new regulations](#).

What are the differences between state and federal law for tipped employees?

Once the new regulations become effective, federal and Pennsylvania wage laws for tipped employees will differ as follows:

- *Defining tipped employees.* Federal law defines a tipped employee as one “engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips.” 29 C.F.R. § 531.50(d). Effective August 5, Pennsylvania law sets the monthly threshold at \$135. 34 Pa. Code § 231.1(b).
- *Tip credits.* The FLSA sets a minimum wage of \$2.13 an hour for tipped employees and permits a tip credit of \$5.12 an hour. Pennsylvania law sets a higher minimum wage of \$2.83 an hour for tipped employees and permits a lower tip credit of \$4.42 an hour. 34 Pa. Code § 231.101a.
- *Non-tipped duties.* Both Pennsylvania and federal law permit a tip credit for non-tipped work that directly supports tip-producing work, so long as such work does not exceed 20 percent of the workweek. 29 C.F.R. § 531.56(f)(4)(i); 34 Pa. Code § 231.111(a) (incorporating 29 C.F.R. § 531.56 by reference). Federal regulations also prohibit a tip credit whenever non-tipped work exceeds 30 continuous minutes, but the new Pennsylvania regulations expressly exclude this provision when they incorporate the rest of the federal non-tipped-duties regulations. *Compare* 29 C.F.R. § 531.56(f)(4)(ii) *with* 34 Pa. Code § 231.111(a) (incorporating § 531.56 with the exception of subsection (f)(4)(ii)). As a practical matter, however, the employer should still pay at least minimum wage whenever a tipped employee performs more than 30 continuous minutes of non-tipped work, as the federal requirement is more stringent than the Pennsylvania requirement.

If you would like to discuss these issues or have additional questions, please contact your Jackson Lewis attorney.

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