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COMMENTARY

## Pro-Worker Agenda to Protect Tipped and Overtime Workers Takes Center Stage

As part of a broad sweeping agenda aimed at protecting Pennsylvania workers, Gov. Tom Wolf unveiled a plan to create safer workplaces, guarantee paid sick leave and increase worker pay. At the time Wolf unrolled the plan in October 2021, he signed an executive order and called on the General Assembly to pass legislation to increase the minimum wage from \$7.25 to \$12 per hour.

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Employment Law

By Jeffrey Campolongo and Scott Badami | September 16, 2022 at 01:30 PM

As part of a broad sweeping agenda aimed at protecting Pennsylvania workers, Gov. Tom Wolf unveiled a plan to create safer workplaces, guarantee paid sick leave and increase worker pay. At the time Wolf unrolled the plan in October 2021, he signed an executive order and called on the General Assembly to pass legislation to increase the minimum wage from \$7.25 to \$12 per hour.

The move was roundly criticized by businesses, driven by fear of increased inflation. Wolf has proposed an increase in Pennsylvania's minimum wage in each of the last seven years, with his most recent proposal to catch Pennsylvania up to Delaware and New Jersey with a \$15 an hour minimum wage by 2027. Those efforts have been unsuccessful in Harrisburg.

As part of the governor's executive order, Wolf directed various state agencies to research and take action with respect to these crucial areas:

### Paid Sick Leave

An estimated 400,000 Pennsylvania workers lack paid sick leave, which forces them to work when sick, risking their health and those around them. Providing paid sick leave would improve public health and prevent more people from getting sick, a protection that is beneficial to both workers and their employers.

### Increase Worker Pay

Despite strong public support, evidence workers keep their jobs and the opportunity to strengthen financial stability for women and people of color, the state legislature has failed to act, leaving Pennsylvania behind all of its neighboring states with a minimum wage of \$7.25. The governor directed DLI to pursue regulatory changes so workers are fairly paid for their work time spent on activities such as security screenings and putting on equipment required for their job.

## **Other Worker-Supporting Actions**

The governor also announced that L&I will make publicly available a list of bad actors that violate labor laws, misclassify their workers, owe unemployment compensation back taxes or fail to carry requisite workers' compensation insurance.

## **Help for Out-of-Work Pennsylvanians**

The governor supported a bill that would amend the Unemployment Compensation Law to streamline the process for eligible Pennsylvania workers to access the benefit to which they are entitled. The bill also includes provisions to strengthen Pennsylvania's unemployment compensation safety net to ensure that benefits are available to workers during future times of high unemployment and economic downturn.

## **Tipped Workers**

In March 2022, in response to the governor's executive order, the Independent Regulatory Review Commission (IRRC) unanimously approved final-form regulations to update Pennsylvania's Minimum Wage Act by changing rules about how employers pay tipped workers and ensure that salaried employees with fluctuating schedules are appropriately compensated for overtime. Updating regulations that were originally written in 1977, Pennsylvania finally enacted changes designed to protect wages earned by thousands of Pennsylvania workers as well as assisting employers by leveling the playing field in what remains a challenging labor market.

The regulations were then sent for review to the office of the Attorney General where they were approved by Josh Shapiro's office shortly thereafter. It was announced by the Department of Labor & Industry (L&I) Secretary Jennifer Berrier that the changes would take effect Aug. 5. Some critics (and workers), however, still believe the changes are insufficient and that there will be little to no impact on paychecks.

Likely the most talked about change updates the definition of "tipped employee"—such that the amount of tips an employee must receive monthly increases from \$30 to \$135 before an employer can reduce an employee's hourly pay down from \$7.25 to as low as \$2.83 per hour. But workers and labor leaders say the changes, even though they are well meaning, just will not meaningfully increase paychecks because the thresholds remain too low.

Other significant changes included in the recent regulations:

- aligning Pennsylvania with what is commonly known as the 80/20 rule—which is a recent federal regulatory update governing employer tip credits to allow employers to take a tip credit under certain conditions, including that the employee spends at least 80 percent of their time on duties that directly generate tips;
- permitting tip pooling among employees (but in most cases excluding managers, supervisors, and business owners);
- prohibiting employers from deducting credit card and other non-cash payment processing transaction fees from an employee's tip left with a credit card or other non-cash methods of payment; and
- developing a requirement for employers to clarify that automatic service charges are not gratuities for tipped employees.

One of the more heralded changes will prevent employers from passing the cost of credit card processing fees on to employees. For example, if someone leaves a \$5 tip on a credit card and it costs 20 cents to process the tip, the employee is no longer responsible for that fee. The employer will now have to absorb the cost, giving the employee \$5 instead of \$4.83.

Pooled tips are also impacted by the new regulations. Tip pools may only include workers in occupations who customarily and regularly receive tips. If all employees are paid at least \$7.25 per hour (the state minimum wage) or higher, tip pools may include both tipped and nontipped employees. However, managers, supervisors, and employers are prohibited from receiving tips from a tip pool, though they may choose to contribute the tips they earned to the tip pool. In that regard, managers, supervisors, and employers can only receive tips from patrons if they provide the entire service without assistance.

The following examples were provided by Bryan Smolock, director of the Bureau of Labor Law Compliance at the Pennsylvania DLI:

- Example 1: A supervisor working at a bar takes a drink order from a patron, makes the drink, delivers the drink and clears the table when the patron is finished. In this case, the supervisor may keep the entire tip.
- Example 2: A manager in a restaurant takes food orders and refills some drinks while a tipped employee delivers food to the table and refills drinks. In this case, the manager may not keep any part of the tip.

Importantly, the rule changes do not alter the overtime compensation regulations for hourly workers. At this point, employers with tipped employees should review their policies to ensure compliance with the new regulations.

Much work remains to be done to bring Pennsylvania workers' wages into the 21st century. There is no doubt that regulations written during the Jimmy Carter administration and needed to be updated to reflect the realities of the 2022 job market. The challenge to be balanced is finding that appropriate and fair wage for line employees while not overburdening employers just starting to come back following the pandemic in an inflationary economy. Nobody wins if employers can't find or don't schedule workers. But similarly, employees deserve a fair wage for their skilled efforts.

**Jeffrey Campolongo** is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.

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