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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE**

48 N.J.R. 2420(a)

Proposed Amendment: N.J.A.C. 12:56-6.7

[Click here to view Interested Persons Statement](#)

Overtime for Tipped Employees

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 34:11-56.43*.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2016-190.

A **public hearing** on the proposed amendment will be held on the following date at the following location:

Tuesday, December 13, 2016
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
10th Floor, Large Conference Room
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by January 20, 2017, to:

David Fish, Executive Director
Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
PO Box 110-13th Floor
Trenton, New Jersey 08625-0110
Fax to: (609) 292-8246

E-mail: David.fish@dol.nj.gov.

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing to amend *N.J.A.C. 12:56-6.7*, so as to indicate that for the purpose of determining overtime premium pay for tipped employees, any tips received by a tipped employee in excess of the difference between the State minimum hourly wage and the cash wage paid to such employee, need not be included in the calculation of the regular hourly wage. The practical effect of this amendment would be that employers who pay their tipped employees cash wages of equal to or less than the State minimum hourly wage (as most do), would calculate overtime premium pay for those tipped employees at a rate of one and one-half times the State minimum hourly wage. This is an approach to the calculation of overtime premium pay for tipped employees which is generally consistent with the approach taken by the United States Department of Labor (USDOL) under the Federal Fair Labor Standards [page=2421] Act (FLSA), 29 U.S.C. §§ 201 et seq., and the accompanying Federal regulations at 29 CFR 531.50 et seq., with the notable exception that the USDOL uses the Federal minimum hourly wage, whereas, the amendments proposed to *N.J.A.C. 12:56-6.7* would refer to the State minimum hourly wage. At the moment, the State minimum hourly wage exceeds the Federal minimum hourly wage by \$ 1.13 (the State rate is set by State Constitutional amendment at \$ 8.38; whereas the Federal rate is \$ 7.25).

It is also worth noting that existing *N.J.A.C. 12:56-6.7(b)* states in pertinent part that where an employee's pay includes the value of gratuities and "it is not feasible to determine the exact regular hourly wage during a particular week, the employer shall be deemed to have fulfilled the overtime requirements of this chapter if the premium payment for the overtime hours is paid in cash on the basis of the agreed hourly wage, but in no event shall the premium payment be at a rate less than the applicable minimum rate." The reality is that in many, if not most, instances, when dealing with tipped employees, it is "not feasible to determine the exact hourly wage during a particular week." Consequently, under the existing rules the Department is already often calculating the overtime premium pay requirement for tipped employees at a rate of one and one-half times the State minimum hourly wage. The benefit of amending *N.J.A.C. 12:56-6.7* in the manner suggested within this notice, is that if the amendments are adopted, neither employers seeking to comply with New Jersey's overtime premium pay requirement, nor Division of Wage and Hour Compliance (Division) staff tasked with enforcing New Jersey's overtime premium pay requirement, would any longer be required to undertake the unenviable task of determining as a threshold matter whether it is "feasible" to calculate the exact regular hourly wage; which, as mentioned above, more often than not, results in a finding that such a calculation is, in fact, not feasible. Rather, both employers and regulators would have a simple and straightforward method to apply when calculating overtime premium pay for tipped employees; a method which, again, is generally consistent with that used by the USDOL under the FLSA and the accompanying Federal regulations.

This is another instance, as was the case with what are commonly referred to as the white collar exemptions from overtime premium pay (43 *N.J.R.* 725(a); 2352(a)); rounding practices (42 *N.J.R.* 1308(a); 3061(b)); and overtime for employees working in agriculture (rulemaking in progress), where the Department has determined that aligning a State regulatory wage and hour standard as closely as possible with an analogous Federal standard is advisable. That is, it fosters uniformity, it eliminates unnecessary confusion among the regulated community, and as described in the earlier cited rule proposals relative to the white collar overtime exemptions, rounding and overtime for agricultural employees, the Department is unaware of any compelling reason to have a New Jersey overtime pay standard for tipped employees which substantially differs from the corresponding overtime pay standard found within the FLSA, so long as the aligned New Jersey regulatory standard is consistent with New Jersey law. Suffice it to say, the Department believes that the standard proposed within this notice of proposal is, in fact, consistent with New Jersey law.

Incidentally, in addition to proposing adoption of the standard set forth within proposed *N.J.A.C. 12:56-6.7(c)* for treatment of tips in the calculation of overtime premium pay for tipped employees, the Department is also proposing the adoption of new *N.J.A.C. 12:56-6.7(d)* and (e), which contain definitions for the terms "tip" and "tipped employees." These definitions are borrowed from Federal regulations; specifically, 29 CFR 531.50, 531.52, and 531.53, would provide clarity both to the regulated community in its efforts to ensure compliance and to the Department in its enforcement of the Wage and Hour Law and accompanying rules.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed amendments would have a positive social impact in that they would eliminate any possible confusion regarding the Department's enforcement policy relative to the calculation of overtime premium pay for tipped employees. This is an issue - that is, how one calculates overtime premium pay for tipped employees under New Jersey law and the existing rules - which has vexed both the regulated community and the Department for many years. With the adoption of the above-described simple, straightforward and, most importantly, uniform, approach to calculating overtime premium pay for tipped employees, one that is consistent with the approach taken by the USDOL under analogous Federal law and regulations, it is the Department's hope that affected employers will be better equipped to ensure compliance and that the Department will be more efficient and effective in its enforcement of New Jersey's Wage and Hour Law.

Economic Impact

The proposed amendments would have a positive economic impact on employers in that having a better understanding of the Department's enforcement policy should help them avoid running afoul of the State overtime law and rules, thereby incurring fewer administrative penalties. The proposed amendments may have a negative economic impact on employees who would seek to recover overtime premium pay against employers under the New Jersey overtime law and rules in that on those occasions under the existing rules where the Department may have determined that it was "feasible" to calculate the "exact regular hourly wage during a particular week," a tipped employee may have had a viable wage and hour complaint against his or her employer for failing to pay at a rate of one and one-half times that regular hourly wage for every hour worked over 40 in a week; whereas, under the amended rule, the same employee may not have a viable wage and hour complaint if his or her employer has paid one and one-half times the State minimum hourly wage for hours worked over 40 in a week, even where it may have been "feasible" to calculate the "exact regular hourly wage." Nevertheless, as indicated in the Summary above, the Department believes that any such possible negative economic impact is outweighed by the benefit of amending *N.J.A.C. 12:56-6.7*, namely, that if the amendments are adopted, neither employers seeking to comply with New Jersey's overtime premium pay requirement, nor Division of Wage and Hour Compliance staff tasked with enforcing New Jersey's overtime premium pay requirement, would any longer be required to undertake the unenviable task of determining as a threshold matter whether it is "feasible" to calculate the exact regular hourly wage; which, as mentioned above, more often than not results in a finding that such a calculation is, in fact, not feasible. Rather, both employers and regulators would have a simple and straightforward method to apply when calculating overtime premium pay for tipped employees; a method which, again, is generally consistent with that used by the USDOL under the FLSA and the accompanying Federal regulations.

Federal Standards Statement

As indicated earlier, it is the Department's objective with this rulemaking to align as closely as possible its rules regarding the calculation of overtime premium pay for tipped employees under the New Jersey Wage and Hour Law with the regulations of the USDOL regarding the calculation of overtime premium pay for tipped employees under the FLSA. The Department uses the State minimum hourly wage in its calculation of regular hourly wage under the proposed amendments, whereas, the USDOL uses the Federal minimum hourly wage in its calculation under the FLSA. This difference between the two approaches is necessary in order to ensure consistency between the Department's rules and the New Jersey Wage and Hour Law. However, in every other respect the proposed amendments track with the pertinent Federal regulations. Moreover, because of the method set forth within *Article I, Paragraph 23, of the New Jersey Constitution*, for the annual adjustment of the State minimum hourly, which takes into account increases in the Federal minimum hourly wage, there may be a date in the future when the State minimum hourly wage and the Federal minimum hourly wage are identical. Under those circumstances, the calculation of overtime premium pay for a given tipped employee would be the same under the Federal regulations as under amended *N.J.A.C. 12:56-6.7*. Thus, it is the Department's position that on their face the proposed amendments would not exceed standards or requirements imposed by Federal law.

[page=2422] Jobs Impact

The Department does not anticipate that the proposed amendments would result in either the generation or loss of jobs.

Agriculture Industry Impact

The Department does not anticipate that the proposed amendments would have any impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

The proposed amendments would impose no reporting, recordkeeping, or compliance requirements on small businesses, as that term is defined within the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. Rather, as to both small and large businesses, the proposed amendments would provide needed clarification regarding the Department's wage and hour enforcement policy relative to overtime premium pay requirements for tipped employees.

Housing Affordability Impact Analysis

The proposed amendments would have no effect on the affordability of housing and would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed amendments pertain to the overtime premium pay requirements for tipped employees. The proposed amendments do not pertain in any way to housing.

Smart Growth Development Impact Analysis

The proposed amendments would have no impact on smart growth and would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendments pertain to the overtime premium pay requirements for tipped employees. The proposed amendments do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Full text of the proposal follows (additions indicated in boldface **thus**):

SUBCHAPTER 6. OVERTIME

12:56-6.7 Offsets; cash payments

(a)-(b) (No change.)

(c) For the purpose of determining overtime premium pay for a tipped employee, any tips received by the tipped employee in excess of the difference between the State minimum hourly wage set forth at *N.J.A.C. 12:56-3.1(a)* and the cash wage paid to such employee, need not be included in the calculation of the regular hourly wage.

(d) For the purpose of use in this section, the term "tipped employee" shall mean any employee engaged in an occupation in which that individual customarily and regularly receives more than \$ 30.00 per month in tips.

(e) For the purpose of use in this section, the term "tip" shall mean a sum presented by a customer as a gift or gratuity in recognition of some service performed for him or her. A tip is to be distinguished from payment of a charge, if any, made for the service. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" for the purpose of calculating premium overtime pay.

1. In addition to cash sums presented by customers that an employee keeps as his or her own, tips received by an employee include amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bill as tips. Special gifts in forms other than money or its equivalent as above described, such as theater tickets, passes, or merchandise, are not counted as tips received by the employee in determining whether the person is a "tipped employee" for the purpose of calculating premium overtime pay.