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January 6, 2020

Ms. Mischelle F. Vanreusel  
Regulatory and Grants Coordinator  
Division of Labor and Industry  
Maryland Department of Labor  
1100 North Eutaw Street, Room 600  
Baltimore, MD 21201  
[Via email: Mischelle.vanreusel@maryland.gov](mailto:Mischelle.vanreusel@maryland.gov)

Re: Comments on Re-proposed Rule COMAR 09.12.41.20, *Restaurant Tip Credit Wage Statement*

Dear Ms. Vanreusel:

Thank you for the opportunity to comment on the re-proposed regulations published on December 6, 2019, related to restaurant employers who utilize a tip credit. The regulation addresses the requirements of Chs. 10 and 11 (H.B. 166 and S.B. 280), Acts of 2019, which amended the Wage and Hour Law to require restaurant employers of certain tipped employees to furnish a wage statement that shows the effective hourly rate of pay.

### **About the American Payroll Association and National Payroll Reporting Consortium**

Established in 1982, the American Payroll Association (APA) is a not-for-profit association serving the interests of about 21,000 payroll professionals nationwide. APA's primary mission is to educate its members and the payroll industry about the best practices associated with paying America's workers while complying with applicable federal, state, and local laws and regulations. APA members are directly responsible for calculating wages and tax withholding for their employers.

NPRC is a nonprofit trade association whose member organizations provide payroll processing and related services to nearly two million U.S. employers, representing over 36% of the private sector workforce. APA and NPRC are strictly neutral on minimum wage policy. We seek only clear guidance and appropriate lead time to accommodate the regulatory changes.

## **Background and Concerns for Payroll Management**

Summarizing our prior comments (attached), we appreciate that the Department hosted meetings and conference calls to solicit input on H.B. 166/S.B. 280 (2019). Many of our members were concerned that any requirement to show the effective hourly rate of pay for each workweek would require a significant amount of space on pay statements. We supported the proposed regulation because it permits Maryland employers to produce a tip credit wage statement separately from the existing pay statement and permits such statements to be furnished electronically. These provisions offer a reasonable solution to providing this information to employees without the potentially significant costs involved with adding a page to existing pay statements.

We have two recommendations for the proposed regulation:

### **1. Provide Appropriate Time for Programming**

As explained in the attached letter dated August 9, 2019, payroll systems, and even point-of-sale systems will need to make significant programming changes to move from payroll inputs that are on a pay period basis (i.e., total hours and earnings for a two-week period), to weekly. There are many different software solutions involved which accurately handle Maryland Wage and Hour calculations, but which do not necessarily pass the results to the payroll system broken out by workweek. Programming changes of this nature typically require six months to a year from the date of any final regulations or specifications.

In general, complex software systems are reprogrammed only upon adoption of relevant final regulations, since substantive requirements can change dramatically between proposed and final regulations. The withdrawal of these regulations in early November likely means that most payroll software developers have been aware but not actively working on related programming changes. Our earlier letter noted that “Programming changes of this nature typically require six months to a year, from the date of any final regulations or specifications.”

The re-proposed regulation is silent as to the effective date, which could be confusing to the public, including affected restaurant employers and employees. We ask that the Department publish a statement on the subject (which could be in the form of “Frequently Asked Questions”) to clarify the date by which employers will be expected to comply, and/or any transition period during which employers should be able to demonstrate good-faith efforts to comply in order to avoid any possible penalty assessments. We recommend that the statement requirement be effective no earlier than six months after the proposed regulation becomes final.

## 2. Offer Examples and Other Guidance

The appendix to these comments shows a simple example of what we understand the new law requires, which is a report produced for each pay period (i.e., which can be every two weeks), but with a separate analysis for each work week. It would be helpful to all involved (i.e., employees, employers, and the Department) if the Department could offer illustrative examples or other guidance given various circumstances, which would tend to improve consistency. For example, employees who change jobs should optimally see similar reports from different employers.

We would be happy to discuss this further if it would be helpful. Again, we appreciate the Department's outreach and collaboration on this matter,

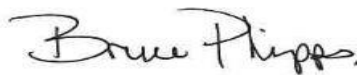
Sincerely,



Pete Isberg  
Cochair, State and Local Topics Subcommittee, APA  
President, National Payroll Reporting Consortium



Carlanna Livingstone, CPP  
Cochair, State and Local Topics Subcommittee



Bruce Phipps, CPP  
Cochair, State and Local Topics Subcommittee

A handwritten signature in black ink that reads "Alice P. Jacobsohn". The signature is written in a cursive style with a large, looped initial "A".

Alice P. Jacobsohn, Esq.  
Senior Manager, Government Relations  
American Payroll Association

**Rate of Pay Analysis  
(For a Biweekly or Semimonthly Payroll)**

*Example for an employee who works in both tipped and non-tipped roles*

**Week 1**

<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$11	20	\$220
Tip credit hours	\$6	15	\$ 90
Tip credit hours	\$4	5	\$ 20
<u>Tips reported</u>			<u>\$200</u>
Total		40	\$530
Effective rate of pay for tip credit hours			\$ 15.50

Example of an employee that works in a non-tipped role and tipped roles with different rates of pay (e.g., lunch and dinner shifts pay different rates).

(Tip-credit wages + tips)/tip credit hours  
(\$110+\$200)/20 = \$15.50

**Week 2**

<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$11	10	\$110
Tip credit hours	\$ 6	30	\$180
<u>Tips reported</u>			<u>\$220</u>
Total		40	\$510
Effective rate of pay for tip credit hours			\$ 13.33

**Example Rate of Pay Analysis with Adjustment to Minimum Wage**

**Week 1**

<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$12	20	\$240
Tip Credit hours	\$ 6	20	\$120
Tips Reported			\$ 80
Adjustment to Min Wage			\$ 20
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Total		40	\$460
Effective rate of pay for tip credit hours			\$ 11.00

Adjustment to minimum is calculated only with respect to tip credit hours and wages

**Week 2**

<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$11	10	\$110
Tip credit hours	\$ 6	30	\$180
<u>Tips reported</u>			<u>\$220</u>
Total		40	\$510
Effective rate of pay for tip credit hours			\$ 13.33



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August 9, 2019

Ms. Michelle F. Vanreusel  
Regulatory and Grants Coordinator  
Division of Labor and Industry  
Maryland Department of Labor  
1100 North Eutaw Street, Room 600  
Baltimore, MD 21201  
*Via email: [Michelle.vanreusel@maryland.gov](mailto:Michelle.vanreusel@maryland.gov)*

Re: Comments on Proposed Rule COMAR 09.12.41.20, *Restaurant Tip Credit Wage Statement*

Dear Ms. Vanreusel:

Thank you for the opportunity to comment on the proposed regulations to require restaurant employers that utilize a tip credit to provide employees with a written or electronic wage statement, as required by H.B. 166/S.B. 280, Acts of 2019. This legislation amended Maryland's Wage and Hour Law to require restaurant employers of certain tipped employees to receive a wage statement that shows the effective hourly tip rate. APA and NPRC support the proposed regulations.

### **About the American Payroll Association and National Payroll Reporting Consortium**

Established in 1982, the American Payroll Association (APA) is a not-for-profit association serving the interests of about 21,000 payroll professionals nationwide. APA's primary mission is to educate its members and the payroll industry about the best practices associated with paying America's workers while complying with applicable federal, state, and local laws and regulations. APA members are directly responsible for calculating wages and tax withholding for their employers.

NPRC is a nonprofit trade association whose member organizations provide payroll processing and related services to nearly two million U.S. employers, representing over 36% of the private sector workforce.

These comments focus on the importance of clear guidance for employers and employees, such that all parties understand what to expect and employers can modify their payroll systems, as needed, to reflect the regulatory changes.

## Background and Concerns for Payroll Management

The relevant section from H.B. 166 is as follows:

3-419. (D) (1) THE COMMISSIONER SHALL ADOPT REGULATIONS, IN CONSULTATION WITH PAYROLL SERVICE PROVIDERS AND RESTAURANT INDUSTRY TRADE GROUP REPRESENTATIVES, TO REQUIRE RESTAURANT EMPLOYERS THAT INCLUDE A TIP CREDIT AS PART OF THE WAGE OF AN EMPLOYEE TO PROVIDE TIPPED EMPLOYEES WITH A WRITTEN OR ELECTRONIC WAGE STATEMENT FOR EACH PAY PERIOD THAT SHOWS THE EFFECTIVE HOURLY TIP RATE AS DERIVED FROM EMPLOYER -PAID CASH WAGES PLUS ALL REPORTED TIPS FOR TIP CREDIT HOURS WORKED EACH WORKWEEK OF THE PAY PERIOD.

In May, the Department of Labor hosted a meeting and conference call to solicit input on H.B. 166 § 3-419, which was attended by representatives of APA and NPRC, including payroll service providers. APA and NPRC appreciate the Department's efforts and outreach in this regard.

The principal concern for APA and NPRC members, given the requirement to show the effective hourly rate of pay for "each workweek of the pay period," is the difficulty in complying. One issue is that the workweek analysis may require a significant amount of space and the amount of space on wage statements is limited. Absent the proposed regulation, many Maryland restaurants may have had to completely overhaul their payroll systems and pay statements to comply.

To illustrate, most employees are paid wages twice a month (biweekly or semimonthly). The only way for employers to show the effective hourly rate of pay for each workweek would be to display each of the elements (hours, tip-credit hours, wages, and tips, along with the effective tip rate) separately for each workweek. The appendix to these comments shows a simple example of what we understand the new law requires. For most employees, the analysis would appear twice on the wage statement; i.e., separately for each work week. For most employers, the added information might have required an additional page. Some payroll systems only provide a single-page wage statement.

## Comments in Support of the Proposed Regulation

### *.20 Restaurant Tip Credit Wage Statement.*

#### A. Definitions.

(1) In this regulation, the following terms have the meanings indicated.

(2) Terms Defined.

(a) "Tip credit wage statement" means a written or electronic statement that shows the employee's effective hourly rate of pay, including employer paid cash wages plus all reported tips, for all tip credit hours worked for each workweek in the pay period.

(b) "Restaurant" has the meaning stated in Regulation .07D of this chapter.

B. A restaurant employer shall provide each employee for whom the employer utilizes a tip credit with a tip credit wage statement for each work week in the pay period no later than 2 weeks following the end of the pay period.

C. A restaurant employer may satisfy the requirement in §B of this regulation by providing an online system through which an employee may obtain the employee's tip credit wage statement.

APA and NPRC applaud the Department for developing the proposed regulation. In effect, the proposed regulation offers employers a reminder about Maryland's minimum wage law related to tipped employees, allowing for adjustments when necessary. While Maryland restaurants are likely aware of the minimum wage law, employees will be able to see the analysis for themselves.

In particular, the proposed regulation helpfully permits Maryland employers to produce a tip credit wage statement separately from the existing pay statements and within two weeks following the end of the pay period. It further enables restaurants to comply by providing "an online system through which an employee may obtain the employee's tip credit wage statement." APA and NPRC support both of these provisions because they offer a reasonable solution to providing the new information to employees without the potentially significant costs involved with adding a page to existing statements and printing them.

Separately, it would be helpful if the regulation explained the effective date by which employers will be expected to comply, or alternatively any transition period during which employers should be able to demonstrate good-faith efforts to comply. Although it is helpful that the report itself can be separate from wage statements, it seems likely that many payroll systems, and even point-of-sale systems, will need to make significant programming changes to move from payroll inputs that are on a pay period basis (i.e., total hours and earnings for a two-week period), to weekly. As we understand it, there are many different software solutions involved that accurately manage Maryland wage and hour calculations and other requirements, but that do not always pass the results to the payroll system by workweek. Programming changes of this nature typically require six months to a year, from the date of any final regulations or specifications.

APA and NPRC would be pleased to discuss this further with the Department.

Sincerely,



Pete Isberg  
Cochair, State and Local Topics Subcommittee  
President, NPRC



Bruce Phipps, CPP  
Cochair, State and Local Topics Subcommittee



Alice P. Jacobsohn, Esq.  
Senior Manager, Government Relations  
American Payroll Association



## Attachment

### Example Display of Weekly Rate of Pay Analysis (Biweekly or Semimonthly Payroll)

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<b>Week 1</b>			
<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$11	20	\$220
Tip credit hours	\$6	20	\$120
<u>Tips reported</u>			<u>\$200</u>
Total		40	\$540
Effective rate of pay			\$ 13.50

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<b>Week 2</b>			
<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Hourly	\$11	10	\$110
Tip credit hours	\$6	30	\$180
<u>Tips reported</u>			<u>\$220</u>
Total		40	\$510
Effective rate of pay			\$ 12.75

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### Example Weekly Rate of Pay Analysis With Adjustment to Minimum Wage

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<b>Week 1</b>			
<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This Period</u>
Tip credit hours	\$4	40	\$160
Tips reported			\$200
<u>Adjustment to Min Wage</u>			<u>\$ 44</u>
Total		40	\$404
Effective rate of pay			\$ 10.10

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