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VIA EMAIL (CBRANDT@IRRC.STATE.PA.US)

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: IRRC Number 3202
Department of Labor and Industry
Regulation #12-106: Minimum Wage

Dear Commissioners:

I write on behalf of the Workplace Policy Institute (WPI) of the law firm Littler Mendelson, P.C. with respect to Final Rulemaking #12-106 (IRRC #3202), which would update the executive, administrative and professional (EAP) exemptions from the minimum wage and overtime provisions of the Pennsylvania Minimum Wage Act of 1968 (PMWA). WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. With more than 1,500 lawyers, Littler is the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters. Approximately fifty of our employment attorneys are located in the Commonwealth of Pennsylvania. On a regular basis, we advise Pennsylvania employers with respect to their compliance with the PMWA and represent Pennsylvania employers in disputes arising under the PMWA.

THE FINAL REGULATION DOES NOT ALIGN THE DUTIES TESTS OF THE PMWA'S EAP EXEMPTIONS WITH THEIR FEDERAL COUNTERPARTS.

According to the Pennsylvania Department of Labor and Industry (the "Department"), "alignment of the duties test [of the PMWA's EAP exemptions] with the federal regulation is in the public interest." [Notice of Final Rulemaking at 12]. We agree.

According to the Department, its final regulation "updates Pennsylvania's duties test to align with USDOL's language." [Regulatory Analysis Form at § 15]. Unfortunately, the final regulation **does not accomplish** the stated objective. As described below, the final regulation does not conform to the intention of the General Assembly in the enactment of the PMWA (or to the Department's own intention in promulgating the regulation) that the EAP exemptions should align with the corresponding FLSA regulations.

The intent of the General Assembly in enacting the PMWA in 1968 was not to deviate from federal law with respect to the EAP duties tests.

The FLSA permits states to adopt laws that provide employees greater protection than federal law. [Regulatory Analysis Form at § 9, citing 29 U.S.C. § 218(a), *Bayada Nurses, Inc. v. Dep't of Labor and Indus.*, 8 A.3d 866, 883 (Pa. 2010)]. However, the intent of the General Assembly when it enacted the PMWA in 1968 was **not** to adopt a higher standard for its EAP exemptions than the well-established federal tests. Indeed, the 1968 version of the PMWA **excluded** from its protections those employees who were already covered by the FLSA. Rather, the General Assembly merely desired to extend minimum wage and overtime protections to those Pennsylvania workers who were not already covered by the FLSA.

Not surprisingly, when the Department first promulgated regulations to define and delimit the EAP exemptions in 1977, it purposefully aligned them with their federal counterparts. As the Department explained, Pennsylvania's EAP regulations "were established to mirror the federal regulations that were in place in 1977." [Regulatory Analysis Form, p. 2 & § 9; *id.* at § 10 ("Pennsylvania's current regulation aligns with the federal law as it existed in 1977."); *see also* Notice of Final Rulemaking at 12].

In 1988, when the General Assembly became concerned about the stagnating FLSA minimum wage, it acted on those concerns by amending the PMWA to eliminate the exclusion for workers covered by the FLSA and to increase the minimum wage for **all** Pennsylvania workers. *See* SB 1222 (Act 1988-150); Pa. Legislative Journal (Senate), Session of 1988, No. 64 (Nov. 21, 1988) at 2857-69 (noting failure to increase FLSA minimum wage since 1981 and intent to increase minimum wage for all Pennsylvania workers). As this example demonstrates, when the General Assembly desires to deviate from federal law and provide greater protection to Pennsylvania employees, it does so **clearly** and **unambiguously**. Notably, the General Assembly never expressed that deviating from federal standards with respect to the duties needed to qualify for an EAP exemption under the PMWA was in the public interest.

The current PMWA EAP duties tests are outdated and obsolete.

Pennsylvania's EAP regulations "have not been updated since their original promulgation in 1977." [Regulatory Analysis Form, p. 2 & § 9.] "[T]he current Pennsylvania regulations contain an outdated duties test." [Notice of Final Rulemaking at 3]. Since 1977, the U.S. Department of Labor ("USDOL") has "significantly changed" the duties tests under federal law. [*Id.* at 12; Regulatory Analysis Form at § 10 (explaining that when USDOL simplified its duties test, no change was made to Pennsylvania's regulation)]. As a result, "the duties test in the MWA's current regulation is out of date and no longer aligns with the USDOL duties test." [Regulatory Analysis Form at § 10].

The Department's failure to update the duties tests for the EAP exemptions creates a complex and unwieldy dual regulatory scheme for Pennsylvania employers, in which outdated and obsolete tests from 1977 still control whether an employee is exempt or nonexempt. As the Department aptly noted, "[t]wo different duties tests make it difficult for employers to accurately determine which employees are exempt from receiving overtime." [Regulatory Analysis Form at § 10; *see also id.* ("[T]he discrepancies between Pennsylvania's regulation and USDOL's regulation made it difficult for Pennsylvania employers to know if

white-collar salaried employees are entitled to receive overtime."); *id.* at § 15 (The current discrepancies between Pennsylvania's long and short duties test and USDOL's single test make it difficult for employers to understand who is truly an exempt employee.")]. The Department explained that the current regulations are "obsolete" because "the duties test in the current regulations is out of date and no longer aligns with the USDOL duties test as it once did." [Notice of Final Rulemaking at 12].

The public interest favors aligning the Pennsylvania EAP duties tests with their federal counterparts.

The Department expressed its "agreement with many commentators that Pennsylvania's duties test should align with the federal regulations." [Notice of Final Rulemaking at 25; *see also* Comment and Response Document at 6-7 ("The Department agrees that Pennsylvania's duties test should align with the Federal regulations.")]. "Updating Pennsylvania's duties test ... is essential to meet the intent of the overtime exemption regulation." [Notice of Final Rulemaking at 12].

As the Department recognizes, "aligning Pennsylvania's duties test with the federal duties test will assist employers with compliance." [Regulatory Analysis Form at § 10]. Aligning the PMWA's duties tests with their federal counterparts will eliminate a "burden" on employers by "making it easier for employers to comply with the law and for employees to know if they should be classified as an exempt or non-exempt EAP employee." [*Id.* at §§ 10 & 15]. "[T]he duties to qualify for each exemption have become outdated and need to be clarified to prevent the improper classification of employees and to be more consistent [with] the duties for the EAP exemptions found in the FLSA's regulations defining the EAP exemptions." [Notice of Final Rulemaking at 4]. As the Department concluded, "making the Act's regulations consistent with the FLSA's regulations with regard to duties would make compliance easier for employers who would no longer have to make separate evaluations of an employee's duties to determine whether they are exempt under both the Act and the FLSA." [*Id.* at 4].

The final rule does not align the Pennsylvania duties tests with their federal counterparts.

The Department claims that its final regulations "mirrored the duties test set forth in the federal regulations." [Notice of Final Rulemaking at 25; Regulatory Analysis Form at § 26]. Despite its stated objective to align the duties tests under the PMWA's EAP exemptions with their federal counterparts, however, the final regulation makes only modest revisions to the duties tests. For example, the rule:

- eliminates the requirement that executive exempt employees "customarily and regularly" exercise discretionary powers; and

- eliminates the requirement that administrative exempt employees "customarily and regularly" exercise discretion and independent judgment (instead requiring that their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance).

However, the final regulation continues to differ from existing federal regulations in significant ways. For example, the regulation does not:

- include the FLSA's clarification that "concurrent performance" of exempt and nonexempt work does not disqualify an employee from the executive exemption (29 C.F.R. § 541.106);

- include any version of the FLSA's regulation confirming that the administrative exemption applies to employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment (29 C.F.R. § 541.204);

- include any version of the FLSA's regulation confirming that the professional exemption applies to employees with a primary duty of teaching at an educational establishment (29 C.F.R. § 541.303);

- include any version of the FLSA's regulation exempting business owners, teachers, physicians, lawyers, and certain computer professionals from the salary requirement (29 C.F.R. §§ 541.101, .303(d), .304(d), .400);

- adopt the streamlined test for the EAP exemptions applicable to "highly compensated" employees (29 C.F.R. § 541.601);

- align the outside sales exemption under the PMWA with its federal counterpart (29 C.F.R. § 541.500);

- provide guidance regarding what it means to be paid on a "salary or fee basis"—including whether deductions from an exempt employee's salary are authorized to the same extent they are permitted under the FLSA (29 C.F.R. § 541.602 - .606); and

- include several of the definitions set forth in the FLSA regulations, including:

    - the definitions of "department of subdivision," "two or more other employees," or "particular weight"—all of which are relevant for the interpretation and application of the executive exemption (29 C.F.R. §§ 541.103-105);

    - the definitions of "directly related to management or general business operations," "discretion and independent judgment"—all of which are relevant for the interpretation and application of the administrative exemption (29 C.F.R. §§ 541.201-202); and

    - the definitions of "primary duty," "customarily and regularly," "directly and closely related" or any of the other provisions of 29 C.F.R. Subpart H.

In its September 21, 2018 comments to the proposed rulemaking, the IRRC cautioned that the proposed rule did not achieve the Department's stated goal to "align the duties tests" of the PMWA's EAP exemptions with their federal counterparts. [IRRC Comments at 4]. Unfortunately, the Department largely ignored the IRRC's concerns and persisted in promulgating a final regulation that does not fully align the duties tests of the PMWA's EAP exemptions with their federal counterparts.

Taking just one example of the Department's failure to align Pennsylvania's rules with the federal regulations involves the failure to include the FLSA's confirmation that "concurrent performance" of exempt and nonexempt work does not disqualify an employee from the executive exemption. Currently, the federal regulations provide that "[c]oncurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met." 29 C.F.R. § 541.106. Section 541.106 allows exempt employees such as store or restaurant managers to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity, without losing the exemption. Without an express provision in the PMWA regulations to address the performance of concurrent duties, retail and restaurant employers in Pennsylvania must guess whether the executive exemption applies to store managers who occasionally perform non-exempt tasks concurrently with their exempt duties. Despite the Department's claim that the final regulation aligns the PMWA's duties tests with their FLSA counterparts, the text of the regulation fails to provide guidance on critical elements of what it means to be an exempt EAP worker in Pennsylvania.

These differences put Pennsylvania businesses at a competitive disadvantage when compared to businesses operating in states that are truly aligned and consistent with the FLSA's regulatory exemptions, make compliance more complicated and uncertain, and raise the chances of time consuming and expensive litigation.

The Department's excuses for failing to align the Pennsylvania duties tests with their federal counterparts are without merit.

The Department claims that it "cannot create a computer exemption because that exemption does not exist in the Act." [Notice of Final Rulemaking at 9 & 15 (claiming "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. That is not correct. Section 5(a)(5) of the PMWA authorizes the Department to promulgate regulations to define and delimit the terms "administrative" and "professional" capacity. While it is true that the FLSA includes a separate statutory provision designed to ensure that certain computer employees could also be classified as exempt even if paid on an hourly basis (29 U.S.C. § 213(a)(17)), there is no reason why the Department could not define the terms "administrative" and "professional" capacity to include those very same hourly-paid computer employees. After all, the Department chose to include a "salary" requirement for the administrative and professional exemptions (*see* 34 Pa. Code §§ 231.83 - .84), and it could just as easily choose to define and delimit those exemptions to include certain hourly-paid computer employees.

The Department claims that it would not be appropriate to include "exemptions for highly compensated employees." [Notice of Final Rulemaking at 9 & 15 (claiming that "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. Again, this is not correct, and the Department's excuse reflects a fundamental misunderstanding of the EAP exemptions under federal law. There is no discrete exemption for "highly compensated employees" under the FLSA; indeed, the FLSA statute does not even mention the concept of "highly compensated employees." Rather, federal regulations merely provide streamlined EAP duties tests for employees with total annual compensation of at least $100,000 ($107,432 effective January 1, 2020). *See* 29 C.F.R. § 541.601. In other words, highly compensated employees still must qualify as executive, administrative, or professional employees to be

exempt under the FLSA; the duties tests are just simplified. There is no reason why the Department cannot adopt the same streamlined EAP duties tests for highly compensated employees under the PMWA.

The Department claims that it would not be appropriate to include an exemption for "business owners." [Notice of Final Rulemaking at 9 & 15 (claiming that "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. Again, this is not correct. There is no discrete exemption for "business owners" under the FLSA. Rather, federal regulations merely recognize that the executive exemption includes certain business owners (those who own at least 20% of the enterprise and are actively engaged in its management). *See* 29 C.F.R. § 541.101. In other words, business owners still must qualify as executive employees to be exempt under the FLSA; the duties test is just simplified. There is no reason why the Department cannot adopt the same streamlined duties test for business owners within the executive exemption under the PMWA.

Finally, the Department acknowledged commentators' observations that its proposed rulemaking did not adopt federal principles and definitions such as "concurrent duties," "primary duty" and "salary basis." [Notice of Final Rulemaking at 15]. While the Department assured employers that it would "look to federal law for guidance for interpreting its regulations" for enforcement purposes [Notice of Final Rulemaking at 15], the IRRC should not simply assume that courts will be as willing to overlook and/or harmonize the many remaining differences between the regulation and the FLSA.

The Department should revise the regulation to align the Pennsylvania duties tests with their federal counterparts.

If the Department truly wishes to align the Pennsylvania duties tests for the EAP exemptions with their federal counterparts to make them consistent (as it claims), then a simpler, more straightforward and proven solution would be to simply incorporate the federal regulations by reference. Other states have accomplished this objective by incorporating by reference the FLSA standards into their laws, including several of Pennsylvania's closest neighbors.

For example, Ohio law provides: "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended." Ohio Rev. Code § 4111.03. In this manner, the exemptions are assured to be treated in the same manner under Ohio law as they are under the FLSA. If regulatory guidance under the FLSA evolves, there will be no reason to revisit the exemption test under Ohio law, because it will be updated automatically, by virtue of the express incorporation by reference.

Similarly, Maryland and New Jersey define the EAP exemptions by reference to their counterparts in the federal regulations found at 29 C.F.R. Part 541. *See, e.g.*, Md. Code Reg. 09.12.41.01, et seq. ("'Administrative capacity' has the meaning stated in 29 CFR §541.200 et seq."); N.J.A.C. §12:56-7.2 ("Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.").

The Department need not attempt to "keep up" with the FLSA by piecemeal amendments. Rather, the Department should do what it says it wishes to do—align the PMWA regulations with their FLSA counterparts—in a single, simple amendment to the Pennsylvania Code:

> 34 Pa. Code § 231.81. Definitions.
>
> The term outside salesmen, executive, administrative and professional capacity shall be ~~defined in these §§231.81 - 231.85 (relating to special definitions)~~ defined in accordance with the Fair Labor Standards Act of 1938 and 29 C.F.R. Part 541, as amended, and employment in those classifications shall be exempt from both the minimum wage and overtime provisions of the act.

This simplified approach would achieve the Department's stated objective of having the duties test for the relevant exemptions align and be consistent with their FLSA counterparts, while avoiding the confusion that is likely to result from the Department's piecemeal proposed amendments.

The Final Regulation's Salary Thresholds Do Not Conform To The Intent Of The General Assembly.

The final regulation would increase the EAP salary threshold under Pennsylvania law to:

- $684 per week ($35,568 annually) effective January 1, 2020;
- $780 per week ($40,560 annually) effective January 1, 2021; and
- $875 per week ($45,500 annually) effective January 1, 2022.

The first increase would align the PMWA's salary threshold with the new FLSA salary threshold that also takes effect January 1, 2020. Beginning in 2021, however, the PMWA's salary threshold will significantly eclipse the FLSA standard.

Effective January 1, 2023 (and each third year thereafter), the salary threshold would reset automatically to an amount equal to the 10th percentile of all Pennsylvania workers who work in salaried exempt EAP jobs. In other words, every three years, those workers whose salaries are among the lowest 10% of all salaried exempt EAP workers in Pennsylvania will need to have their salary adjusted to a new threshold in order to maintain their exempt status.

The Department's salary level increase will have a costly and material impact on employers in the Commonwealth. Among the employers who will be most impacted by the dramatic change in the salary threshold will be those in the nonprofit, education and medical provider sectors. For these employers (who cannot simply raise prices to offset the costs of salary increases or additional overtime obligations), the salary increase amounts to an unfunded mandate. The only option for such employers will be to reduce services by restricting hours worked by a new class of nonexempt employees. We encourage the IRRC to consider carefully the many comments from employers who expressed concerns about the

economic impact of the regulation and the adverse effects that the regulation will have on services provided by employers—especially those in the nonprofit, education and medical provider sectors.

In these comments, however, I will focus on the Department's attempt to distinguish its regulation with the federal regulation that was struck down by a federal district court in *Nevada v. United States Department of Labor*, 275 F. Supp.3d 795 (E.D. Tex. 2017). In that case, as the Department acknowledges, the court held that the U.S. Department of Labor's attempt to raise the salary threshold to $913 per week was improper because it excluded from the EAP exemptions large numbers of people who performed exempt duties, rendering the duties test irrelevant. [Regulatory Analysis Form at § 9]. The Department claims that it "does not anticipate a similar legal challenge to its regulation" and argues that its regulation differs from the rule struck down by the Texas federal district. [*Id.*]. The Department's attempt to distinguish its regulation from the federal regulation falls short.

In the federal case, the court reviewed the language of the FLSA and Congressional intent, and determined that the USDOL was delegated authority to define and delimit the duties that would constitute an employee working in a "bona fide executive, administrative, or professional capacity." *Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795, 805 (E.D. Tex. 2017). The relevant language reflecting the legislative intent of the General Assembly when enacting the PMWA tracks the relevant policy language from the FLSA. *Compare* 29 U.S.C. § 202 (statement of purpose) *with* 43 P.S. § 333.101 (declaration of policy). The relevant language reflecting the delegation of authority to the Department to define and delimit the EAP exemptions in the PMWA tracks the corresponding language from the FLSA. *Compare* 29 U.S.C. § 213(a)(1) (EAP exemptions) *with* 43 P.S. § 333.105(a)(5) (EAP exemptions).

In the federal case, the court examined the plain meaning of the terms "define," "delimit," "bona fide," "executive," "administrative," "professional," and "capacity," from at or near the time Congress enacted the statute in 1938. 275 F. Supp. 3d at 805. The court expressly held that the USDOL's "authority is limited to determining the essential qualities of, precise signification of, or marking the limits of those 'bona fide executive, administrative, or professional capacity' employees who perform exempt duties and should be exempt from overtime pay." *Id.* The USDOL "does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1)," or "to categorically exclude those who perform 'bona fide executive, administrative, or professional capacity' duties based on salary level alone." *Id.* Rather, a permissible salary level would merely act as a floor to identify and screen out categories of employees who are "obviously nonexempt," thereby making an analysis of duties unnecessary. *Id.* at 806. Thus, any salary level "should also be somewhere near the lower end of the range of prevailing salaries" for obviously non-exempt employees or else risk eclipsing the duties test. *Id.* The USDOL's proposed salary level of $913 per week "would essentially make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level." *Id.* The Texas court found that this result "is not what Congress intended with the EAP exemption." *Id.*

The Department has not explained why its proposed salary threshold would not be susceptible to the same defect. Raising the salary threshold to $875 per week would make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. Although the General Assembly granted the Department the authority to define and delimit the EAP exemptions, it did not

deputize the Department with the authority to set the salary so high that individuals employed in a *bona fide* executive, administrative, or professional capacity are nonetheless unable to qualify as exempt.

Any significant changes to the salary threshold will have deep and significant economic and public policy impact. If the General Assembly had intended to delegate authority over those changes, it surely would have done so expressly. Here, no such express delegation exists. In fact, the clearest expression of legislative intent—that the Department is to revisit the EAP definitions "from time to time" (not once every 42 years)—is directly contrary to such a conclusion. Therefore, the General Assembly, not the Department, should be tasked with deciding whether to increase the salary threshold as an initial matter, and then automatically thereafter, since these questions are quintessential policy decisions of a substantial nature. The Department's overreach is not in the public's interest.

The Department justifies the new salary level by arguing that it will "increase earnings" for Pennsylvania workers, reduce "the use of public assistance," provide more "free time" for individuals, "increase consumer demand, create more jobs, and increase the economic multiplier effect on local economies in the Commonwealth." [Regulatory Analysis Form at § 10]. As relevant here, however, the PMWA only delegated authority to the Department for the limited purpose of defining what it means to be a "*bona fide* executive, administrative, or professional" employee—***not*** to make policy judgments about how to arbitrarily set the salary threshold so high that a *bona fide* EAP exempt worker is nonetheless excluded from the exemption in furtherance of unrelated policy objectives. Any increase in the salary level must have as its only objective the drawing of a line separating out obviously nonexempt employees from the exemption, rather than pursuing unrelated policy objectives (no matter how laudable).

The Department attempts to distinguish the regulation from the invalidated federal rule by noting that the Department's increase in the salary threshold is smaller than the 2016 USDOL rulemaking and that the Department used a different methodology to calculate the salary threshold. [Regulatory Analysis Form at § 9]. To be sure, the Department's approach resulted in a salary level at an amount 95.8% as high as the invalidated federal rule. The Department does not explain why this 4.2% difference is so material that it would survive legal challenge. It cannot be disputed that setting the salary level so high disqualifies many *bona fide* EAP exempt individuals from the exemption. Thus, it clearly exceeds the scope of the Department's authority.

The Department also attempts to distinguish the regulation from the invalidated federal rule by pretending that "the Department's increase in the salary threshold is part of a comprehensive effort to update the duties test to qualify for the EAP exemption, including eliminating the "long" and "short" tests. [Regulatory Analysis Form at § 9]. This is simply not true. As noted above, the minor revisions to the duties test hardly qualify as "comprehensive" reform in light of all of the inconsistencies that remain between the regulation and the federal EAP duties tests. Also, the so-called "long" test has been obsolete since at least 2004. The "long" test only applies to individuals earning a salary below $250 per week. Since the FLSA established a $455 salary threshold in 2004, it is reasonable to assume there are **zero** EAP exempt workers in Pennsylvania who earn less than $455 per week. In other words, eliminating the "long" test is not "comprehensive" regulatory reform; it is eliminating an obsolete regulation that has been of no effect since at least 2004. In any event, even if the regulation was part of a "comprehensive" effort, the fact

remains that setting the salary level so high disqualifies *bona fide* EAP exempt individuals from the exemption and thus clearly exceeds the scope of the Department's authority.

The regulation's provision to automatically, and without further review and oversight, adjust the salary level every three years to the 10th percentile of all Pennsylvania workers who work in salaried exempt EAP jobs raises significant issues regarding the Department's authority and responsibility under section 5 of the PMWA—questions that could mire this rulemaking in litigation similar to that faced by its FLSA counterpart. There is simply no indication that the General Assembly intended that the salary level test for exemption under section 5 be indexed. Indeed, in the entire history of the PMWA (and similarly in the history of the FLSA), the General Assembly never provided for automatic increases of the minimum wage in perpetuity. Instead, the General Assembly expressly and unambiguously stated that the Department is to define and delimit the EAP definitions "from time to time" by regulation. 43 P.S. § 333.105(a)(5). Clearly, the General Assembly intended for the Department to revisit the EAP regulations from time to time (not once every 42 years). Such legislative intent should be embraced, not ignored, especially where there is no evidence of a contrary intention to put these regulations on auto-pilot. Mandating tri-annual increases conflicts with legislative intent.

An index that recalibrates every three years based on salaries of EAP exempt employees will be relying on an ever-shrinking pool of such employees, causing a never ending, upward ratcheting effect. Every three years, those workers whose salaries are among the lowest 10% of all salaried exempt EAP workers in Pennsylvania will need to have their salary adjusted to a new threshold or (more likely) be reclassified to non-exempt and removed from the pool of salaried EAP exempt employees from which the 10th percentile is calculated. Whichever choice the employer makes, the change will automatically force the 10th percentile ever higher, without regard to then-current economic conditions.

CONCLUSION

The Regulatory Review Act makes clear that the IRRC must determine "whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based." 71 P.S. § 745.5b(a). The Commission should issue a **disapproval order** and encourage the Department to resubmit the regulation with revisions that actually achieve the General Assembly's intention and the Department's stated objective: (a) to align the duties tests of the PMWA's EAP exemptions with their federal counterparts; and (b) to adopt a salary threshold that only excludes obviously nonexempt employees, so that *bona fide* executive, administrative, and professional employees are not excluded from exempt status. It has been more than 40 years since the Department attempted to define and delimit the scope of the EAP exemptions. The Department should not squander this opportunity to get it right.

Very truly yours,

/s/ Robert W. Pritchard

Robert W. Pritchard