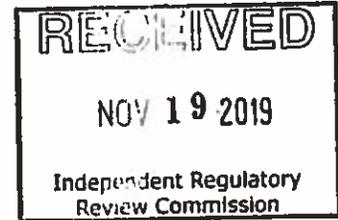


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November 19, 2019

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

Re: Regulation #12-106, Final Form Regulation, Amendments to 34 Pa. Code Chapter 231 with respect to Overtime Pay

To the Honorable Members of the Independent Regulatory Review Commission:

I write on behalf of the Pennsylvania Chamber of Business and Industry in response to the Pennsylvania Department of Labor and Industry's (L&I or the Department) Oct. 17, 2019 Final Form Regulation which seeks to amend rules related to overtime pay exemptions under the Pennsylvania Minimum Wage Act. Thank you for the opportunity to submit these comments and briefly address the Commission during your Nov. 21 meeting.

The PA Chamber is the largest broad-based business advocacy association in the Commonwealth. Our membership comprises around 10,000 employers of all sizes and industry sectors throughout the state – from sole proprietors to Fortune 100 companies – representing nearly 50 percent of the private workforce in the Commonwealth.

Federal and state law require employers to pay employees time-and-a half for hours worked over 40 in a week; but both also limit application of this requirement, including exempting individuals classified as Executive, Administrative or Professional, based on their salary and duties.

On June 12, 2018, the state Department of Labor and Industry proposed new rules related to employee eligibility for overtime pay, including more than doubling the minimum salary threshold to potentially qualify for exempt status, from \$455 per week to \$921, and requiring regular increases. The narrative accompanying the proposal described L&I's desire to better align federal and state overtime laws, a

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most welcomed sentiment that unfortunately fell well short of being achieved in the actual regulatory language.

The PA Chamber submitted comments to the Independent Regulatory Review Commission (the Commission) expressing strenuous opposition to the proposed changes to the salary threshold and describing a number of other serious concerns, many of which were noted by the Commission in your response submitted Sept. 21, 2018.

We were pleased to see that included in the section of your response focusing on “Reaching of consensus” was acknowledging that you had received hundreds of comments highlighting numerous and significant outstanding concerns and encouraging L&I to continue engaging with impacted employers. We were further pleased to be subsequently contacted by L&I officials who suggested working together to help facilitate their outreach to the statewide employer community – a request we accepted. We worked with leaders from several local chambers of commerce to help coordinate roundtable meetings; recruit their members and other employers from their respective regions to attend and provide their insights; and ultimately host the events.

These meetings occurred in May and June 2019 in Harrisburg, Erie, Chester, Pittsburgh and Scranton. I attended the meetings in Harrisburg and Pittsburgh and spoke to individuals who attended the others. Based on my observations, what I heard from others and the summaries L&I included in its Final Form Regulation, it seems the meetings were similar in many ways: they featured a diverse group of employers who varied in size, industry, workforce composition and demographics, status as for-profit or not-for-profit, sources of revenue, urban, rural, suburban, etc.; the L&I officials in attendance and employer participants engaged in a positive, cordial discussion; and the employer participants were generally willing to candidly share their perspective on the proposed rule and its impact on their business and employees.

The concerns and suggestions raised by these employers were generally the same as those raised by the PA Chamber, other associations, hundreds of employers who also submitted comments to the Commission and no doubt shared by thousands of others. In short, they described how and why: the proposed salary threshold for exempt status is too high; the automatic escalator will exacerbate challenges going forward; the method proposed for automatically setting new thresholds would

inherently create a cascading effect of larger and larger increases; and workplace morale will suffer as employers are forced to shift salaried employees into hourly positions in which hours can be tracked and capped at 40 per week.

Many employers were particularly vehement on this final point concerning workplace morale and how this proposal has been received by their employees. Although the Department seems to view being reclassified as non-exempt as a clear advantage, the view from employers is that employees will view the reclassification to non-exempt status as a demotion, as work hours are closely regulated and monitored, they are forced to punch a clock, they fall out of the more generous employee benefit plans, and they are no longer eligible for incentive pay. Moreover, individuals who are currently paid a guaranteed salary as compensation for all hours worked (and who thus have the flexibility over decisions such as when to work) will lose that flexibility and will instead be forced to choose between earning their hourly wages and leaving work to attend to personal matters. Those individuals also stand to see their wages reduced if their hours worked in any given week falls below 40.

Some roundtable attendees expressed disappointment that the proposal did not achieve its stated intention of bringing consistency with federal law. Employers in Pennsylvania struggle to simultaneously administer inconsistent federal and state overtime laws; particularly smaller employers and nonprofits who may not have personnel with expertise or resources to consult outside counsel. Numerous participants applauded the Department's *desire* for better alignment; but noted that, while the proposal includes some improvements, significant inconsistencies would remain, including prohibiting Pennsylvania employers from following various provisions under federal law. 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, unnecessarily and unintentionally making compliance more complicated and confusing, and raising the chances of time consuming and expensive litigation.

Many nonprofits explained how a significant portion, or in some cases all, of their revenue is derived from public sources, which will be unable to increase funding commensurate with the new labor costs. The result will be a reduction in personnel, and therefore, services.

The conclusion for many of the regional roundtable participants was to suggest that the Department hold off its proposal; particularly as, at the time, it was expected

that the federal government would soon release its proposal for an overtime rule update.

Roundtable participants with whom I spoke generally left the meetings encouraged by what seemed like a constructive exchange of perspectives and cautiously optimistic that compelling arguments from a range of employer stakeholders would resonate with the Department.

As expected, on Sept. 24, 2019, the U.S. Department of Labor (USDOL) announced its proposal to increase the minimum salary to potentially qualify for exempt status from \$455 per week to \$684. This represents a roughly 50 percent increase, compared to the Department's proposal to increase the threshold by over 100 percent. While the federal update will still be a challenge for some employers as they adjust, it was generally viewed as more manageable; and since it applies nationally, Pennsylvania's competitiveness would not be harmed.

The prevailing sentiment among employers was that L&I would likewise adopt a more reasonable approach, given the strong outcry from impacted parties; similar concerns expressed by the Commission; compelling personal perspectives shared during the course of stakeholder outreach; and a meaningful, albeit less aggressive, overtime eligibility expansion proposed by the federal government.

Unfortunately, this sentiment was misguided. On Oct 17, 2019, the PA Department of Labor & Industry issued a final form regulation with only minimal differences from the proposed rule that generated such opposition. The proposal still increases the minimum salary too aggressively, by over 92 percent; still mandates automatic increases that will preclude stakeholder input going forward; still utilizes a flawed method for automatically increasing the threshold creating the cascading effect of larger and larger increases; and still falls far short of the Department's stated goal of better aligning federal and state overtime law.

Serious concerns heard first-hand were largely disregarded by the Department.

In fact, nearly all points the PA Chamber outlined in comments we submitted in response to the proposed rule are applicable to the final rule; including key factors that, based on the criteria in Section 5.2 of the Regulatory Review Act (RRA), should prompt the Commission to disapprove. For example:

Whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based

The Department's Regulatory Analysis acknowledges that an earlier attempt by USDOL to significantly increase the salary threshold was struck down by the United States District Court for the Eastern District of Texas, because the Judge, an appointee of President Obama, concluded the threshold was "so high it rendered the duties test for the EAP exemptions irrelevant." The same applies to the Department's rule: while the Pennsylvania General Assembly delegated authority to the Secretary of L&I to occasionally adjust the salary threshold to potentially qualify as an employee working in an executive, administrative, or professional capacity, it did not delegate authority to render the duties test irrelevant. A permissible salary level should merely act as a floor to identify and screen out categories of employees who are obviously nonexempt, thereby making an analysis of duties unnecessary.

The Department's proposed increase to the salary threshold is indeed significant enough as to alter the application of the EAP exemptions. This is a policy decision that does not conform to the intentions of the General Assembly.

Economic or fiscal impacts of the regulation and direct and indirect costs to the private sector.

This proposal will have a profound impact on a range of employers, particularly small business and nonprofits, and we are concerned the Department apply seriously enough the principles of a thorough and objective regulatory economic cost/benefit analysis. The Department seems to focus on the employers who are unlikely to be effected, rather than the many who are guaranteed to be affected.

Among the employers who will be most impacted by the change in the salary threshold will be those in the nonprofit and medical provider sectors, as well as the higher education community. Non-profits, for example, primarily rely on private donations and government grants for their revenues. Many employers in the healthcare industry depend on reimbursements from Medicaid, Medicare and private insurance – which will not increase just because the Department raises the salary level for exempt employees.

The Department rather casually suggests these employers can simply increase salaries to maintain exempt status or pay overtime. This is not constructive advice for employers who are aware of these options, just not how to pay for them. The Department does not adequately address these direct and indirect costs as envisioned by the RRA.

The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur.

The Department's proposed salary level increase is dramatic and unprecedented, and will have a costly and material impact on employers in the Commonwealth. As an initial matter, employers will need to familiarize themselves with the final regulation, analyze their workforce, and determine how to comply. This process will require employers to identify all exempt employees earning a salary less than the new required level; evaluate whether to comply by providing a salary increase or reclassifying some or all of such employees to non-exempt status; decide whether to pay reclassified employees on an hourly or salaried basis; and draft new compensation plans for reclassified employees. Employers will also need to evaluate: whether to limit the hours employees work; whether they can still afford to pay bonuses; what adjustments are necessary to benefit plans; and how they will set the new hourly rates or salaries.

Employers are sure to incur significant legal, consulting or accounting services in order to comply with the proposed rule.

The protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.

Many of the employers likely to be impacted by the proposed rule are nonprofits that provide important health and social services to vulnerable populations. These sectors often depend on public sources of funding and are unable to raise prices to increase the revenue needed to absorb the costs of a significant increase to the salary level. Their only option is to reduce services by decreasing employee headcount and/or hours worked, forcing the people they serve to go without these services.

A number of comments submitted to US DOL when it proposed a similar rule included examples of how these types of organizations would be impacted by a similar proposal:

- The Salvation Army expected that approximately 50 percent or more of its employees nationally who were currently classified as “exempt” would be reclassified as non-exempt purely on the basis of their salary.
- The YMCA expected layoffs or a reduction in hours for reclassified employees
- Operation Smile expected an increased payroll cost of nearly \$1 million annually affecting over 50 percent of their workforce, which is a programmatic cost that would result in more than 4,000 cleft lip surgeries going unperformed.
- Lutheran Services expected a 9.1 percent unfunded increase in its budget Nationally.

This proposal would adversely impact public health by over-burdening those organizations who have taken on the responsibility of caring for Pennsylvania’s most vulnerable residents.

Possible conflict with or duplication of statutes or existing regulations.

Pennsylvania employers currently follow the federal Fair Labor Standard Act’s salary threshold to potentially qualify for exempt status. The Department may have the authority to increase the salary threshold beyond the salary threshold and thereby put Pennsylvania employers at a competitive disadvantage, but doing so is clearly in conflict with existing federal statutes.

Additionally, Pennsylvania overtime laws and regulations have failed to keep up with changes that have occurred over the decades to the Fair Labor Standards Act. This, combined with a number of court decisions, has created a conflict between federal and state law in which employers are unable to follow federal law, even if Pennsylvania law is silent on some particular matter.

The Department has acknowledged as much and stated a desire to align federal and state law. While the actual proposed rule makes some improvements, it unfortunately falls far short of the stated goal of aligning with federal.

Need for the regulation.

The Department's justification for its proposed rulemaking to increase the salary threshold is that "USDOL's EAP salary thresholds have not been updated since 2004" and thus "failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers." This rationale, however, does not recognize that the federal threshold is scheduled to increase around 50 percent effective January 1, 2020. This increase will still be a challenge for many employers as they adjust but it is certainly more management; and since it applies nationally, Pennsylvania's competitiveness will not be harmed.

Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

Any significant changes to the salary threshold will have deep and significant economic and public policy impact. As previously stated, while the Pennsylvania Generally Assembly delegated authority to the Secretary of L&I to occasionally adjust the salary threshold to potentially qualify as an employee working in an executive, administrative, or professional capacity, it did not delegate authority to render the duties test irrelevant. If the legislature had intended to delegate authority to that extent it surely would have done so expressly.

Additionally, the Department's proposal to require regular, automatic increases to the salary threshold would also appear to qualify as a policy decision since the legislature clearly intended for the Department to revisit the EAP definitions "from time to time." Such a proposal is a tremendous concern as it ensures the business community will never again be allowed to participate in a public debate regarding the salary levels.

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For the foregoing reasons, the PA Chamber urges the Independent Regulatory Review Commission to disapprove the Department's proposed rule.

Thank you for considering my views on this important matter.

Sincerely,

A handwritten signature in black ink that reads "Alex J. Halper". The signature is written in a cursive style with a large, stylized "A" and "H".

Alex Halper
Director, Government Affairs