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Senate of Pennsylvania

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July 31, 2018

Mr. Bryan M. Smolock
Director
Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas Street, Room 1301
Harrisburg, PA 17121



Dear Director Smolock:

As Chair of the Senate Labor and Industry Committee, I respectfully submit the following comments in response to proposed regulation #12-106: *Minimum Wage* submitted by the Department of Labor and Industry. While the regulation may be well intentioned I believe it will have significant negative consequences for Pennsylvania employers and workers and therefore will not be in the public interest.

While it is fair to conclude that salary thresholds established in 1977 should be updated, the proposed increases far exceed reasonable levels and in some cases make the corresponding duties tests irrelevant, straying from the intent of the statute. The Minimum Wage Act of 1968 exempts individuals "in a bona fide executive, administrative, or professional capacity" from the minimum wage and overtime provisions of the Act. While salary has historically played a role in determining whether the exemption applies, the duties of the individual should be the main deciding factor.

In fact, this very issue was at the heart of the U.S. District Court for the Eastern District of Texas' decision in *State of Nevada v. United States Department of Labor*. On August 31, 2017, the court invalidated the U.S. Department of Labor rulemaking that proposed to increase the salary threshold for executive, administrative and professional employees from \$455 per week to \$913 per week concluding that the Department did not "have the authority to categorically exclude those who perform "bona fide executive, administrative or professional capacity" duties based on salary level alone." The Fair Labor Standards Act (FLSA) that served as the basis for the federal rulemaking, similar to Pennsylvania law, exempts "any employee employed in a bona fide executive, administrative, or professional capacity." While FLSA, similar to the Pennsylvania Minimum Wage Act, gives the administering agency the authority to promulgate regulations to define such terms, the court concluded that the plain meaning of "bona fide executive, administrative or professional capacity" relate to a person's performance, conduct or function.

By way of example, using the 2017 High Priority Occupations list for the Westmoreland-Fayette Workforce Development Area (W-F WDA) published by the Department, several occupations have entry level wages below the proposed salary threshold two years after publication (\$47,892) that likely otherwise qualify for the exemption utilizing the proposed duties test.

- Social and Community Service Managers have an entry-level wage of \$39,460 in the W-F WDA. O*Net, the nation's primary source of occupational information developed under the sponsorship of the US Department of Labor, summarizes duties of Social and Community Service Managers as: “Plan, direct, or coordinate the activities of a social service program or community outreach organization. Oversee the program or organization's budget and policies regarding participant involvement, program requirements, and benefits. Work may involve directing social workers, counselors, or probation officers.” An individual in this job likely meets the four criteria outlined for the Executive exemption but may not qualify solely based on the salary threshold.
- Human Resources Specialists have an entry-level wage of \$38,640 in the W-F WDA. O*Net cites the following as typical tasks of Human Resources Specialists: “prepare or maintain employment records related to events, such as hiring, termination, leaves, transfers, or promotions; interpret and explain human resources policies, procedures, laws, standards, or regulations; hire employees and process hiring-related paperwork; inform job applicants of details such as duties and responsibilities, compensation, benefits, schedules, working conditions, or promotion opportunities; address employee relations issues, such as harassment allegations, work complaints, or other employee concerns.” An individual in this job likely meets the criteria outlined for the Administrative exemption but may not qualify solely based on the salary threshold. In fact, the proposed rulemaking definition for “general operation,” which informs the Administrative exemption, explicitly includes “personnel management, human resources, employee benefits and labor relations” as activities related to general operation.
- Accountants and Auditors have an entry-level wage of \$41,680 in the W-F WDA. Similar to the Human Resources Specialist example, the proposed rulemaking definition for “general operation” that informs the Administrative exemption explicitly includes “tax, finance, accounting, budgeting and auditing.” Therefore, an accountant or auditor likely meets the criteria outlined for the Administrative exemption but may not qualify solely based on the salary threshold.

Excluding individuals that should be exempt has the potential to have profound impact on Pennsylvania employers and employees. While the proposed rulemaking could have some positive impacts as detailed in the Regulatory Analysis Form (RAF) there are also potentially negative outcomes that could result. While the RAF correctly notes that some exempt employees that currently work more than 40 hours a week would benefit with increased wages (as a result of overtime pay) or reduced hours, it could just as likely result in the same or lower wages with less flexibility. For example, a salaried employee may be given the flexibility to come in late because of a doctor’s appointment or leave early for a child’s sporting event without any impact on

wages. If converted to an hourly employee, that individual now has to punch the clock and will not be compensated for that time. This is in direct contradiction to a statement in response to RAF Question (10) that the rulemaking will result in “a healthier workforce and more time for families to spend together,” a conclusion which the Department admits in the response is not quantifiable anyway.

The RAF also concludes in the response to Question (12) that the regulation “will have a small impact on Pennsylvania’s ability to compete and a potentially net positive impact.” What is this conclusion based on? Did the Department consult with potentially impacted businesses prior to issuing this rulemaking? Did the Department consult with local chambers of commerce or economic development agencies? The response further suggests that employers have several choices to comply with the new regulation: reduce hours to eliminate overtime (which the Department suggests could result in hiring of new employees to fill those hours); increase worker salaries above the threshold; or pay workers overtime for excess hours worked. All of these options are likely to increase employer labor costs which could in turn increase prices of products and services and/or result in reductions in the size of the workforce to manage labor costs.

I am also concerned that the RAF minimizes the potential impacts to nonprofit organizations, local government and state government. The options for employers to comply cited by the Department are also likely to increase labor costs for nonprofit organizations, local government and state government. The RAF response to Question (15) does acknowledge that “some small nonprofits, including some that provide human services...will have limited ability to increase their revenues to cover any increase in costs.” State and local governments would need to increase tax revenues or cut other programs and services in order to cover higher labor costs.

I question what, if any, data the Department used in determining that this regulation as proposed is even necessary. Does the Department have any data that indicates exempt Executive, Administrative and Professional employees are not receiving at least minimum wage? Does the Department have any data that indicates exempt Executive, Administrative and Professional employees with salaries between the current threshold and proposed threshold are working more than 40 hours a week? If so, how many workers and what are the average hours of overtime worked?

The proposed regulation also falls short in its expressed goal to align Pennsylvania minimum wage regulations with federal regulations issued under the Fair Labor Standards Act (FLSA) of 1938. While the specific duties test factors proposed generally mirror federal regulations, the federal regulation proceeds to provide far more detail and clarity in defining terms and offering examples of job types that typically meet or do not meet the exemption requirements. I urge the Department to exactly mirror the federal regulations wherever possible.

To that point, the United States Department of Labor is currently in the process of considering revisions to Part 541 regulations implementing the executive, administrative and professional exemptions under Section 13(a)(1) of the FLSA. I believe it would be in the best interest of the commonwealth to await the federal final rule before moving forward with this rulemaking.

Thank you for the opportunity to review the proposed regulation. If you have any questions regarding my comments, please do not hesitate to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim L. Ward". The signature is fluid and cursive, with the first name "Kim" being more prominent.

Senator Kim L. Ward
Chair
Senate Labor and Industry Committee

cc: Independent Regulatory Review Commission (via e-mail)