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HARRISBURG

November 1, 2019

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

RECEIVED
IRRC
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RE: DISAPPROVAL of Final Rulemaking (DLI 12-106 and IRRC #3202)

Dear Commissioners:

The House Labor and Industry Committee directed me to advise that, in accordance with Section 5.1(j.2) of the Regulatory Review Act, the committee has disapproved the final rulemaking, which updates the executive, administrative and professional exemptions from the minimum wage and overtime requirements of the Minimum Wage Act of 1968.

The committee disapproved of the rule on October 29, 2019, by a vote of 15-10. Among reasons considered in reaching this decision are the following:

A. There is no consensus on this rulemaking

As the commission noted in its comments on the Department of Labor and Industry's (DLI) proposed rule, Section 2(a) of the Regulatory Review Act states, "To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of consensus among the commission, the standing committees, interested parties and the agency."

In total, over 1,100 comments were received on the proposed rule. Although some commenters supported the rule, hundreds of others expressed opposition. Former House Labor and Industry Committee Chairman Rob Kauffman expressed several serious concerns about this rule in his legislative comments, and 15 other members of the committee (including myself) submitted a letter to signal our agreement with Rep. Kauffman's concerns. Given that the changes made by DLI in the final form rule were relatively minor, the most serious concerns raised by a majority of the committee and many other commenters have not been addressed.

As further evidenced by the contested (15-10) vote on the motion to disapprove this rule, DLI has not reached a consensus among the commission, standing committees, interested parties and the agency.

B. The final form rule does not address the commission's comments

As noted above in section (A), the commission raised the lack of consensus. The commission also commented on the concerns raised about the difference between the state and federal standards, which I will address more fully below in section (C). Although those are the two most flagrant problems with this regulation, the commission also raised several other notable issues in their comments, which DLI has not adequately addressed in the final form rule. A few of the most concerning failures to satisfactorily address the commission's comments include:

- *IRRC encouraged DLI to work with the standing committees and state lawmakers to address their issues in the final rulemaking* – There has been no meaningful negotiation between DLI and the standing committee members who raised concerns about the proposed rule. DLI cites a preliminary staff-level briefing on the proposed rule and review of legislative comments as engagement with the legislature. More gallingly, DLI cites a hearing held in September 2018 by the House Labor and Industry Committee on the proposed rule. Although DLI participated in the hearing, they certainly did not request the hearing or follow-up with committee members, and they callously ignored the many serious concerns expressed by various employers who testified about the negative impact of this rule.
- *IRRC directed DLI to explain why this rule is in the public interest* – DLI has not satisfactorily explained why a rule that will create major discrepancies between state and federal standards is in the public interest. DLI's response to the Commission's comments focus largely on the need to update the obsolete state regulations and the 2004 federal standards. However, as will be discussed in detail below, USDOL has issued a new, modern standard, which will take effect at the beginning of 2020. If DLI conformed its rule to the new federal standard, it would arguably be in the public interest to have one uniform standard for overtime pay, which could be enforced at the state and federal levels. It is clearly not in the public interest to have wildly different standards for overtime pay being enforced at two different levels of government.
- *IRRC directed DLI to explain how the implementation schedule provides sufficient time for compliance* – DLI's failure to conform its rule to the new federal standards will create a moving target for the regulated community, regardless of the amount of time provided to implement the rule. Although DLI's rule mirrors the federal salary threshold for the first year, the threshold will continue to increase in two annual stages– and will be recalculated every three years after that. So, while many employers may be aware of the new salary threshold in the federal rule, it is not difficult to envision the difficulty many employers will have when the lesser-known state rule continually increases. Furthermore, since DLI's rule does not conform to the full list of exemptions in federal overtime standards, these obscure differences will create numerous 'gotcha' moments for employers who made a good faith attempt to comply with all relevant standards.

C. This rule creates a compliance trap for employers

In his comments on the proposed rule, Rep. Kauffman expressed concerns that the rule “will further exacerbate the discrepancies between state and federal requirements, which will lead to more confusion and consternation among employers and employees alike.” This concern was echoed in other legislative and public comments. Rep. Kauffman and other committee members encouraged DLI to wait until the U.S. Department of Labor (USDOL) completed its rulemaking process on the same topic and propose regulations to conform state overtime regulations to federal standards.

The new USDOL rule, which will take effect on January 1, 2020, will make a reasonable adjustment to the federal salary thresholds set in 2004 (from \$455/week to \$684/week). Unfortunately, DLI has chosen to ignore the concerns expressed about a dual standard and push forward with a rule that will exacerbate the existing discrepancies between the state and federal standards. Notably, the final form rule:

- Phases-in salary thresholds for the administrative, executive and professional exemptions which are approximately 30% higher than the NEW federal rule. After the higher thresholds (\$875/week) are fully implemented, they will be adjusted every three years, which will further confuse employers attempting to comply.
- Maintains a number of other discrepancies between the state and federal standards. The most notable differences include:
 - The lack of a highly compensated employee exemption in the state standards.
 - Differences between the state and federal treatment of computer employees and outside sales employees.
 - Differences between how an employer may calculate a workweek – federal standards provide much more flexibility for fluctuations in workweeks.

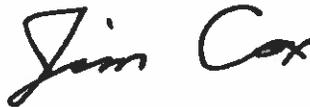
When overtime exemptions differ between state and federal standards, employers have the additional cost and confusion of figuring out which standards to apply. Under this final rulemaking, employers will not be allowed to apply commonsense provisions of federal rules – such as the federal method for calculating a workweek. This will be especially cumbersome for small businesses and nonprofit organizations, who do not have dedicated human resources professionals or labor law attorneys at their disposal to help them navigate the confusing nature of this dual standard.

The commission also cited the differences between state and federal standard in its comments on the proposed rule, and DLI has done very little in the final form rule to address this major concern and conform its rule to the recently released federal standards.

I hope the information above provides some additional detail about the main concerns raised by members of the House Labor and Industry Committee. Although there are many other concerns about this ill-advised rulemaking effort, it is not possible for me to summarize the hundreds of public comments submitted by Pennsylvanians who are opposed to this rule, so I would encourage the commission to review these comments to determine whether the concerns have been meaningfully addressed.

Please take the House Labor and Industry Committee's disapproval into account during the Commission's consideration of this rule on November 21.

Sincerely,



Jim Cox, Chairman
Labor and Industry Committee
PA House of Representatives

cc: Hon. Gerard Oleksiak
Hon. Patrick Harkins