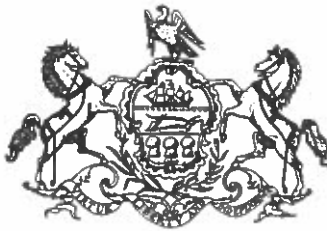


3202
PATRICK J. HARKINS, MEMBER
1ST LEGISLATIVE DISTRICT

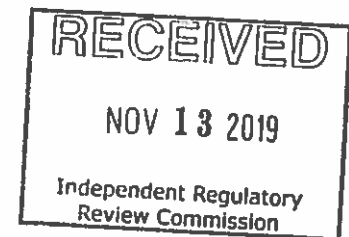
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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG
November 13, 2019

COMMITTEES
LABOR, DEMOCRATIC CHAIRMAN



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

RE: Dissent to the Disapproval of Final Rulemaking – Minimum Wage Act #12-106 (IRRC # 3202)

Dear Commissioners:

On Tuesday, October 29, 2019, the House Labor and Industry Committee voted 15-10 to disapprove the final rulemaking put forth by the Department of Labor & Industry (DLI) regarding the executive, administrative and professional (EAP) exemptions from state minimum wage and overtime requirements pursuant to the Pennsylvania Minimum Wage Act. In an unexpected breach of decorum, this vote was called up without prior notice, leaving many members without the ability to deliberate on the issue or prepare remarks for the public voting meeting. Further, the letter submitted on behalf of the House Labor and Industry Committee on November 4, 2019, does not reflect our position on the rulemaking. As such, on behalf of the ten dissenting members of the House Labor and Industry Committee and in response to the disapproval of the final rulemaking package, I submit the following:

1. This rulemaking will benefit Pennsylvania workers and communities.

As former Chairman Galloway explained in his public comments (submitted August 21, 2018) supporting the proposed rulemaking, since the recession, we have been experiencing economic trends that require the protections afforded to workers under the Minimum Wage Act to be refreshed and expanded. Specifically, my predecessor wrote:

While one may have expected low unemployment and increased demand for labor to lead to higher wages, wages on average are stagnant despite otherwise positive economic news. This trend creates serious concern about the impact this phenomenon could have on an ever-increasing wealth gap. The wealth disparities between upper-income and lower- and middle-income families have been increasing since the late 1970s. The most recent data suggests that the top 0.1 percent own virtually the same amount of the nation's wealth as the bottom 90 percent, combined. If the trend continues, the wage gap

will widen and the middle class will shrink. In addition, fewer employers provide benefits, students graduate from college with more debt, and many Pennsylvanians face a lack of upward mobility in the workforce. **All of these trends are reminiscent of the imbalance in economic power experienced by working Pennsylvanians that prompted the creation of the Minimum Wage Act and its protections.** I believe the Commonwealth should use all the tools at its disposal to counter this shift, and updating the overtime rules is a positive step.¹

Ultimately, this rulemaking helps to restore protections for hard-working Pennsylvanians. These women and men have worked for free because of an outdated threshold, which we have failed to update at the state-level for 42 years.

2. DLI extensively explains why this rulemaking is in the public interest within its regulatory packet.

First and foremost, as DLI explains, the General Assembly established within the 1968 language of the Minimum Wage Act that the protection of workers from unreasonably low wages is in the public interest:

Employees are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to the public interest and public policy commands its regulation. Employees employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Judged by any reasonable standard, wage in such occupation are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employees, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the economy. **The evils of unreasonable and unfair wages as they affect some employees employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and the employees employed therein and of the public interest of the community at large.**

As the Pennsylvania Supreme Court explained in *Commonwealth v. Corban Corp*: "When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent."² I firmly believe that this strong declaration of policy in Section 1 of the Minimum Wage Act is clear and free from ambiguity. The act, including its overtime

¹ Preamble, p. 11, Para 4.

² 447, Pa. 463 (1972).

provisions and the secretary's authority to "define and delimit" the EAP exemptions, is designed to protect the workers and sets forth that the protection of workers is in the interest of the public.

Furthermore, the current duties and salary thresholds are obsolete. The two-tiered duties test is confusing for employers and based on outdated federal regulations that were in place in the 1940s. Under Pennsylvania's current regulations, the salary threshold is just \$8,060, therefore the higher federal threshold applies. On January 1, 2020, the federal threshold will increase from \$23,600 to \$35,568. DLI believes that this increase is not enough, and I agree. The new federal threshold is based on the 20th percentile of **all** full-time workers in the nation's lowest-wage region, not just EAP workers. In other words, the federal methodology is not tailored to Pennsylvania's economic realities.

DLI's updates are necessary and will benefit both workers and employers. One thing I have heard repeatedly from business owners is their struggle to find qualified employees to fill positions. It is my belief that proactively setting a higher, more appropriate standard than the federal government will address this issue by helping Pennsylvania attract and retain its best workers. A higher threshold also sends a message that Pennsylvania is ready for a competitive 21st century economy, rather than engaging in a race to the bottom.

3. We disagree with the House Labor and Industry Committee action to disapprove the final rulemaking.

The 15 members of the committee, in disapproving the final rulemaking, put forward two arguments in their letter:

1. That Pennsylvania should conform to the federal rules because different overtime rules at the state and federal level are problematic for employers, and therefore, not in the public interest.
2. That DLI has not reached consensus among the commission, standing committees, interested parties and the agency.

We respectfully disagree. DLI is not obligated to conform to the federal rules, and two different standards at the state and federal level exist for a reason. Furthermore, considering the arguments made within the disapproval letter, it is evident that DLI tried, to the greatest extent possible, to reach consensus.

a) DLI conformed to the federal rules while acknowledging deliberate policy differences.

In 1995, Justice Anthony Kennedy wrote: "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have

two political capacities, one state and one federal, each protected from incursion by the other.”³ The Fair Labor Standards Act anticipates and encourages states to take action beyond the federal standard to protect workers. Section 218(a) of the FLSA ensures that a worker is protected by whichever standard is more beneficial to the worker. The saving clause in the FLSA explicitly authorizes states to set stricter regulations, which provides clear evidence that Congress intended to “preserve rather than supplant state law.”⁴ Therefore, we reject the premise that the commonwealth must conform to the federal government’s standards.

Arguably, DLI should diverge from the United States Department of Labor (USDOL), especially on the salary threshold. As DLI explains, USDOL calculates its threshold based on the 20th percentile of workers in the nation’s lowest wage region because “it is intended to be usable in every area of the nation.” However, the new threshold is still so low that, “even if used in the lowest wage areas of the country, [it] would be highly unlikely to include actual executive, administrative, and professional employees.”⁵ Therefore, the federal threshold serves as a minimum, not a maximum. DLI’s revised methodology limits the calculation of the salary threshold to Pennsylvania-specific data, specifically the weighted average of 10th percentile wages for exempt occupations. This approach is more likely to ensure that the employees of our commonwealth who do qualify for overtime protections receive them.

Additionally, the disapproval letter notes that the final form regulation differs from federal rules, but fails to explain why:

- DLI does not have the authority to include the highly compensated employee exemption or the computer employee exemption into the state standards because the Minimum Wage Act does not provide for these exemptions and DLI “cannot adopt a categorical exemption through regulation that does not exist in the act. *Nationwide Mut. Ins. Co. v. Foster*, 580 A.2d 436, 422 (Pa. Cmwlth. 1990).”⁶
- DLI’s current regulations include an exemption for outside sales. In order to be considered an outside salesman, an employee must spend more than 80% of work time away from their employer’s place of business. The federal regulations do not specify any such percentage. Once again, the federal threshold serves as a minimum and DLI has the authority to maintain regulations that are beneficial to the employee, even if those regulations diverge from USDOL.
- This rulemaking would not impact the flexibility of an employee’s work schedule. A non-exempt employee could continue to work flexible hours as long as overtime is paid after 40 hours.

³ *U.S. Term Limits, Inc. v. Thornton* 514, U.S. 779, 838 (1995).

⁴ Preamble, p. 15, Para 1.

⁵ Preamble, p. 27, Para 4.

⁶ Preamble, P. 15, Para 4; and Comment and Response Document, p. 5. Para 4.

- Adopting standards for a “fluctuating workweek” that allows employees to work more than 40 hours per week without overtime pay would be a major policy change, which would necessitate legislative deliberation and approval.

If members of the General Assembly believe Pennsylvania would benefit from increased federal conformity where legislative action is required, we are glad to collaborate on potential amendments to the Minimum Wage Act. We are more than willing to discuss the merits of highly compensated employee and computer employee exemptions, as well as other changes that promote the fundamental goal of worker protection.

Ultimately, the main argument in the disapproval letter is that “it is clearly not in the public interest to have wildly different standards for overtime pay being enforced at two different levels of government.” In other words, the 15 members of the committee that voted to disapprove the rulemaking do not believe there should be a state level rulemaking at all, unless it simply brings the state’s standards in line with the standards established by the federal government.

b) Full consensus is not always achieved in the legislative or regulatory process.

Consensus is an admirable and necessary part of lawmaking. This is especially true with labor issues, which have been adjudicated and re-adjudicated repeatedly since the Industrial Revolution. Many of the commonwealth's labor laws reflect the compromises and consensus-building inherent in a democracy.

Section 2(a) of the Regulatory Review Act encourages, but does not require, consensus. We respect our majority colleagues’ ability under the act to disapprove of this regulation. At the same time, we also regret their lack of effort to reach consensus with the entire committee regarding Regulation 12-106, especially the lack of communication and transparency before the motion to disapprove the regulation at the committee meeting on October 29, 2019.

Despite assertions to the contrary, DLI made several significant changes with the input of stakeholders in the business community. Those changes include, but are not limited to:

- Aligning the salary threshold with USDOL for the first year.
- Lowering the salary threshold from the amounts included in the proposed regulation to \$40,560 in 2021 and \$45,500 in 2022 to reflect salaried employees only in Pennsylvania. This addresses a major complaint about the original proposed regulation, which included higher salaries in surrounding northeastern states in its calculation.
- Increasing the length of the phase-in period to give employers time to review and adjust to the new rules.
- Overhauling the duties test to simplify it for employers and employees and align it with USDOL.

I believe it is also important to note that when the public comment period closed on August 22, 2018, it generated a total of 917 unique comments, the majority of which were in favor of the proposed rulemaking. Nevertheless, DLI sought consensus by conducting significant outreach to the regulated community by holding ten roundtable meetings across the state in addition to the six meetings with the Governor's Middle Class Task Force. Additionally, DLI met with staff of the four standing committees and testified at a hearing held by the House Labor and Industry Committee. Although the Democratic members of the House Labor and Industry Committee supported the original proposal, as it would have impacted even more workers, we applaud DLI for trying to reach consensus by making reasonable adjustments to the salary threshold, implementation schedule, duties test, bonus and incentive pay, and the automatic adjustment.⁷

At the same time, insufficient action that maintains the status quo is not a neutral act, as it enables continued erosion of worker protections by default. One consequence of not updating this regulation for long periods of time may be difficulty in finding broad consensus among all parties.

I believe DLI has complied with the Regulatory Review Act and thoroughly responded to the public, legislators, and the commission. This regulation is reasonable, and it should be approved. It will benefit Pennsylvania's workers by ensuring fair compensation for hours worked and help employers attract and retain a qualified workforce.

In closing, I thank you for this opportunity to offer our comments on the final rulemaking and dissent from the House Labor and Industry Committee's disapproval action. Please take this letter into account during the Commission's consideration of this rule on November 21.

Sincerely,

A handwritten signature in black ink that reads "Patrick J. Harkins". The signature is written in a cursive, flowing style.

Patrick J. Harkins, Democratic Chairman
Labor and Industry Committee
Pennsylvania House of Representatives

Cc: The Honorable Tom Wolf, Governor
The Honorable W. Gerard Oleksiak, Secretary of the Department of Labor and Industry
The Honorable Frank Dermody, Democratic Leader
The Honorable Jim Cox, Republican Chairman, House Labor and Industry Committee

⁷ Preamble, pg. 5-11.