ROB KAUFFMAN, MEMBER
89TH LEGISLATIVE DISTRICT

3202

House of Representatives
Commonwealth of Pennsylvania
Harrisburg

COMMITTEES

MAJORITY CHAIRMAN,
LABOR & INDUSTRY

CONSUMER AFFAIRS

RULES

July 12, 2018

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

Re: Proposed Rulemaking – Minimum Wage Act of 1968 – IRRC Number 3202

Dear Director Smolock:

I am writing these comments, as Chairman of the House Labor and Industry, to express my objections to the proposed rulemaking concerning the executive, administrative and professional (EAP) exemptions from state minimum wage and overtime requirements under the PA Minimum Wage Act.

This proposal runs counter to the public interest for a number of reasons:

- The proposed salary thresholds are so high that they substantially reduce the importance of the duties test.
- The U.S. Department of Labor is currently engaged in rulemaking regarding the same topic.
- The proposal will further exacerbate the discrepancies between state and federal requirements, which will lead to more confusion and consternation among employers and employees alike.
- The ability of the Commonwealth and counties to provide cost-effective human services will be impaired by imposing these requirements on the provider agencies they contract with.
- If implemented, this rule will cause significant disruptions and economic impact for many types of employer and many of their employees.
- The proposed regulation is such a significant change that it should be handled through the legislative process.

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For the reasons noted above (I will expand on them below in more detail), I strongly believe that the Department of Labor and Industry should withdraw this proposal, allow the federal rulemaking on this topic to run its course, and then propose regulations to mirror (as closely as possible) the U.S. Department of Labor standards for exemptions from minimum wage and overtime requirements.

The proposed salary thresholds are so high that they substantially reduce the importance of the duties test.

Let me begin by acknowledging that the current salary thresholds for the state and federal EAP exemptions have not been adjusted since 1977 and 2004, respectively. Of course, this means that these thresholds have lost value over the years:

- The purchasing power of the $155/week state threshold (with a "long" duties test) adjusted for inflation since 1977 would compare to about $665/week in today's dollars.
- The purchasing power of the $455/week federal threshold adjusted for inflation since 2004 would compare to about $620/week in today's dollars.

When fully implemented, the proposed rule would set the salary thresholds for the EAP exemptions at $921/week two years after the effective date. This proposal goes well beyond updating salary threshold – and would equate to nearly 150% of the inflation-adjusted value of the most recent federal adjustment. To lock the value of the unreasonable adjustment in for perpetuity, the proposed rule would provide for a triennial adjustment (based on federal earnings data).

By increasing the salary threshold so significantly, and then providing for automatic adjustments, the proposed rule makes the EAP exemptions much more heavily dependent on a salary test than a duties test. Although there are a number of other reasons why this proposed rule should be withdrawn, it would be admittedly difficult to object to the reasonableness of the salary threshold if the proposal included the first phase of the increase ($610/week) – *and stopped there*. A salary threshold of $921/week with an automatic adjustment thereafter is not reasonable at all, and it makes the duties test largely irrelevant.

The U.S. Department of Labor is currently engaged in rulemaking regarding the same topic.

As the Department of Labor and Industry must be well aware, the U.S. Department of Labor is engaged in rulemaking on this topic. As of the date of this letter, the U.S. Department of Labor provides the following statement on its public website:

> *"On July 26, 2017, the Department of Labor published a Request for Information (RFI) regarding the Overtime Final Rule, which was published on May 23, 2016, asking for public input on what changes the Department should propose. That comment period has ended and the Department is reviewing those submissions.*

On August 31, 2017, U.S. District Court Judge Amos Mazzant granted summary judgment against the Department of Labor in consolidated cases challenging the Overtime Final Rule. The court held that the Final Rule's salary level exceeded the Department's authority, and concluded that the Final Rule is invalid.

On October 30, 2017, the Department of Justice, on behalf of the Department of Labor, appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. On November 6, 2017, the Fifth Circuit granted the government's motion to hold the appeal in abeyance while the Department of Labor undertakes further rulemaking to determine what the salary level should be."

Federal and state standards for minimum wage and overtime can be very confusing for the regulated community when they conflict. While some may grow impatient at the length of the federal rulemaking process, the submission of this state-level proposal on the same topic at this time is highly irresponsible. The Department of Labor and Industry should wait until the U.S. Department of Labor resolves the federal rules for the EAP and other exemptions, and they should carefully consider any new federal standards when crafting a state rule.

The proposal will further exacerbate the discrepancies between state and federal requirements, which will lead to more confusion and consternation among employers and employees alike.

The federal Fair Labor Standards Act includes language to clarify that the standards for minimum wage and overtime contained in the law do not excuse noncompliance with a state law or local ordinance that is more favorable to employees. This means that when state and federal standards conflict, an employer subject to both standards must: 1) carefully review both sets of standards and monitor any changes, 2) ascertain which standards are more favorable to employees, and 3) apply a hybrid set of standards based on which provisions are more favorable to the employees.

Although I appreciate the Department of Labor and Industry's attempt to conform to federal standards regarding the duties test (despite its reduced significance as the result of the proposed salary thresholds), there are a number of other minimum wage and overtime standards that differ significantly from the federal standards. In addition to the proposed salary thresholds, which will certainly exceed any new thresholds proposed by the U.S. Department of Labor, some notable examples include:

- The federal standards provide exemption for highly compensated employees, while Pennsylvania standards do not.
- The federal standards include an exemption for certain "computer" employees, while state standards do not.
- Federal and state language differs with regard to the outside sales exemption.
- The federal standards provide an exemption for business owners under the executive exemption, while state standards do not.

- Federal standards provide more flexibility for a fluctuating workweek, while state standards to not.

Since federal labor standards are so prominent and pervasive, state standards should be designed to, as closely as possible, mirror the federal standards. This proposed rule does nothing to eliminate other discrepancies between the two sets of standards, yet it will exacerbate the difference between the salary standards. If there are discrepancies between state and federal standards that the Department of Labor and Industry believes it cannot address via regulation, they have *never* contacted me to propose legislation to conform our state standards to the federal rules. (NOTE: I certainly recognize that the current state salary thresholds for the EAP exemptions differ from the federal thresholds. However, the Department of Labor and Industry's failure to update these thresholds during the last 41 years means that the federal thresholds are the only meaningful standard at the present time.)

The ability of the Commonwealth and counties to provide cost-effective health and human services will be impaired by imposing these requirements on the provider agencies they contract with.

The Commonwealth and its counties contract with a variety of health and human services providers to deliver services funded by Medical Assistance dollars and other state program dollars to many of our most vulnerable Pennsylvanians. This proposal will be an unfunded mandate on these organizations, which will either result in an increased cost to providers (potentially jeopardizing their ability to maintain their operations) or a decrease in services provided (as these employers limit the hours that employees may work providing these services).

Each year when the General Assembly crafts a state budget, we must balance the need to fund public education, health and human services, pension and debt costs and other state services with the need to avoid overburdening our residents and businesses with unaffordable taxes. If this proposed rule becomes effective, it will significantly impact the ability to provide needed services, and it is not likely that state funding will be available to offset the additional costs faced by providers. Therefore, the impact of this unfunded mandate on public health and safety must be seriously considered before proceeding with any final rule.

If implemented, this rule will cause significant disruptions and economic impact for many types of employer and many of their employees.

A variety of employers and groups have contacted my office to express their significant concerns about this proposal. Every employer with employees that fall under the current EAP exemptions will have choices to make. Some of these choices may include:

- Increasing employee compensation to meet the new thresholds and passing the increased cost on to employees (ex. by reducing employee benefits) or to customers and clients (ex. by increasing prices).

- Lowering the salaries of employees (so that the employee is paid about the same amount when overtime is calculated).
- Transitioning some salaried employees to hourly employees (reducing the employee's flexibility).
- Increasing the compensation to some employees while laying off others (to offset the cost).
- Strictly enforcing workplace rules about the number of hours worked to avoid overtime payments and disciplining dedicated employees who violate those rules (ex. by responding to work emails from home or working on a weekend to finish a major project).

It is impossible to predict how any specific employer would choose to comply with this proposal – I believe the choices will vary widely. It is clear that there will be an additional administrative and economic burden on many employers, and the manner they choose to comply could negatively affect their employees. I strongly encourage the department to carefully consider the comments of employer groups and individual employers. They are in the best position to provide a sense of the disparate economic impact of this proposal – but I believe there will be a very significant overall economic impact.

The proposed regulation is such a significant change that it should be handled through the legislative process.

This proposal is not a mere clarification or adjustment for value lost to inflation. Regulations under the Minimum Wage Act were first promulgated in 1977, and they have not been updated since that time. Given the Department of Labor and Industry's failure to update these regulations over the last 41 years, and that the proposed salary thresholds go well beyond any reasonable inflationary adjustment, this is not appropriate for the rulemaking process. A proposal of this magnitude should a matter for the General Assembly to consider. This is much too weighty a consideration to be left to unelected department officials.

Finally, given the significance of this proposal, I urge the Department of Labor and Industry to extend the public comment period by at least an <u>additional</u> thirty days. The time-frame for public comments- even with the modest extension to sixty days - is simply not adequate for a proposal of this nature. I am the Chairman of the House Labor and Industry Committee, so these proposed regulations were delivered to my office. This is not the case for the millions of Pennsylvania employers and employees who could be affected by this rulemaking. It takes time for the news of a proposal like this to spread. Pennsylvanians deserve enough time to review this proposal, consider its potential impact, and craft thoughtful public comments.

I appreciate the opportunity to submit these comments. I will reiterate that I believe the Department of Labor and Industry should withdraw this proposal, wait for the federal rulemaking process to complete, and submit a proposed rule that will minimize the discrepancies between state and federal standards for minimum wage and overtime (and work with the General Assembly to address any areas for which a statutory change is necessary). If

the department insists on proceeding down this irresponsible path, I hope that they will, at least, take a slower approach, allow much more time for public comments, and make major revisions to this proposal to address the serious concerns that have been raised.

Sincerely,

Robert W. Kauffman, Chairman
Labor and Industry Committee
PA House of Representatives
89th Legislative District

cc: Independent Regulatory Review Commission (via email)