

3202

JOHN T. GALLOWAY, MEMBER
301 IRVIS OFFICE BUILDING
P.O. BOX 202140
HARRISBURG, PENNSYLVANIA 17120-2140
(717) 787-1292
FAX: (717) 780-4780
EMAIL: JGALLOWAY@PAHOUSE.NET
WEBSITE: WWW.PAHOUSE.COM/GALLOWAY



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

LABOR & INDUSTRY, CHAIRMAN
SOUTHEAST DELEGATION

CAUCUSES

COAL
EARLY CHILDHOOD EDUCATION
IRISH AMERICAN
MANUFACTURING
MULTIPLE SCLEROSIS
PA HOPE
PRO-LIFE
STEEL
RARE DISEASE

8610 NEW FALLS ROAD
LEVITTOWN, PENNSYLVANIA 19054
(215) 843-7200
FAX: (215) 943-2008

August 21, 2018

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

2018 AUG 21 P 3:35

RECEIVED
IRRC

RE: Proposed Rulemaking- Minimum Wage Act #12-106 (IRRC # 3202)

Dear Director Smolock:

As the Democratic Chairman of the House Labor and Industry Committee, I write to express my support for the proposed rulemaking put forth by the Department of Labor and Industry regarding the executive, administrative and professional (EAP) exemptions from state minimum wage and overtime requirements pursuant to the Pennsylvania Minimum Wage Act. I support these changes including the standardization of duties test, increases to the salary level tests and automatic updates, and inclusion of nondiscretionary bonuses, incentives or commissions.

This rulemaking is consistent with the intent of the Minimum Wage Act of 1968

The Department of Labor and Industry's proposed changes to the overtime threshold is the first time the Commonwealth has sought to modify these amounts in decades. Given the length of time since these regulations have been updated, it is worth drawing attention to the strong declaration of policy contained in Section 1 of the Minimum Wage Act of 1968, which underlines the importance of the act's protections for Pennsylvanians:

"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 employes, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduce 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.”

The act, including its overtime provisions, is designed to protect employees. Such protections serve the public interest, and the Department of Labor and Industry is correct to consider regulatory action that maintains and expands these protections. I believe that consideration of the changes to the overtime provisions in the proposed regulation should keep the act’s fundamental goal of employee protection at the forefront -- a goal that is increasingly crucial in light of both structural changes to our economy and more recent economic trends that reduce the economic stability of working Pennsylvanians.

This rulemaking will benefit Pennsylvania workers and communities

Through my role as a member of the Pennsylvania House of Representatives, I can attest to the severe need for improvements to minimum wage rates and overtime rules. Many of my constituents were affected by the loss of family-sustaining middle class jobs during the recession, and returning employment opportunities are frequently not of the same quality. In other words, many people that once worked middle-class jobs now are employed in lower-wage jobs. For example, Pennsylvania lost over 97,000 private sector manufacturing jobs over the ten year period from 2007-2017 (-14.7%) but added 66,000 leisure and hospitality jobs over the same period (13.2%), based on the Bureau of Labor Statistics’ Quarterly Census of Employment and Wages. Although Pennsylvania’s unemployment rate is at its lowest point since 2007, our workers have generally felt little gain in their take home pay.

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 tools at its disposal to counter this shift, and updating the overtime rules is a positive step.

Unfortunately, the federal approach to address these widening disparities falls short of helping middle class families. The United States Department of Labor has yet to take any meaningful action to update the rule governing the EAP exemptions under Section 13(a)(1) of the FLSA. Despite claims that the 2017 tax cuts would put money back in the pockets of average American workers, the the main results are massive payouts for CEOs, fueled by share buy-backs, rather than significant and widespread wage or benefit increases to employees. Furthermore, the United States Department of Labor recently reported that wages have been relatively stagnant for the past year. In other words, the tax cuts have not stimulated wage growth. This proposed rulemaking is both timely and necessary.

Data supporting the Department's proposed regulation

Each year, the National Bureau of Economic Research (NBER) assembles data from the Current Population Survey (CPS) conducted by the Census Bureau, a survey which the Bureau of Labor Statistics uses to calculate many of the official labor force statistics for the United States. The NBER extracts, known as the Merged Outgoing Rotation Group dataset, provide highly detailed microdata of employment and wages.¹ The dataset contains sufficient detail for studying the population that could be affected by the proposed regulation. The US Department of Labor used similar CPS Merged Outgoing Rotation Group data to inform both the 2004 and 2015 FLSA rulemakings. The following analysis limits the data to the Pennsylvania salaried workforce covered by the overtime provisions of the Minimum Wage Act, and makes further adjustments to account for the specific statutory exemptions contained in the act as closely as possible.

Using this approach, the data reveals several trends that support the proposed regulation:

The outdated threshold protects fewer workers over time.

For 2017, we calculate that approximately 167,000 salaried, non-statutorily exempt workers in Pennsylvania earned below \$455/week (the federal FLSA threshold set in 2004), and would be eligible for overtime protections through the salary test. By comparison, that number was approximately 287,000 in 2004. Despite an 8% increase in the total number of salaried, non-statutorily exempt workers between 2004 and 2017, the number of Pennsylvanians protected

¹ See <https://www.nber.org/data/morg.html> for information about NBER's Merged Outgoing Rotation Group data.

under a \$455/week threshold has declined 38%.

Without action to update the effective threshold in Pennsylvania, the act will protect fewer and fewer workers over time.

If the proposed rulemaking is adopted, we estimate the change would expand overtime protections to 455,000 Pennsylvanians, once fully implemented to the \$921/week threshold. This estimate varies slightly from the estimate provided by the Department in its regulatory analysis, likely due to differences in methodology.

Businesses can adapt, and have previously adapted to regulatory changes to overtime rules.

Several stakeholders raise concerns that a substantial increase to the threshold will have negative economic impacts on businesses, however, I believe that the proposal gives employers flexibility as to how to comply with the law. The first time a threshold regulation appeared was in 1938, at the federal level. Ever since its inception, employers preferred broad definitions and low thresholds and fought against any increases to the threshold. Nevertheless, throughout history, employers have largely been able to adapt and comply with the updates to overtime changes because the regulations are flexible, by design.

In their discussion submitted to IRRC, the Department explains that businesses who will be affected by the change can mitigate the impact by adjusting hours or increasing salaries. Additionally, allowing nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the salary test also provides employers with an additional option for satisfying overtime requirements.

The data supports the Department's assertion, based on trends following the FLSA threshold change in 2004 by comparing the usual hours worked by the salaried, non-statutorily exempt population in 2003 and 2005 (before and after the new FLSA threshold was implemented). The percentage of the covered population usually working greater than 40 hours per week (and therefore subject to overtime) declined from 38.6% of total in 2003 to 33.6% of total in 2005. Meanwhile, the percentage usually working 40 hours per week increased from 50.0% to 54.1% and the percentage working fewer than 40 hours per week remained mostly steady, changing from 11.5% to 12.3%.

The decline in the number of employees who usually worked more than 40 hours per week after the 2004 threshold was implemented, along with the uptick in those usually working exactly 40 hours per week supports the department's contention that businesses can successfully modify their practices to adapt to regulatory changes that protect working Pennsylvanians.

This rulemaking provides the simplest approach to update overtime standards

I share the opinion of the Department of Labor and Industry that this rule change will establish clear and simple guidelines for employers and reduce misclassification of workers as exempt from overtime wage requirements. Misclassification is unfair to our workforce. Low-road employers gain unfair business advantages over law-abiding employers by cheating workers out of fair pay and inaccurately reporting payroll taxes. Unfortunately, wage theft is prevalent and often difficult for the Department to investigate and impose corrective actions. Establishing clear and simple rules for employers will help improve compliance and ensure that workers receive fair pay for hard work and long hours.

Suggestion on the effective date of the rulemaking

Under the proposed regulation, the first threshold increase would immediately go into effect upon publication of the final form rulemaking in the Pennsylvania Bulletin, with subsequent increases phased-in over the following two years. I believe that the staged approach to help smooth the increase is appropriate. However, I also believe that the department should consider delaying the initial implementation for a period of time after the rule is published so it can work to notify employers about their responsibilities. An outreach effort will help improve compliance not just with the new threshold, but also help explain the nondiscretionary bonus option that would be available to employers.

This rulemaking should be adopted

The current salary threshold does not provide meaningful protections for Pennsylvania workers and the Department of Labor and Industry has demonstrated that the proposal is consistent with the original intent and purpose of the Minimum Wage Act. When individuals put in overtime hours and frequently perform non-managerial duties, they should be compensated for it. Likewise, I support the proposed annual, automatic updates to salary levels for overtime exemptions since it is evident that governments, at the state and federal level, have failed to provide consistent updates. Additionally, I support the revised duties test, because it provides employers and employees with a clearer definition of what positions actually qualify for the EAP exemption and, thus, ensures that exemptions only apply to true and bona fide managerial and professional employees, who receive benefits and privileges from employers that are undeniably better than those provided to common workers.

Since the recession, several states have taken significant steps to strengthen and empower their workforce by updating laws and regulations guaranteeing fair wages and treatment in a variety of different ways. It is time for Pennsylvania to join in those efforts. Favorable actions on this

rulemaking package will demonstrate that we recognize the value of our workers and are ready to take corrective action on an economy that has failed so many Pennsylvanians.

In closing, I thank you for this opportunity to offer comments on this truly significant and timely rulemaking. I will be glad to offer further support for this measure should any additional information be required.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Galloway', with a long horizontal flourish extending to the right.

John T. Galloway, Democratic Chairman
Labor and Industry Committee
Pennsylvania House of Representatives

cc: Independent Regulatory Review Commission (via email)