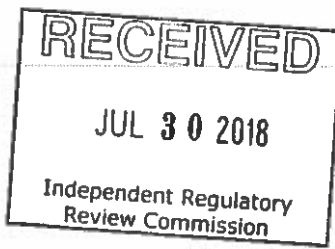


3202

Kathy Cooper

From: Smolock, Bryan <bsmolock@pa.gov>
Sent: Monday, July 30, 2018 8:55 AM
To: IRRRC; Kathy Cooper
Cc: Rapach, Jennifer Buchanan; Schramm, Robert (LI-OCC); Haffner, Garrett
Subject: FW: Comments on proposed overtime regulations
Attachments: Community Legal Services Comments on Proposed Overtime Regulations.pdf



From: Seth Lyons [mailto:slyons@clsphila.org]
Sent: Friday, July 27, 2018 4:16 PM
To: Smolock, Bryan <bsmolock@pa.gov>
Subject: Comments on proposed overtime regulations

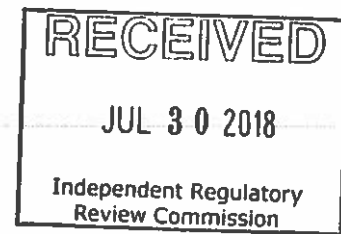
Dear Mr. Smolock,

Attached please find comments prepared by Community Legal Services (CLS) on behalf of our low-wage clients in support of the PA Department of Labor and Industry's proposed overtime regulations. Please note that these comments are submitted separately from the ones submitted by CLS as a non-profit employer.

Best,
Seth

Seth P. Lyons, Esq.
Staff Attorney – Employment Unit
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3790
slyons@clsphila.org
Pronouns: He/Him/His





**Comments by Community Legal Services on Proposed Title 34, Chapter 231 Regulations
(Exemptions from Overtime Pay)
Regulation ID# 12-106 (IRRC #3202)**

Community Legal Services (CLS) submits these comments on behalf of our low-wage clients in support of the Pennsylvania Department of Labor and Industry's (DLI) Notice of Proposed Rulemaking, which seeks to amend and clarify the overtime exemptions for Executive, Administrative, and Professional (EAP) employees under the Minimum Wage Act. These comments are provided separately from our comments dated July 19, 2018, which were submitted in support of the proposed rulemaking on behalf of CLS itself, as a non-profit employer.

CLS is a non-profit, legal services organization that provides legal assistance to over 10,000 low-income residents of Philadelphia each year. The Employment Unit at CLS represents a large number of low-wage workers who are routinely misclassified, underpaid, and denied overtime wages by their employers.

We have regularly witnessed clients living close to or under the poverty line who are deemed exempt from overtime by their employers. Most often these clients work in fast food or other restaurants, retail, construction, and administrative positions. They often work 60 to 80 hours per week but, because they are given a few managerial tasks and a fixed salary, they are not entitled to overtime despite earning poverty level wages. These low-wage workers are not truly managers and should not be exempt from overtime protections. However, under the existing salary threshold and duties test they must often work long hours without adequate compensation.

We have also witnessed consistent confusion among employers about who qualifies as an exempt employee. For many businesses, especially small businesses who may not receive much legal advice, the existing regulations are both vague and unnecessarily complex. This has resulted in litigation that is costly to businesses and time-consuming for both advocates and employees.

According to analysis by the National Employment Law Project (NELP), over 37,000 workers in Philadelphia alone would benefit from this proposed regulation.¹ CLS supports DLI's proposed changes because they would (1) update the salary threshold to reflect current wage levels and keep pace with the cost of living in Pennsylvania, and (2) clarify the duties test to

¹ NATIONAL EMPLOYMENT LAW PROJECT, "Number of Workers Statewide and by County that Would Benefit from Pennsylvania's Proposed Overtime Rule" (2018) (attached to these comments).

reduce misclassification and unnecessary litigation that are a burden on both employers and employees.

Additionally, for the following reasons, we believe this regulation complies with The Regulatory Review Act, 71 P.S. §745.1 *et seq.*:

- DLI has the authority to make these changes;
- The proposal aligns with the legislative intent of the Minimum Wage Act;
- The economic impact of the proposal will be a net gain for the Commonwealth of Pennsylvania;
- The effect on public health and welfare will be positive; and
- The proposal improves the clarity and reasonableness of existing regulations.

Finally, we address concerns raised by other commenters regarding the impact on small businesses, the proposal's record-keeping requirements, and the impact on the competitiveness of Pennsylvania's businesses.

I. The Proposal Meets the Criteria of a Regulation in the Public Interest Under The Regulatory Review Act.

Under The Regulatory Review Act, the Independent Regulatory Review Commission's goal is to determine whether a proposed regulation is in the public interest.² The first and primary concern is whether the regulation complies with the agency's statutory authority and the legislative intent.³ If the Commission determines the regulation meets those requirements, it then considers the economic impacts and the clarity, feasibility, and reasonableness of the regulation.⁴ The proposed adjustments to the overtime regulations are clearly within DLI's authority and the legislative intent of the Minimum Wage Act, The regulation will also lead to greater clarity for employers and employees, and have a net positive economic impact.

a. The Department of Labor and Industry Has the Authority to Define and Revise the Terms "Executive," "Administrative," and "Professional" in the Minimum Wage Act.

The Pennsylvania legislature gave the power to issue regulations and enforce the Minimum Wage Act of 1968 to the Secretary of Labor and Industry. The Minimum Wage Act specifically states that the terms "bona fide executive, administrative, or professional capacity... or in the capacity of outside salesman" are to be "defined and delimited from time to time by regulations of the secretary [of Labor and Industry]."⁵ The Act anticipated the need for exactly this kind of revision of regulations over time in order "to carry out the purposes of this act" and entrusted DLI as the interpreters of that statutory purpose.⁶

In their proposed regulation, the Department exercises the power to interpret these terms by updating the test that determines whether an employee is an exempt executive, administrative, or professional employee. The agency is seeking to clarify both the duties an exempt employee must perform and the salary threshold above which an employee may be considered exempt. Together, the salary threshold and duties test constitute the Department's definition of the

² 71 P.S. §745.5b.

³ 71 P.S. §745.5b(a).

⁴ 71 P.S. §745.5b(b).

⁵ 43 P.S. §333.105(a)(5).

⁶ 43 P.S. §333.109.

exempt employees and updating them in this manner falls within their purview under the Minimum Wage Act.

b. *The Proposed Amendments Further the Legislative Intent to Ensure Fair Wages Under the Minimum Wage Act.*

The Minimum Wage Act begins with a declaration of policy in which the Pennsylvania legislature stated their intention to protect employees from “unreasonably low” wages “not fairly commensurate with the value of the services rendered.”⁷ The legislature also recognized that employers have an unfair advantage in bargaining for employment terms and that minimum wage standards are critical to avoid “the depression of wages” and a reduction in “the purchasing power of workers” that could hurt the economy.⁸

The proposal from DLI focuses on bringing the overtime threshold and job duties tests back in line with the original intent of the legislature. Under the current regulations in Pennsylvania, which were last updated in 1977, the minimum annual salary threshold for the exemption is either \$8,060 or \$13,000, depending on job duties.⁹ If the regulation had tied the thresholds to inflation, those salary thresholds would now equal \$34,718.48 and \$55,997.56, respectively, in today’s dollars. Under the federal Fair Labor Standards Act (FLSA), the threshold is somewhat higher at \$23,600, but that amount has not been updated since 2004 and many small businesses are not covered by the FLSA.¹⁰ Those thresholds may have been appropriate at the time they were put in place, but today they are woefully inadequate.

First, because of the outdated threshold amounts, very few workers are actually eligible for overtime. In 1975, 62 percent of full-time salaried workers were eligible for overtime nationally, but today that number has dropped to only eight percent.¹¹ Moreover, as a result of inflation, the current thresholds now represent much less in purchasing power than they did in 1977. The increased thresholds suggested by DLI would merely return these standards to a level consistent with the purpose of the Minimum Wage Act’s overtime protections.

c. *This Regulation Will Result in a Net Positive Economic Impact on Pennsylvania’s Economy Because of the Additional Resources Available to Lower Income Residents.*

Under the Regulatory Review Act, the Independent Regulatory Review Commission, in its consideration of the economic and fiscal impacts of the regulation, should evaluate the costs to the Commonwealth, the adverse effects on business, the paperwork burden incurred, the cost of services necessary for compliance, and the possibility of setting lower standards for small businesses.¹² DLI’s proposed regulation will have a net positive impact when all of these factors are considered together.

⁷ 43 P.S. §333.101.

⁸ *Id.*

⁹ 34 Pa. Code §§231.82-231.84.

¹⁰ 29 C.F.R. §541.600; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38515, (proposed July 6, 2015).

¹¹ WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *FACT SHEET: Middle Class Economics Rewarding Hard Work by Restoring Overtime Pay*, June 30, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/06/30/fact-sheet-middle-class-economics-rewarding-hard-work-restoring-overtime>.

¹² 71 P.S. §745.5b(b).

First, the Department has not asked for additional funding for this regulation and expects to use its existing budget for enforcing the regulation.¹³ If anything, the regulation will free up resources for the Department because the simpler, clearer standard will reduce unnecessary private and government litigation and investigations that the Department has to pursue when workers are improperly denied overtime under the EAP exemptions.

The financial impact on businesses will depend on what choices businesses make. Businesses will have the freedom to optimize their finances by choosing how to comply with the regulation. It is likely employers will choose to (1) raise the salaries of their workers above the updated threshold amount, (2) maintain current salary levels and pay overtime to workers who continue to work over 40 hours per week, or (3) reduce employee hours and hire additional employees to cover those hours at the regular rate of pay. There will likely be some costs associated with any of these options, but employers can minimize those costs by choosing the most cost effective option for their particular business.

It is unlikely this regulation would have much of an impact on competitiveness since surrounding states already have significantly higher minimum wages and at least New York has an overtime threshold comparable to what is being proposed.¹⁴ Most businesses also already have accounting or payroll practices that account for hourly workers or that keep track of salaried workers' pay to ensure compliance. The nature of the regulation does not change the kind of systems employers need; it only requires employers to recalculate which employees are exempt from overtime and which are not. Similarly, it is unlikely the private sector will have to retain any more legal, consulting, or accounting services than they already do to comply with the regulation. They may, in fact, save money because the simpler rules will reduce confusion and the resulting compliance problems.

Moreover, businesses are also likely to see positive impacts from this regulation. For instance, many businesses are likely to see an increase in consumer demand because the regulation will put more money into the hands of those who most need it and are most likely to spend it. In other words, employers' possible increased expenses are likely to contribute to increased business.¹⁵ There is also evidence that higher wages increase productivity.¹⁶

Considering that businesses are unlikely to face serious economic ramifications from this regulation, it would not be in the public interest to set lower standards for small businesses, or to exempt them. Many of the employees who would be affected by this regulation are employed by small businesses since those are the workers not covered under the FLSA. Additionally, it would be contrary to the intent of legislators to exempt small businesses because, unlike the FLSA, the Pennsylvania legislature saw fit to require all employers, regardless of size, to meet minimum employment standards.

Most importantly, this regulation would have a significant positive impact on the most vulnerable and least well off in Pennsylvania. Employees would either receive more money or

¹³ Department of Labor and Industry, *Regulatory Analysis Form* (June 12, 2018).

¹⁴ See 12 NY 142-2.14 (requiring an overtime threshold of \$937.50 per week by 2020).

¹⁵ See James Manyika, Jaana Remes, and Jan Mischke, *The U.S. Economy is Suffering from Low Demand. Higher Wages Would Help*, HARVARD BUSINESS REVIEW (February 22, 2018), <https://hbr.org/2018/02/the-u-s-economy-is-suffering-from-low-demand-higher-wages-would-help>.

¹⁶ See Brendan Duke, *To Waise Productivity, Let's Raise Wages*, CENTER FOR AMERICAN PROGRESS (September 2, 2016), <https://www.americanprogress.org/issues/economy/reports/2016/09/02/142040/to-raise-productivity-lets-raise-wages/>.

have more free time, both of which have significant positive impacts. More money would allow employees to meet their basic needs, like rent and food, or save money for retirement or college tuition. Alternatively, if employers choose to lower hours to avoid paying overtime, workers will have more time to spend with their families or earn more money from a second job. More free time means lower stress and increased happiness, which will lead to lower healthcare costs and higher productivity.¹⁷ The regulation is also likely to create jobs since employers who do not want to pay overtime will need to hire other employees to work those hours.

All of these economic impacts together will produce a net positive for Pennsylvania and are part of the reason we support DLI's proposed regulation.

d. Public Health, Safety, and Welfare Will Improve as a Result of this Regulation Because it Will Result in Shorter Work Hours or More Money to Spend on Basic Necessities.

Employers will have the option to reduce hours or pay their employees more money if their wages fall between the current salary threshold and the proposed threshold, but either way it will benefit the health and welfare of employees.

As discussed above, shorter hours are known to have positive health effects. Additionally, long hours are associated with more injuries on the job. The Occupational Safety and Health Administration has found that worker fatigue is associated with both greater risk of illness and injuries, and that working 12 hours per day increases the risk of injury by 37 percent.¹⁸ Workers who make less than the proposed overtime threshold are often performing physical jobs, where injury is not uncommon, but they can least afford the healthcare costs of illness or injury.

However, if an employer chooses to pay workers more, either by raising their salary to the threshold or by paying them overtime, workers' health will also benefit. Healthcare is expensive in the United States, as is nutritious food. More money means a greater ability to care for oneself. The workers impacted by this regulation would benefit greatly from higher income, both through reduced stress and greater access to healthcare resources.

e. Employers and Workers Would Both Benefit from the Increased Clarity and Reasonable Parameters of this Proposed Regulation.

A significant benefit of this proposed regulation is increased clarity, which will help avoid costly and unnecessary litigation. The current EAP definitions are vague and provide little guidance regarding the kinds of job duties that qualify as executive, administrative, or professional. In contrast, the proposed regulation provides a specific list of the duties that fall into each of the exemption categories. This way, employers will not have to guess whether their employees fall into the exemptions and risk litigation for guessing incorrectly.

The reasonableness of the proposal is evident from its design. The use of a three-year phase-in period will help businesses gradually adjust to this change and is a reasonable means of

¹⁷ See, e.g., Mika Kivimaki et al., *Long Working Hours and Risk of Coronary Heart Disease and Stroke*, 386 *The Lancet* 1707 (October 2015) (finding employees who worked longer hours were more likely to have heart problems); "Get a Life," *The Economist* (September 24, 2013) (explaining research that shows hours worked and productivity are negatively correlated after a point).

¹⁸ OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *Long Work Hours, Extended or Irregular Shifts, and Worker Fatigue*, <https://www.osha.gov/SLTC/workerfatigue/hazards.html#ref1>.

accommodating business interests without sacrificing the needs of workers. The proposal to automatically update the overtime thresholds every three years is also sensible because it ensures that the threshold will never again fall so far out of alignment with current wage levels or the original intent of the Act's overtime protections. DLI's choice to raise the threshold to only the 30th percentile of full-time salaried workers in the Northeast recognizes that wages in Pennsylvania are somewhat lower than those in surrounding states, and prevents implementing too drastic a change all at once.

Additionally, all of these changes are based on extensive data, which is a factor the Independent Regulatory Review Commission must evaluate and supports the reasonableness of the proposal. DLI relied on the long record developed from the federal government's similar proposal in 2015, and sought additional information and data analysis from organizations such as the Economic Policy Institute and the National Employment Law Project.

The data clearly demonstrate the necessity of the regulation. Overtime has become virtually meaningless in Pennsylvania, and these regulations are needed to ensure that overtime protections cover the workers they are meant to protect. Too many low-wage workers are being shortchanged without even knowing they have been misclassified and denied their hard-earned wages. The proposed regulation targets the well-known problems with the existing regulations without exceeding the bounds of the agency's authority or harming Pennsylvania's economy.

Community Legal Services fully supports the enactment of these regulations in order to better the lives of over 465,000 workers in Pennsylvania.

II. Comments Addressing the Impact of the Proposed Regulation on Businesses Misunderstand the Rule with Little Evidence to Support Their Claims.

The Independent Regulatory Review Commission has already received a number of comments, particularly from business owners. These comments focus only on the direct impact on their payroll and do not consider the broader economic impacts associated with this proposed regulation. They also demonstrate some of the common misunderstandings about how the current and proposed overtime rules work.

a. The Comments Already Received Demonstrate a Misunderstanding of How Many Employees Will Be Affected by this Regulation.

Many of the comments submitted discuss the regulation as if many or all of their employees fall into these exemptions, and they also focus solely on the salary threshold as the likely reason their employees will become non-exempt. Both of these arguments demonstrate a misunderstanding of the law.

Most businesses, including small businesses, are not comprised entirely of executive, administrative, and professional employees. In order to be exempt from overtime pay, these employees must have jobs that actually fall into these categories, including, for instance, working 80% of their time in management related tasks, using independent judgment on significant issues related to the business, or having advanced knowledge in a field that requires specialized instruction. These are not qualities that the majority of employees have in most businesses of any kind.

This misunderstanding is likely because the duties tests are currently unclear. In our experience with low-income clients and their employers in Philadelphia, many employers incorrectly assume that if they pay their workers a fixed salary, those workers are automatically

exempt from overtime. For many of these employers, it is unlikely that they have more than a few workers who truly meet the definition of EAP employees.

For instance, one of the comments is from a convenience store and gas station owner who is concerned about the impact on his company. The comment indicates that the company treats employees as exempt, even when they are working in their first job with the company. However, it is highly unlikely that more than a few positions at a gas station could legally be classified as exempt under the current regulations. It is therefore likely that, when evaluating the economic impacts of this regulation, this company and others like it are counting workers who are misclassified as exempt when those workers should already be entitled to overtime. DLI and the Independent Regulatory Review Commission should not be concerned with protecting employers' ability to continue illegally circumventing overtime protections just because it may be more costly to actually pay their workers correctly.

Finally, employers misstate how the proposed regulation will impact employees who go from being exempt to non-exempt. A number of the employer-commenters express a concern that newly non-exempt employees will lose out on their previous schedule flexibility. This is untrue. Whether a non-exempt employee is paid hourly or on a salary basis with overtime pay, there is no requirement that they work a fixed schedule. Regardless of how an employee is paid, the regulations place no restrictions on when an employee works during the week—schedule flexibility is entirely up to employers. The only additional burden that these regulations add for newly non-exempt workers is that their hours will need to be tracked, likely using whatever recordkeeping system is already in place for an employer's non-exempt workers.

b. *Employers Who Argue They Will Face Significant Increases in Labor Costs Are the Same Employers Overworking Their Employees for Low Pay.*

There were a number of employers who commented that they will face significantly increased labor costs under the proposed regulations. However, these comments turn the intent of the Minimum Wage Act on its head.

As stated with striking force in its opening policy declaration, the purpose of the Minimum Wage Act is to protect workers from unfairly low wages and to remedy the inequity of bargaining power between employee and employer in order to protect workers' wages and the stability of the economy.

The employers who will face a significant increase in labor costs are those who have a small number of workers working large amounts of uncompensated overtime hours for low pay. These are precisely the employers that the Act was created to rein in.

If a business currently has a handful of exempt employees who work a few overtime hours each week, paying those workers overtime or hiring an additional worker to cover the overtime hours will not result in a significant financial burden. Allowing employers to continue requiring their employees to work long hours for poverty-level wages, without any overtime pay, runs counter to the purpose of the Minimum Wage Act, and acts as a government stamp of approval for exploitation of low-wage workers.

c. *Many Comments Discuss an Increased Record-Keeping Burden, but Such Requirements are Unlikely to Require Significant Changes in Payroll Management.*

Most of the comments from employers discuss the significant record-keeping burden they believe this law will place on them, but the basis for that argument is unclear. Presumably, most

of these employers do not pay every one of their workers a salary above the current threshold or have a staff made up of entirely exempt employees. Instead, they must have some hourly employees on their staff and the necessary payroll systems to keep track of workers' hours. The only requirement under the regulation is that, if employers choose not to raise salaried workers above the threshold, they will need to keep track the hours of a few additional workers. This is not a significant burden.

d. Businesses Underestimate How Much Different the Cost of Business in Other States Already is.

Many employers commented that they feared reduced competitiveness with businesses in other states, but they fail to recognize how far behind Pennsylvania already is with regard to wage standards. Of the states that geographically surround Pennsylvania, every single one has a minimum wage that is higher by at least one dollar per hour, and New York's minimum wage by the end of 2020 will be five dollars higher than Pennsylvania's.¹⁹ This means that in 2020, if Pennsylvania's minimum wage stays the same, the overtime rate for a minimum wage worker in Pennsylvania will be only 47 cents higher than the New York State standard minimum hourly wage. Additionally, New York has enacted an overtime threshold that is very similar to the one proposed by DLI.²⁰ This proposed regulation will only begin to bring Pennsylvania in line with the standards in nearby states, and will not result in a competitive disadvantage for businesses.

Pennsylvania employers want to stay competitive, but it is contrary to legislative intent and also deeply unfair to allow the state's employment standards to sink so far below all of its neighbors. Moreover, the employers who commented ignore the fact that they are not only competing for customers, but also for employees. The competition for employees may well become much harsher if Pennsylvania's employment standards remain significantly below those of its neighboring states.

e. None of the Employers Who Commented Considered the Positive Economic Impacts of this Regulation on Their Businesses.

While employers regularly commented on how much more money will be spent on labor costs under this regulation, none of them noted that more money will also come in. As discussed above, putting more money into the hands of low-income workers will result in greater demand in the economy generally. By stimulating demand, employers will likely see an increase in revenues from those additional sales or transactions. This important economic consideration will help offset any additional labor costs that they may incur. Employers are making the economic burdens seem worse than they truly are by failing to recognize the broader economic impacts of the regulation.

III. Conclusion

The regulation proposed by DLI would be incredibly beneficial to low-income residents of Pennsylvania and would appropriately reward them for their long hours and hard work. The

¹⁹ New Jersey has a minimum wage of \$8.60, Delaware has a minimum wage of \$8.25, Ohio has a minimum wage of \$8.30, Maryland has a minimum wage of \$10.10, West Virginia has a minimum wage of \$8.75, and New York has a minimum wage of \$10.40 currently, but that will rise to \$12.50 by the end of 2020. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *2018 Minimum Wage by State* (January 2, 2018), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#Table>.

²⁰ 12 NY 142-2.14 (creating an overtime threshold of \$937.50 per week by 2020)

proposed changes are an equitable solution to the current regulatory problems and adequately balance the interests of businesses and workers. The proposal also complies with all of the statutory requirements under the Regulatory Review Act and properly effectuates the purpose behind the Minimum Wage Act. CLS believes these changes to the overtime threshold and the duties tests are long overdue and we fully support them.

For further discussion of these points, contact

Seth Lyons, Esq.: 215.981.3790 | slyons@clsphila.org

Submitted by:

Seth Lyons, Community Legal Services, Inc.

Submitted July 27, 2018

Number of workers statewide and by county that would benefit from Pennsylvania's proposed overtime rule

State/County	Total affected	State/County	Total affected
Pennsylvania	465,115	Juniata	887
Adams	4,206	Lackawanna	11,284
Allegheny	46,665	Lancaster	23,901
Armstrong	1,891	Lawrence	3,354
Beaver	5,282	Lebanon	5,560
Bedford	2,021	Lehigh	14,325
Berks	14,756	Luzerne	15,765
Blair	6,870	Lycoming	5,573
Bradford	2,306	Mckean	1,675
Bucks	22,148	Mercer	5,527
Butler	7,199	Mifflin	1,912
Cambria	6,488	Monroe	6,130
Cameron	215	Montgomery	26,978
Carbon	2,303	Montour	801
Centre	5,464	Northampton	10,280
Chester	13,164	Northumberland	3,177
Clarion	1,884	Perry	1,102
Clearfield	3,666	Philadelphia	37,432
Clinton	1,385	Pike	1,693
Columbia	2,956	Potter	539
Crawford	3,822	Schuylkill	5,645
Cumberland	11,877	Snyder	2,207
Dauphin	12,508	Somerset	2,947
Delaware	14,617	Sullivan	220
Elk	1,643	Susquehanna	1,087
Erie	13,654	Tioga	1,416
Fayette	4,992	Union	1,815
Franklin	6,459	Venango	2,175
Forest	N/A	Warren	1,712
Fulton	449	Washington	6,280
Greene	896	Wayne	1,809
Huntingdon	1,464	Westmoreland	14,218
Indiana	3,042	Wyoming	885
Jefferson	1,888	York	16,623

Source: NELP analysis of data from the Bureau of Labor Statistics' Quarterly Census of Employment and Wages (QCEW), the Economic Policy Institute and the Current Population Survey.