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LICENSED IN PENNSYLVANIA & OHIO

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Brian Smolock, Director
Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas St., Rm 1301
Harrisburg, PA 17121

RE: Regulation #12-106: Minimum Wage
IRRC #3202

Dear Director Bryon Smolock:

As legal counsel for several non-profit exempt health entities, I am writing to comment on the proposed rulemaking concerning the executive, administrative and professional (EAP) exemptions from state minimum wage and overtime requirements under the PA Minimum Wage Act above referenced.

This Pennsylvania Department of Labor and Industry (L&I) proposal runs counter to the public interest for a number of reasons:

- The L&I proposed salary thresholds are so high that they substantially reduce the importance of the duties test;
- The U.S. Department of Labor (DOL) is currently engaged in rulemaking regarding the same topic;
- The L&I proposal will further exacerbate the discrepancies between state and federal requirements, which will lead to more confusion and uncertainty 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 with which they contract.
- If implemented, this rule will cause significant disruption 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

For the reasons noted above, L&I should withdraw its proposal, allow the federal rulemaking on this topic to run its course, and then propose regulations to mirror (as closely as possible) the DOL 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. 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 even higher than that proposed by the DOL by year three, 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 DOL is currently engaged in rulemaking regarding the same topic.

As L&I is well aware, the DOL is engaged in rulemaking on this topic in 2015-2016. As of the date of this letter, the DOL provides the following statement on its public website:

"On July 26, 2017, the Department of Labor published a Request/or 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 DOL 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 L&I's proposal on the same topic at this time is irresponsible and ignores the compliance complexity of two sets of regulations by Commonwealth businesses. L&I should wait until the DOL 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 monitors 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 L&I'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 do not. See. 34 Pa Code §231.43(d) (3). Foster v. Kraft Foods Global, Inc. 2012 WL 3704992.

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 L&I believes it cannot address via regulation, it is recommended it contacts the PA General Assembly legislative committees to propose legislation which would conform PA Code to the CFR.

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).

L&I in its submission to the IRRC, states on p.9 (23) that business can "mitigate the impact of compliance based on its own decision making." This suggests a failure of L&I insight how such regulations may disproportionately impact industries in which fees charged are largely controlled externally over which mitigation is largely not available. In fact L&I concedes for "regulated communities in the five fiscal years following implementation the savings are not quantifiable" suggesting there may be a cost savings. It further estimates for the same five FY period, the cost expense would be "less than .1% of payroll." Such suggestions by L&I largely reflects a lack of insight as to how the non-profit sector operates.

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 Commonwealth 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, if not in the first year, by the second and third years and going forward.

Concerns of my clients 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 and increasing costs). Salary basis employees when moved to hourly view this move as a demotion as they know their work will be more closely scrutinized by the employer in an effort to control overtime expense.
- Increasing the compensation to some employees while furloughing 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, but it is postulated 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. L&I must carefully consider the comments of employer groups and individual employers as they are in the best position to provide a sense of the disparate economic impact of this proposal. It is believe there will be a very significant overall economic impact.

The proposed regulation is such a significant change 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 have not been updated since. Given L&I's failure to update these regulations over the last 41years, 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 elected Pennsylvania General Assembly to address.

Thank you for considering these foregoing concerns.

Respectfully,

Michael J. Lawson, Esq.
Attorney At Law