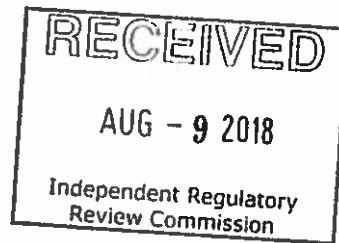


3202



August 9, 2018

Bryan Smolock, Director  
Bureau of Labor Law Compliance  
Department of Labor & Industry  
651 Boas Street, Room 301  
Harrisburg, PA 17121

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

Director Smolock:

As the largest hospitality and tourism association in the Commonwealth, we write to express our extreme concerns with the proposed rulemaking regarding executive, administrative and professional exemptions (EAP) under the PA Minimum Wage Act. Our members are especially sensitive to this rulemaking as they consist of primarily small business owners and non-profit marketing organizations.

While we appreciate the 30-day extension that has been given to provide comments, a proposal of this magnitude that impacts every business and employee in the Commonwealth should not provide a mere 60 days for businesses to respond. Sixty days, especially over the course of the summer months, is not sufficient time for businesses to collect the data needed to determine the true impact such a proposal would have on their operations.

By the department's own admission, the only data used for this proposal was legal counsel, economists and policy analysts. Further, the Department stated that it did not ask the opinions of businesses owners or operators but stated that the brief public comment period would be used for that purpose. Who could speak better to the impact of these regulations than the over 230,000 businesses affected? The Department, as far as we are aware, has made no effort to gain public input outside of posting this regulatory change—a regulatory change that most businesses in the Commonwealth are not even aware of.

Our association does not disagree that there need to be updates to Pennsylvania's current standards, but those updates should be made to *align* with the federal duties test and to *align* with federal changes to the salary threshold.

The Department purports that it does attempt to align the state duties test with the current federal test, but it fails on a number of parts:

- The federal standards allow for an exemption for highly compensated employees, while Pennsylvania does not.

- The federal standards include an exemption for certain “computer” employees, while the state standards do not.
- Federal and state language differ as it pertains to outside sales.
- The federal standards provide an exemption for business owners under the executive exemption, while state standards do not.

The continued differences between federal and state standards only make it more difficult for businesses to comply. If the state wants the duties tests to be identical, they should truly be identical.

In fact, because Pennsylvania has not updated its own standards for decades, most businesses already follow and understand the federal threshold to be their barometer for compliance.

We do not oppose a moderate change to the salary threshold. In fact, when speaking to our members, none of them have exempt staff paid at a mere \$455/week. But these changes should be determined at the federal level to ensure a level playing field for all states.

The Department’s proposed salary level is not an appropriate level for our diverse hospitality industry. Pennsylvania is a broad and complex state. Businesses located in urban centers are vastly different than those located in more rural locations. Even what is stated to be a gradual increase to the salary threshold is still crippling to small, rurally located operations. Throughout Pennsylvania, there are significant differences in cost of living and salary levels to account for those differences. The Department’s proposed level of \$921/week is too high in general, but it is even more unreasonable in certain parts of the state outside of Philadelphia and Pittsburgh.

This proposal is more than a 100 percent increase over three years and then ties the increase to data from all northeast states. Pennsylvania is inherently different from many of our neighboring states and tying these increases to the 30<sup>th</sup> percentile of other states in the region only exacerbates the differences between businesses within our own Commonwealth. In addition, it clearly puts our state at a competitive disadvantage when it comes to attracting new businesses and allowing in-state businesses to grow and thrive.

The impact to employees is much larger than the Department insinuates in its proposal. We saw the impact of these potential broad changes in 2016 when there was an effort at the federal level to increase the threshold by over 100 percent—an effort that was halted by the courts. Our industry operates on razor-thin margins. An increase such as this cannot be handled by simply increasing the exempt employees’ salaries. There are essentially only two solutions to this type of increase:

1. Shift a current exempt salaried employee to hourly. Salaried managers are able to generally determine their own schedules, take time off when needed, benefit from paid time off, retirement benefits and health insurance all with consistent compensation. Universally, we have found that the shift of an exempt manager to an hourly employee that must clock in and out and has no flexibility or benefits is viewed as a demotion by that employee. This hurts employee morale and retention.
2. Businesses will be forced to streamline operations and eliminate jobs.

Neither of these two scenarios achieves the Department's supposed goals. In fact, it hurts employees, in-state businesses and potential future businesses. We routinely hear from employees in our industry that a promotion from an hourly position to a salaried position is a career milestone. Employees enjoy the expanded flexibility, benefits and salary predictability that comes with working in a salaried position. Unfortunately, most businesses will be forced to reclassify these salaried employees as hourly because they will not be able to absorb the increased costs of the higher threshold.

The proposal also severely inhibits those businesses that rely on bonuses and commissions as it pertains to compensating employees. Bonuses are a critical component of the compensation package that is offered to our employees. By capping these incentives at 10 percent of the threshold, it changes the entire make-up of the compensation package, a package that is lucrative to many managers in this industry and incentivizes good performance.

The U.S. Department of Labor proposed a similar increase to the salary threshold under the Obama administration, an extreme increase that was thrown out in federal district court because it was so high that it made the duties test irrelevant. The vast majority of restaurant managers meet the duties test for exemption, but the proposed salary threshold is so high that they will not qualify. We believe that this makes the Pennsylvania proposal vulnerable to legal challenge for the same reason.

The Pennsylvania Department of Labor & Industry's proposal is a one-size-fits-all approach to businesses that are tremendously different when it comes to geography, operations and margins. What may be reasonable and achievable for certain industries and locations may not be attainable for other types of businesses or areas.

This proposal impacts *every single business and employee* in the Commonwealth to some degree. Pennsylvania is home to over 230,000 businesses, but the short timeline for public comment and the lack of due diligence regarding the effects of this proposal make it impossible to support. Due to the breadth of this proposed rule, we feel that this discussion and potential changes – if not made at the federal level – should be determined legislatively by our elected officials.

On behalf of Pennsylvania's hospitality and tourism industries, we strongly oppose the proposal as written and urge the Department to undertake a serious review that engages all stakeholders on this important issue.

Regards,



Jim Gratton  
Chairman of the Board



John Longstreet  
President & CEO