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LeadingAge PA
an association of not-for-profit senior services

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August 3, 2018

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

Dear Mr. Smolock:

LeadingAge PA, a statewide association representing more than 320 mission-driven not-for-profit providers of services for older adults across the Commonwealth of Pennsylvania, appreciates the opportunity to submit comments on the proposed minimum wage regulation, 12-106, as published June 23, 2018 in the *Pennsylvania Bulletin*.

Specifically, LeadingAge PA members provide long-term care services and supports in a variety of settings including nursing facilities, personal care homes, assisted living residences and independent living communities, which are often part of continuing care retirement communities (CCRCs), and affordable senior housing. Members also provide adult day services programs, Living Independence for the Elderly (LIFE), known nationally as the Program of All-Inclusive Care for the Elderly - or PACE - Programs, home care and home health care services, and hospice services.

LeadingAge PA members employ more than 45,000 individuals and have a stated vision for senior services and supports that encourages member organizations to create a competency and culture of talent management and development that engages and empowers team members, resulting in high performance, innovation, and increased satisfaction. Further, this vision urges members to create an environment that fosters opportunities for consumers and team members to contribute to the good of the larger community, resulting in a sense of meaning and purpose. As not-for-profits, members have a high degree of commitment to their workforce and are well aware of the large role that they and their employees play in sustaining families, providing benefits that protect workers and their families, and enhancing the local economy. It can be quite a balancing act to meet all of these responsibilities in these mission- driven organizations. The Department of Labor and Industry's (L&I's) proposed rule would interfere with these goals in several ways.

The primary reason for concern, of course, is that the cost in sheer dollars to employers is significant. The impact may be devastating to entities like LeadingAge PA members where a large portion of their business costs are invested in staffing. As stated in the regulations, the proposed rule is estimated to affect 460,000 salaried employees by 2022, which is potentially a very large impact, leaving aside the regulatory adjustment costs, the additional cost of tracking hours for additional employees, and the revisions to personnel policies and benefits that will be required. For not-for-profits, this potential transfer of funds to employees does not come out of profits and distributions to shareholders, but instead, directly reduces the funding available to provide care and services, or to hire additional workers. Senior services are primarily funded by the seniors themselves or through the Medical Assistance program, both of which limit the ability of our members to increase revenues in order to cover increased costs associated with meeting the proposed salary test. For entities that are already challenged to balance personnel costs with mission-driven services, this imposes an additional burden on maintaining high quality operations.

The gap between the current exempt salary level and the levels in this regulatory proposal is much too large for immediate implementation. Employers will need time to review and potentially reclassify positions and to budget for any necessary increases, or to re-examine their business model to see if it can be adapted to the new requirements. If employees are reclassified, employers will also need time to educate them on new practices once they become hourly workers. Adequate time to develop a sound approach to service delivery under these proposed new conditions is especially important in senior services because the services are staff-intensive and because those who use the services cannot manage without them.

In addition to the immediate potential costs and potentially onerous recordkeeping requirements, we are concerned that members' recruitment of compassionate and committed employees to oversee the provision of care will suffer if salaries are increased in other sectors. Members work very hard to provide salary and benefit packages that can attract and retain the best staff possible. It may be harder to compete if other employers increase their salaries to adjust to the proposed requirements.

While we appreciate the Department's phased approach, it is the initial $610 per week that should be phased in if the salary threshold increase is even necessary after the U.S. Department of Labor (DOL) has finalized its regulations pertaining to the Executive Administrative and Professional (EAP) exemption. The additional increases that are proposed would bring Pennsylvania far above the federal EAP salary level. L&I should also recognize that the U.S. Department of Labor's 2004 threshold already sets the minimum threshold for these positions at $455 per week or about $23,660 annually which more reasonably delineates an entry-level manager's salary than does the phase 3 salary L&I has proposed of $921 per week or $47,892 annually. For this and other reasons we will discuss below, LeadingAge PA respectfully requests that L&I wait until the DOL final rule is promulgated before it acts to make changes to Pennsylvania's minimum wage regulations.

LeadingAge PA members have expressed a willingness to adapt to an adjustment to the EAP salary threshold if it is based on a reasonable factor related to Pennsylvania's annual wage inflation and is conducted with an annual notice and public comment period, so that the changes are more predictable and can be planned and budgeted. Because the current proposal does not meet these criteria, LeadingAge PA requests that the salary threshold adjustment be eliminated or reconfigured to meet the criteria stated above. The proposed automatic increase includes several frailties. First, the benchmark for it is the 30th percentile of full-time salaried workers in the Northeastern United States. This is a large region that includes Boston, MA and New York City, NY with their substantially higher wages and cost of living, and fails to recognize the lower costs of living in significant portions of Pennsylvania. Rural areas will be adversely affected by the proposed automatic adjustment because it will drive the EAP threshold salary far from a level that can be supported in the local economy and is therefore likely to disrupt many local businesses including senior service providers in rural areas. LeadingAge PA requests that L&I investigate and identify a more appropriate measure if it wishes to propose an automatic adjustment.

L&I states that one reason for the proposed rule is to align Pennsylvania's Minimum Wage Act (PMWA) requirements with the U.S. Fair Labor Standards Act (FLSA) regulations, an action which would benefit both employers and employees by providing clarity regarding employers' duties and responsibilities. Unfortunately, L&I's proposed rule does not accomplish this worthy objective, leaving many discrepancies between state and federal regulations in place. Further, since the U.S. DOL is known to be in the process of making changes to FLSA regulation, L&I's action now to change the state regulation almost assures there will be continued mismatch, overlap, and confusion. LeadingAge PA agrees with L&I about the importance of better aligning PMWA regulations with the federal requirements and urges L&I to wait until U.S. DOL has completed its rulemaking before it moves forward with new requirements

In addition to the simple cost burden, LeadingAge PA members note that some of the provisions of the proposed regulation may lead to unintentional outcomes that entry-level managerial and administrative staff may find unfavorable and may even lower productivity by reducing their flexibility in managing their work-life balance. Some individuals have an investment in being salaried, since it shows that they have been identified by their employer as a future leader, with the professional status that conveys; moving these individuals to hourly workers may be insulting to them. It may even be a deterrent to some people who place more value on a job well done than on the dollars they bring home; some hourly workers find the constant tracking of their hours to be a nuisance and resent the prohibitions that keep them from wrapping up their tasks in the exemplary manner they are comfortable producing. LeadingAge PA members have found that it is important to identify what an employee values in order to align the compensation (in all of its forms) with the worker's priorities. While the amount of wage or salary is very important, it is not always the amount of take-home pay that is the most appreciated reward for a job well done. For example, many organizations have vacation and insurance benefits for salaried workers that are different from those of hourly staff, which adds to their overall compensation. Therefore, some staff may be dismayed to find themselves stripped of benefits they value due to movement to the hourly workforce, even if their pay is increased. In addition, some employees appreciate a steady income stream, while having the ability to put in more hours during busy times and fewer during less busy times. If there is a major storm, power outage, or even during flu season, for example, additional hours worked by management staff are often key to providing the necessary services during a short-term crisis.

Finally, this proposed rule's unintended consequences are likely to hurt seniors by reducing the level, flexibility, or variety of services available to them, and potentially increasing the costs they pay to receive services. Further, approximately 65 percent of individuals in nursing facilities have services paid for by the Medical Assistance (MA) Program and the reimbursement nursing facilities receive currently does not begin to cover the cost of providing care. In fact, according to a national study of 2016 costs by Eljay, LLC and Hansen Hunter & Co., P.C., Pennsylvania's nursing homes were reimbursed less than their cost of care by an average of $27.25 per resident per day. LeadingAge PA's not-for-profit members have reported much larger gaps between their costs and the MA reimbursement they receive to care for nursing facility residents. The proposed rule would likely increase personnel costs significantly for our member communities, but MA funding, which pays for the majority of nursing home residents, is capped at what the MA Program is authorized by the General Assembly and the Governor to pay.

In conclusion, LeadingAge PA's not-for-profit members and the seniors and communities they serve will be harmed by the ambiguity and confusion likely to be created when the updates to the state regulations do not match upcoming changes to the federal FLSA regulations and do not address all of the current discrepancies between the two. Employees and seniors will be negatively impacted by the reduction in flexibility of employees to meet the needs of the communities operated by LeadingAge PA members and the seniors who live there as well as to achieve their preferred work-life balance. The changes proposed are likely to impose significant new costs and do not allow a reasonable timeline to implement these proposed complex changes to business practices. Finally, the automatic adjustment that is proposed is not based on a reasonable measure that will reflect Pennsylvania's cost of living, especially in rural areas of the state and does not allow adequate opportunity for public comment. Therefore, LeadingAge PA believes that this rulemaking is not in the public interest and respectfully requests that the Pennsylvania Department of Labor and Industry defer its rulemaking until the federal Department of Labor has published its regulation as final. We further request that, when L&I continues with rulemaking, it should align with the federal rule in areas such as the duties tests, concurrent performance of exempt and non-exempt work, and fluctuating work weeks, for example.

Thank you again for the opportunity to provide comments on the proposed changes to Pennsylvania's minimum wage rule regarding the EAP exemptions. If you have any questions about our comments, please contact me.

Sincerely,

Beth Greenberg

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Senior Director of Regulatory Affairs
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