

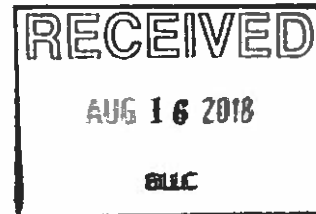
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The Pennsylvania State Council of SHRM, Inc.

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August 13, 2018

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

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

Re: Comments on the Department of Labor and Industry's Proposed Rulemaking for 34 PA Code.
Chapter 231 Re: Overtime Pay; Minimum Wage #12-106 (IRRC number 3202)

Dear Mr. Smolock:

The Pennsylvania State Council of the Society for Human Resource Management ("PA SHRM") and the undersigned Pennsylvania SHRM chapters appreciate the opportunity to submit these comments in response to the proposed rulemaking by the Pennsylvania Department of Labor ("Department") issued on June 23, 2018, for comment. The proposal seeks to revise the regulations implementing 34 Pa. Code Chapter 231 regarding overtime pay.

The Department seeks to change the definition of executive, administrative, and professional (EAP) salaried workers who are exempt from receiving minimum wage and overtime pay. In so doing, the Department's proposal largely mirrors the failed 2016 federal effort to update the overtime salary threshold, which was invalidated in federal court on August 31, 2017. In its Regulatory Analysis Form, the Department purports to update the salary threshold that applies to salaried employees "to more accurately match the duties they perform" and to "be consistent with Federal regulations interpreting the Fair Labor Standards Act." However, respectfully, as explained below, the proposed regulation does neither.

PA SHRM State Council is an affiliate of the Society for Human Resource Management (SHRM). Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. Representing nearly 300,000 members in over 160 countries and more than 12,000 members in the commonwealth of Pennsylvania, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management.

I. The Department's Proposed Increase in the Salary Threshold Is Too High

Pennsylvania's existing overtime regulations mirror the federal framework by providing a three-part test for determining whether an employee is exempt from minimum wage and overtime. The test consists of 1) being paid on a salary basis, 2) being paid a salary that meets or exceeds the established salary threshold and 3) meeting one of several enumerated duties tests.

While the role of the salary threshold has always been important, it has not been the primary focus for determining exemption. Rather, the salary threshold is intended to screen out employees who obviously would not meet the requirements of the duties test—in other words, as a floor to identify those who are obviously nonexempt. Once the salary threshold is met, the duties test applies. Thus, if an employee is paid above the



salary threshold, the employer would then need to examine the type of duties the employee performs in order to determine whether the employee is exempt.

In 2016, the U.S. Department of Labor (“DOL”) proposed increasing the minimum weekly salary threshold from \$455 per week to \$913 per week. A federal court correctly struck down the proposed rule on the theory that, by setting the salary threshold so high, the U.S. DOL had effectively made the minimum weekly salary the sole arbiter of exempt status.

The Department has proposed increasing the current existing salary threshold in Pennsylvania (\$455 per week under federal law) to \$921 per week under Pennsylvania state law in just a two-year window. By more than doubling the salary threshold, Pennsylvania’s new threshold will become the sole arbiter of exempt status in most cases and will particularly affect small business and employers in rural areas whose salaries may be lower than those of large or urban employers.

In addition, under the current proposed regulations, the salary threshold will automatically adjust every three years based on the 30th percentile of full-time salaried workers in the Northeast census region as determined by the U.S. DOL. While the proposal for automatic adjustments is well-intentioned, it would have a significant impact on the salary threshold. Each time employers are forced to reclassify employees from exempt to nonexempt due to a change in the minimum threshold, the bottom of the data set of those newly reclassified employees will disappear—driving the salary threshold higher and higher. The fact that there is no limit or cap in the proposed regulations poses a very real risk that the salary threshold could become so high that a majority of employees doing exempt-type work would shift to a nonexempt classification.

In an apparent attempt to avoid the fate of the 2016 U.S. DOL rule, the Department set the minimum salary based on the 30th percentile of full-time salaried workers in the Northeast, a marginal contrast to the original 40th percentile proposed by the U.S. DOL in 2016. However, this slight percentile decrease does not change the reality of the situation, nor correct a fatal flaw of the proposal.

Further disconcerting is the Department’s reliance on data from the entire Northeast region, as opposed to from only the commonwealth. The Northeast includes areas such as Boston, New York City, and Washington, D.C.—all of which pay higher salaries than Pennsylvania employers. Even at the 30th percentile, the practical effect will be for the minimum salary to eclipse the duties requirements for most Pennsylvania employees.

The Department should expect a legal challenge to its rule, should it be finalized, similar to the successful challenge to the 2016 U.S. DOL final rule. As was the case under federal law, employers and employees alike will exist in a state of unhealthy uncertainty as the litigation moves forward.

II. Negative Impact of Proposed Change on Employers and Employees

The Department contends that the regulation will have a “small impact on Pennsylvania’s ability to compete” and makes several claims about the possible limited impact or even benefits of the rule, including the suggestion that the rule could force employers to make their operations more efficient to eliminate the need for overtime. We respectfully and strongly disagree.

In response to the proposed regulation, Pennsylvania employers will have to decide whether to increase salaries so that employees who are affected by the new salary threshold remain exempt. This will undoubtedly increase the cost of doing business for those who elect to do so, making such employers potentially less competitive with the concomitant risk to jobs. This is especially critical in Pennsylvania, where the Independent



Regulatory Review Commission has estimated that 98 percent of the businesses required to comply with the regulation are small businesses. These employers must offset these additional costs and may do so by reducing benefits or limiting salary increases for current employees.

Smaller employers and particularly those in rural areas may find the minimum salary cost increase prohibitive. To avoid the cost increase, these employers have additional options, such as:

- Convert the exempt employee to nonexempt but decrease the base rate of pay to account for anticipated overtime.
- Restructure the one full-time exempt job into two part-time jobs that are less likely to have full benefits.
- Convert the employee to nonexempt and enforce a strong no-overtime policy—whatever work the converted employee could not accomplish could be given to lower-paid, part-time employees (presumably without benefits), located inside or outside of Pennsylvania.

Strictly limiting overtime work may result in additional negative employment consequences, including increased pressure to get the work done in 40 hours, reduced workplace flexibility, loss of professional status and reduced access to opportunity to gain needed experience.

If history is any guide, we have a strong indication that such dramatic changes to overtime rules would have a negative effect on employees. In anticipation of the now-invalidated 2016 U.S. DOL rules, SHRM asked its members in 2016 how likely certain scenarios would be if the U.S. DOL's revised regulation led to an increased number of employees eligible for overtime pay.

In that survey, 70 percent of organizations indicated that the most likely response would be more restrictive overtime policies leading to a reduction in employees working overtime. The next most likely change would be decreased workplace flexibility and autonomy for employees who must revert to a mentality of clocking in and out of work in order to track their work time. SHRM members report that many employees view reclassification from exempt to nonexempt as akin to a demotion, resulting in decreased morale.

The Department also minimizes the impact of the proposal on the estimated 108,491 nonprofit organizations in Pennsylvania. In its regulatory analysis, the Department suggests that nonprofits can somehow mitigate the impact of the increased salary threshold and overtime costs through "decisions and adaptations the nonprofit organization chooses to make in the least costly way possible." By contrast, SHRM's outreach to nonprofit organizations in response to the 2016 federal proposed salary threshold, upon which the Department bases its proposal, indicated real concerns from the nonprofit community. According to SHRM members working in nonprofit organizations, which often operate on tight budgets, nonprofits were likely to take steps to ensure that reclassified employees did not work overtime and to restructure jobs to rely on more part-time employees, often without benefits.

The nonprofit sector is also unique in its inability to pass on the costs associated with new wage mandates. With limited options to pass on these costs, nonprofits likely will have to decrease services. The Department's suggestion that "the phase-in period provides these nonprofits with the ability to adjust operationally and strategically with their funding requests" is cold comfort in today's atmosphere of declining charitable giving.

To the extent the proposal increases labor costs in both the for-profit and not-for-profit sectors, the proposed regulations will make Pennsylvania less competitive with other states in which it competes, such as Ohio, Michigan, South Carolina and Tennessee. As a result, the proposed rule may cause employers to move



work outside of Pennsylvania. Further, it may not only discourage existing employers from expanding operations in Pennsylvania, but it may also discourage entrepreneurs from starting businesses in Pennsylvania.

Pennsylvania already ranks in the bottom third of states for job growth. *Employment Rankings, U.S. News & World Report* (2018) <https://www.usnews.com/news/best-states/rankings/economy/employment>. We have concerns that the Department's proposal could result in Pennsylvania's ending up even lower when it comes to job growth.

III. The Proposal Fails to Meet the Department's Stated Purpose of Aligning Pennsylvania's Overtime Rules with the Federal Rules Under the Fair Labor Standards Act (FLSA)

The Department's proposal to more than double the minimum salary threshold (beyond the current FLSA minimum salary) is not the only concerning aspect of the proposed regulations. Equally concerning is the fact that the proposed rule fails to meet its own stated objective—to align the Pennsylvania rules with the FLSA rule. The Department's proposal contains several inconsistencies with the FLSA, as identified below.

A. The Proposal Fails to Incorporate Several White-Collar Exemptions That Exist Under the FLSA

Several FLSA exemptions are not part of the Department's proposal, including exemptions for:

- Computer professionals.
- Highly compensated employees.
- Employees of educational establishments, including colleges and universities (a specific administrative exemption under the FLSA).
- Teachers (a specific professional exemption under the FLSA).

B. The Proposal Alters the Outside Sales Exemption

Most significantly, the current definition for the outside sales exemption under Pennsylvania law includes a 20 percent limitation on the amount of work that is not directly related to or in conjunction with such outside sales. No such limitation exists under federal law, which applies a qualitative rather than quantitative primary duty test.

C. The Proposal Changes the Exemption Language as Used in the FLSA

While purporting to mirror the federal requirements, the Department's proposal does not utilize the same exemption language. For example, the proposed Department exemption for executives requires executive exempt employees to "customarily and regularly" exercise discretionary powers, a requirement that does not exist under the FLSA.

Similarly, the proposed Department exemption for administrative employees requires administrative exempt employees to "customarily and regularly" exercise discretion and independent judgment with respect to matters of significance. The corresponding counterpart in the FLSA requires only that the employee's primary duty "include" the exercise of discretion and independent judgment with respect to matters of significance.



D. The Proposal Fails to Define Certain Critical Terms

The Department's proposal leaves certain key terms undefined, leaving employers in a situation of uncertainty as they attempt to comply and opening up potential for litigation. Critical terms include:

- **Primary duty.** While the Department correctly eliminates the existing percentage requirements from the duties test (except as to outside sales employees, as noted above), the Department provides no guidance on what is a "primary duty." Based on the Department's comments, the definition of "primary duty" should be the same as applied under federal law—utilizing a quantitative approach. However, in the absence of clear language, this is an issue that invites litigation.
- **Salary basis.** Will the Department follow federal law? What deductions will be permitted without violating the salary basis test? Employers should not have to guess and risk the cost or business diversion of litigation when the Department could, and should, provide guidance consistent with federal law.
- **Concurrent duties test.** The FLSA recognizes the concurrent duties test as applied to executive employees. This test is particularly important to brick-and-mortar retail, an industry that is struggling to survive. The proposed Department regulations are silent on this noteworthy test. At a very minimum, the silence creates a serious risk of litigation that could put a barely surviving retail establishment out of business.

These are but some of the areas where the Department proposal differs from the FLSA. The differences provide a lack of guidance to employers and employees alike. The absence of guidance benefits no one but the lawyers who will inevitably end up litigating these issues.

In today's competitive climate, employers often cannot pass on the cost of litigation (or government-mandated increased labor costs) to customers. As a result, these proposed regulations could have the unintended result of potentially limiting the amount of money available for employee compensation, benefits and other programs.

IV. Federal DOL Proposed Rule

The federal DOL has made clear that it intends to propose a new rule early in 2019. Employers subsequently will need to make changes to adapt and conform to the new rule, whatever it may be.

The Department has stated that one of its primary goals in implementing the proposed regulations is to align Pennsylvania law with federal law. This may prove to be a near-impossible task, as the federal law is *going to change*. In fact, the U.S. DOL has already begun the regulatory process by taking public comment on the federal overtime rule through its July 26, 2017, Request for Information and identifying in its spring regulatory agenda January 2019 as the date for publication of a new proposed rule.

Significantly, as noted in Section III, the changes proposed by the Department do not even align Pennsylvania law with the current FLSA implementing regulations, let alone anticipate what is expected in early 2019.

If the proposed changes become final before the new FLSA rule is finalized, one can anticipate an even greater chasm between federal and Pennsylvania law. Such a lack of alignment between federal and



Pennsylvania law will leave employers struggling to implement inconsistent federal and state regulations in a legislative and regulatory environment that cries out for consistency.

V. Conclusion

We respectfully request the Department defer its final rule until the federal DOL publishes its new rule. Alternatively, we request the Department modify its proposed rule to provide simply that the white-collar exemptions under federal and Pennsylvania law are the same in all respects.

Respectfully submitted,

Judy Rang

Judy Rang
State Director

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan A. Segal".

Jonathan A. Segal
Legislative Director