

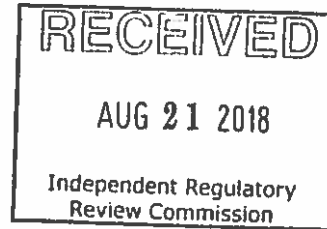


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Bryan M. Smolock
Director, Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas Street, Room 1301
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Re: Comments on the Department of Labor and Industry's Proposed Rulemaking for 34 PA Code, Chapter 231 on Overtime Pay, Minimum Wage #12-106 (IRRC #3202)

August 20, 2018

Dear Mr. Smolock:

I appreciate the opportunity to provide public comment on the proposed overtime changes to the Pennsylvania Minimum Wage Act (35 P.S. §333.101) (PMWA). I currently serve as General Counsel and Vice President for Legal Affairs at Mercyhurst University. Mercyhurst is a Catholic private liberal arts Mercy institution with over 3,000 students in Erie, PA. We are rapidly approaching our centennial celebration. We offer master, bachelor, and associate level degrees, and certificates. We are home to twenty-two Division 2 varsity teams, and two Division 1 teams. Some of our marquee academic programs include Intelligence Studies and Forensic Science, both housed in our Tom Ridge College for Intelligence Studies and Applied Sciences. With approximately 400 full-time employees and 200 part-time employees, we are one of the top twenty-five employers in Erie County, contributing hundreds of millions of dollars to the local and regional economy each year. In the following comments, I have attempted to 1) Outline some problematic current discrepancies between the PMWA and the FLSA; 2) Describe how an exacerbation of these differences through increasing the state overtime threshold will negatively impact higher education institutions, students, workers, local communities and businesses in Pennsylvania; 3) Provide some concrete solutions that could alleviate the stated concerns.

1) Employers in Pennsylvania must follow both the state (PMWA) and federal (FLSA) rules related to overtime pay. There are significant points of divergence currently between the federal and Pennsylvania rules on exemption status. Some key areas where Pennsylvania law does not track with the federal law include a) the scope and application of the Professional Exemption; b) the scope and application of the Administrative Exemption; and c) the existence of a Computer Employees Exemption.

a) Scope and Application of the Professional Exemption

The FLSA clearly establishes a Professional Exemption category that explicitly includes post-secondary teachers. There is no salary requirement for teachers under the FLSA. In other words they do not have to make \$455/week to be exempt. They are exempt by virtue of their

bona fide teaching position. Teaching must be their primary duty under the FLSA. That is not the case in Pennsylvania. In Pennsylvania, a minimum salary of \$250/week must be met and the exemption is limited by the narrow language found in the Professional Exemption statutory language. Furthermore, a teacher in Pennsylvania must spend no more than 20% of their time on non-teaching duties. No such specific requirement exists in the FLSA.

The US DOL issued a fact sheet that stated other “professional” employees such as coaches, psychologists, certified public accountants, and certified athletic trainers, and librarians, may also be exempt under the “Professional Exemption”, so long as they meet the salary test of \$455/week. Coaches can be exempt with no concern for meeting the threshold if teaching their sport is their “primary” function. This standard differs from the PMWA. The effect of this Professional Exemption discrepancy is that the Federal rules provide institutions with a clearly defined exemption status for coaches and other critical academic professionals who are not teachers. This clarity is lacking in the PMWA.

b) **Scope and Application of the Administrative Exemption**

The US DOL explicitly includes the following “academic administrative employees” in higher education as exempt under the Administrative Exemption category: academic counselors, financial aid counselors, department heads, intervention specialists, academic advisors, and anyone else who works in academic or educational training or instruction. The PMWA does not provide any specific guidance on these employees.

c) **Existence of a Computer Employees Exemption**

The FLSA specifically recognizes an exemption category for Computer Employees. The PMWA does not recognize this as an exemption category.

2) Section (1) above outlines some of the current areas of divergence between the FLSA and the PMWA. With the recently announced proposed changes in the PMWA overtime threshold, taking the exemption salary level from \$23,660 to \$47,892 over the next five years, the divergence between the two laws will increase exponentially. This will create significant challenges for our institution and the other 150+ higher education institutions across Pennsylvania. The proposed changes in the PMWA will have uniquely negative impacts on colleges and universities. These negative impacts will be felt most by students, their families, employees, local businesses, and communities. The negative impacts will also be felt financially at the state level. Under the new thresholds, most of the assistant coaches, admissions counselors, financial aid counselors, and academic counselors employed at our institution may become non-exempt. Moving these employees from exempt to non-exempt will cause a myriad of problems including those listed below.

a) **Reduction in Student Services and Programs**

According to the Department of Education 2014 IPEDS report, there are over 690,000 non-profit, higher education students in Pennsylvania. These students will be negatively impacted because many universities will be forced to reduce the student services they currently offer. These services include academic and financial aid counseling, crisis response, coaching, and supervisory/support tasks to all educational functions. Our students study, eat, play, and live with us 365 days a year, 24 hours a day, 7

days a week. We have a moral and ethical obligation to be available to our students to assist with classes, athletics, injuries, and crises. The stark reality is that we may soon be finding ourselves telling our employees, "You can't help that student because you can't work any more hours this week because there is no money left in the budget for overtime pay." This negatively impacts the state because state-funded programs will be forced to pick up the slack. If we cannot employ adequate support services to students, the burden of this work will go to local rape crisis centers, mental health facilities, local police departments, and other state-funded support services and entities. State-funded entities will have to assist us much more than they do now.

There is also a distinct possibility that institutions will be forced to make cuts to certain programs, including athletic teams, tutoring, and other student support services. We simply do not have the ability to pay the overtime that would occur in certain areas, and we also cannot afford to hire more people. This harms students and also harms the state. Pennsylvania risks becoming a state known for the low quality of student services and programs at our colleges and universities. The issue of reduced services and programs will be unique to Pennsylvania because other states (who more closely mirror FLSA) will be able to keep more people "exempt" and therefore offer more robust services and programs to students. This reduction in the reputation of colleges in Pennsylvania harms our business and the communities who rely on the presence and health of the institution in their district. The impact of this will be felt across entire communities in the state, where it is not uncommon for the biggest employer and local economic engine to be a higher education institution.

One of the most poignant examples of the negative impact on programs comes from athletics. Our baseball team plays in the PSAC conference. This conference is home to Millersville University, Shippensburg University, as well as many other state system schools. PSAC often plays double header/double elimination games over the course of a weekend. Teams travel on Thursday or Friday and they may end up playing two games or four games, depending on their play. They may get rained out, or have other weather-related issues/delays. The game may go into extra innings. A player may get injured. Heading out on Friday, the five person coaching staff may end up working three 15 hour days for a total of 225 worked hours or they may work one 10 hour day for a total of 50 worked hours. There is simply no way of knowing what to expect when so much is dependent on so many unknown factors. This type of uncertainty in overtime costs across dozens or even hundreds of employees could push some vulnerable institutions into perilous cash flow situations where they cannot make institutional pay roll because of the unanticipated overtime. If the overtime had not been budgeted or approved, the only solution may end up being for a team to pack it in and forfeit the next round of play. Colleges and universities do not have the flexibility to adjust to these budgetary changes in real time. We generally collect revenue two times a year with each semester, and budgets are set a year in advance. Once set, there are no "new funds" we can call upon to make up increased unexpected costs.

Certainly the scenario above would be a nightmare one for our coaches, student-athletes, their families, and communities. It will also certainly negatively impact a coach's ability to recruit in the future. It is worth noting that the vast majority of assistant coaches in the state system schools earn under \$47,892. Without some carve-out akin to that provided by the DOL on these employees, the state will be facing extraordinary overtime costs associated with athletics as a result of this change to the PMWA. The average salary of an assistant coach at our institution is under \$40,000, which is common across private

Institutions in Pennsylvania. Giving each of them an \$8,000+ raise is not financially possible, forcing us to make them hourly, and leading to the bizarre and unfortunate outcomes of cancelling playoff games, forbidding coaches from visiting players in the hospital when they are injured, or doing anything else “extra” with students outside of practice and game times to ensure they don’t use any overtime hours. These same types of prohibitions will be put in place for admissions counselors, financial aid counselors, and other educational support personnel – no returning calls or emails outside 8:30-4:30, or meeting with parents, or students after hours. This is antithetical to the culture, mission and values of most colleges and universities, and more importantly to the needs of our students.

b) Increases in Tuition

The main source of revenue for many higher education institutions in Pennsylvania is tuition. When our costs go up, we have to increase tuition, we have no other levers to pull. When we increase tuition, student debt increases, family disposable income goes down which harms businesses and the tax base, and fewer students pursue higher education. Unfortunately, this impact may be felt more so here in Pennsylvania than in other states whose laws track more closely with the FLSA. Institutions in other states can keep coaches, and other key academic administrators exempt and be relieved of the financial burden of paying overtime to a significant part of their workforce. One unintended effect of these new thresholds is that Pennsylvania may quickly become one of the most expensive states in which to earn a college degree.

c) Wage Uncertainty

According to the Department of Education 2014 IPEDS report, non-profit higher education institutions in Pennsylvania employ over 138,000 people. Many of our workers will likely suffer some hardships under the new regulations. The primary example of the type of worker this will most negatively impact is an assistant coach who earns under the new threshold. In order to keep this assistant coach employed, we will have to “wage-smooth” her to be at an hourly rate that will amount to her current annual salary. We would look at her current salary, estimate how many total hours of overtime she will work in the entire year and then “wage-smooth” her to get to a regular hourly rate that will maintain her current salary. If she is currently a \$40,000/year salaried exempt employee, she will soon become an hourly non-exempt employee. Her current hourly rate would be \$20.51 (\$40,000/1950 hours). If we determined that she works on average 50 hours/week throughout the year, and paid her \$20.51 for the 1950 hours of regular time she worked and \$30.76 for the 520 hours of overtime she worked, her new salary would be approximately \$55,000/year (1950 @ \$20.51 + 520 @ \$30.76). This \$15,000 raise across the institution for each person who is newly non-exempt is simply not possible for many institutions.

Most institutions don’t have the margins or budgets to do this. Because it will be impossible to give all the newly non-exempt employees this type of raise, institutions are forced to reduce hourly rates through “wage-smoothing”. In order to “wage-smooth” this exemplary employee and keep her at her current \$40,000 salary, we have to take her down to \$15/hour (1950 @ \$15 + 520 @ \$22.5 = \$40,950). She will make nearly the same exact salary and work the same

number of hours that year. The big downside for her is that she will now have weeks where her pay is very low and weeks where it is very high. During a week where she works 30 hours, her pay check will be \$450 less withholdings for health insurance, taxes, etc. During weeks when she works 60 hours, her pay check will be \$1,050 less withholdings. These low weeks will all occur together and the high weeks will all occur together because low weeks will occur during out of season and high weeks will all occur while in season. So we in essence have to pay her a very low wage for months at a time and then a higher wage for months at a time. This is a not a good outcome for her. It will jeopardize her ability to pay all of her monthly bills with a weekly rate this low. The other downside for her is that she *feels* she has been demoted. She also now has to keep track of every hour she works and has lost all flexibility. She also now will be tightly controlled by the administration, and disciplined (including termination) for working overtime without permission. And perhaps the worst consequence for her is that she can no longer dedicate herself to her student-athletes. If a player is injured during a game, she may be told she can't go to the hospital to visit that student-athlete because it would be "working" and there is no money in the budget for that. She may also be told that she has to pack up the team in the middle of a tournament because her staff have all already worked as much overtime as is permitted/possible for that week.

Also noteworthy is the fact that these wage-smoothed rates are so low that they may make Pennsylvania an unattractive place to come work. A valuable assistant coach will have the choice to either go to a neighboring state (who mirrors FLSA) and make \$40,000 a year as a salaried exempt employee (under the FLSA and state law), or come take a job in Pennsylvania doing the exact same thing earning \$15.00/hour. There is little doubt which would be more attractive to a young professional. Becoming an unattractive place to live and work is bad for our communities, the businesses in them, and the tax base.

It is worth noting that the desire to keep coaches exempt is not solely driven by a concern re the certainty of significant overtime work/pay, but is in large part a reflection of the desire to respect and maintain the valuable work that our teams, coaches, and student-athletes do. Their work truly is unique. They train intensely for a period of time, compete intensely for a period of time, and then rest for a period of time. The time spent between a coach and his or her athletes is a mix of work, play, and quasi-familial bonding. They don't go to the hospital to visit an injured player, or stay an extra hour in the gym to work on free throws, or meet with parents because they are "working". It is often about much more than that – mentoring, caretaking, bonding, and friendship. We are being forced to find a way to take those components out of coaching and many other academic support functions.

d) Increased litigation

The current state of divergence between federal and state law, on coaches in particular, makes institutions vulnerable to wage claims under the PMWA. These claims are costly for institutions and any state-wide increase in litigation is costly for the state court system. Colleges and universities have increasingly been the target of FLSA and state wage claims in part because of the uncertainty that exists and the lucrative nature of the claims due in part to their fee-shifting

component. Increasing the state-level threshold while keeping the federal at \$455/week exacerbates this risk significantly.

3) There are numerous steps that could be taken to alleviate the burden of this proposed change on higher education institutions, including the following: a) update all exemption categories to align with FLSA and/or issue guidance on certain higher education employees; b) exempt colleges and universities from the PMWA minimum wage and overtime rules; c) keep exemption threshold in line with federal.

- a) The United States Department of Labor, in recognition of the unique work environment at colleges and universities, provided helpful guidance for higher education institutions through the attached "Fact Sheet #17S Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA)" (<https://www.dol.gov/whd/overtime/whdfs17s.pdf>). A move to align Pennsylvania law with the guidance from the DOL on these employees would be immensely helpful. Any movement towards more aligned exemption categories would be welcome, including the creation of a computer employee exemption such as the one found in the FLSA.
- b) Completely exempting colleges and universities, or certain employees within them who work with students would be a welcome solution. It would allow us to act in accord with our institutional missions to educate, and support our students in their personal and professional growth. It is worth noting that part of what makes colleges and universities unique, as it relates to this issue, is that we are not working for financial profit. The "profit" we work towards is student growth, maturity, success, and learning. The mission in higher education is about what we create in people and for society, not money. Our ability to achieve these non-financial outcomes is called into question when we are forced to behave like a for-profit company. The PMWA exempts numerous categories of workers from the overtime and minimum wage rules, adding certain categories of college and university employees would alleviate many of the concerns stated herein.
- c) Any situation in which an employer has two sets of laws to follow in the same action is burdensome. The complexity of having differing exemption category definitions/guidance between PMWA and FLSA is difficult as-is. The proposed salary threshold changes in the PMW would create additional burdens and more divergence between these two sets of laws. Any action that is taken should be towards better alignment not worse.

My institution, like many others across the country, is struggling to deal with the intense competitive, demographic, and regulatory pressures facing higher education today. We laud the intention of moving to increase wages across the Commonwealth and have no doubt that in some cases, the increased threshold may accomplish that. However, in higher education, where tuition/enrollment and state budgets fund operations, the outcome will not be increased wages, but rather reduced student-services and harm to employees. In recognition of that we ask that you work to address the negative outcomes these threshold increases would have on colleges and universities in the Commonwealth through any one or combination of the solutions provided above. In closing, I thank you for your service to the Commonwealth and your willingness to hear from the constituents in the state who will be seriously impacted by this drastic change to the overtime rules. I am happy to provide any additional information should it be deemed helpful.

Sincerely,

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