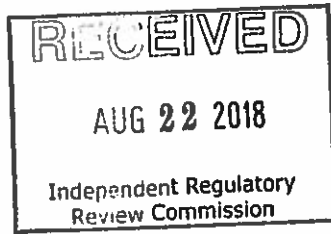


3202



August 22, 2018



Pennsylvania Ski
Areas Association

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VIA ELECTRONIC MAIL (bsmolock@pa.gov) AND HAND DELIVERY

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

**Re: Public Comment to Proposal 12-106 regarding 34 Pa. Code Chapter 231;
IRRC No. 3202**

Dear Mr. Smolock:

The Pennsylvania Ski Areas Association (PSAA) thanks you for the opportunity to comment on the proposed regulations submitted by the Pennsylvania Department of Labor and Industry; specifically, amendments to 34 Pa. Code Chapter 231 regarding Overtime Pay and Exemptions.

PSAA is a non-profit association that develops and promotes the Pennsylvania ski industry and its member Ski Areas and Resorts across Pennsylvania. Our members are gravely concerned with the proposed regulations and would like to explain the negative impacts presented by the proposed rule as it is currently written. While the proposal may, in theory, have noble aspirations, the reality is that businesses across Pennsylvania will be hurt and employees/families will suffer the impact of this damage to businesses.

First and foremost, the proposed salary thresholds for exempt employees are unrealistically high. The currently applicable weekly threshold of \$455¹ will be increased 102% to \$921 per week in just three short years. Such a sharp increase will be unsustainable for many Pennsylvania businesses. The National Retail Federation, when evaluating similar proposals, estimated hundreds of millions of dollars of increased costs to businesses, well beyond those costs allocated solely to payroll. For example, change to payroll software alone presents a steep cost. Likewise, business models and day-to-day staffing arrangements will be disrupted while trying to come into compliance with such a groundbreaking change. Moreover, as more fully addressed below, increased costs will be passed along to consumers and result in unnecessary layoffs of employees.

¹ Per the Federal Labor Standards Act, which is higher than current Pennsylvania authority.

Second, and equally important, the proposal's expansive overhaul eliminates, for practical purposes, the Executive, Administrative or Professional (EAP) duties tests -- abandoning decades of authority (that has been rigorously tested in our courts) regarding the EAP exemption. As the proposal recognizes, the U.S. Department of Labor adopted a similar increased salary threshold in 2016 -- which a federal district court enjoined. See *Nevada v. U.S. Dep't of Labor*, 4:16-CV-00731 (E.D. Tx. 11/22/16). In *Nevada*, the federal judge determined that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption". In other words, the judge held the U.S. Department of Labor could not raise the salary threshold so high as to supplant the duties tests outlined in the federal Fair Labor Standards Act. The L&I proposal mimics the same salary threshold from the 2016 federal regulation and, as such, does nothing to avoid supplanting the duties test.

Third, such a fundamental change should be handled by the Legislature, not through an agency action. Legislative action would ensure that representatives from across the Commonwealth take a more pragmatic approach and deliberate over any necessary changes.

Finally, the PSAA cannot ignore that the U.S. Department of Labor is currently engaged in the rulemaking process on the exact same issue -- making this proposal unnecessary and, likely, duplicative.

Negative Impact for Industry, Workers, and Consumers

In 2015, SnowSports Industries America (SIA), which represents various snow sport resorts, conducted a survey regarding the U.S. Department of Labor's increase to the salary threshold. This survey revealed that 25% of all resorts predicted they would have to pass on the increased payroll costs to consumers. Even more concerning, nearly 20% of all resorts anticipated layoffs. In addition, the America Outdoors Association, which represents recreation companies across the United States, reported that its nearly 600 members anticipated catastrophic layoffs. PSAA members share similar concerns about Pennsylvania's nearly identical proposal.

As with any change in regulation, employers will have the choice of passing along the increased costs to consumers or cutting costs by eliminating jobs and/or lowering wages. Even if layoffs or wage cuts can be avoided, employers will now be forced to develop strict policies to control overtime costs for previously exempt EAP employees. This will deter opportunity for wage growth and professional development. To explain, employees that were previously salaried managers may have traveled and/or attended various educational programs to advance their career. Now, that same professional development time will not be exempt; instead, it will be viewed as overtime and result in increased costs to employers. Logic dictates that employers will have to cut back on

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such professional development, ultimately hurting employees who aspire to advancement in their education and career.

Hardship from Automatic Increase of Salary Threshold

The proposed automatic increase of the salary threshold after every three (3) year period places a further burden on employers, including PSAA member resorts. We submit that automatic increases, which take effect without deliberation, will surely result in unintended consequences similar to those caused by the initial increase. In addition, such blind automatic increases fail to take into consideration the economic realities and/or industry concerns at the time of the increase. Such deliberations should be thorough and should be made by the Legislature.

Proposal Relies on Tainted Opinion

Additionally, PSAA must respectfully raise its concern about L&I's reliance on the opinion of the Economic Policy Institute (Institute). L&I's proposal includes as "Attachment A" a publication authored by the Institute, which supports a higher overtime threshold. L&I relies upon the Institute's opinion to justify its proposed increased salary threshold – claiming that the Institute's analysis proves up to 460,000 Pennsylvania employees will be benefited.

L&I's reliance upon the Institute is fundamentally flawed. While the Institute advertises itself as a non-partisan entity on its website, further investigation into this claim reveals that it is false. To the contrary, the Institute has revealed itself as an advocate for dramatic and unreasonable increases in the salary threshold, without objective support for its position. In fact, in 2015, during the initial public comment period for the similar federal regulation on overtime pay, the Institute collected and submitted 9,622 public comments to the U.S. Department of Labor supporting the regulatory change.

In the Institute's public comment regarding similar federal regulations, posted on July 28, 2015, it stated "[t]he Department of Labor should act immediately to raise the overtime threshold to \$50,440...". This is an increase even larger than the one proposed in the L&I rulemaking. [Public Comments are available at <https://www.regulations.gov/docket?D=WHD-2015-0001>. The Institute's public comment is ID: WHD-2015-0001-0933, Tracking number: 1jz-8k8j-9w7y.] PSAA submits that a regulatory change that will impact the lives of all Pennsylvanian's should be based on fair, neutral, and realistic input.

For all the reasons outlined above, PSAA asks that this Department of Labor & Industry reconsider its proposed modification to the salary threshold for exempt employees and, instead, allow the Legislature to address any changes to the current structure to avoid

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negative impact on businesses and citizens within the Commonwealth. PSAA thanks you for your time and attention.

Sincerely,

A handwritten signature in black ink that reads "Donald E. MacAskill". The signature is written in a cursive style with a small star above the letter 'i' in "Askill".

Donald E. MacAskill
President – Pennsylvania Ski Areas Association
President & General Manager – Whitetail Resort

cc: [Pennsylvania Independent Regulatory Review Commission –
irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)