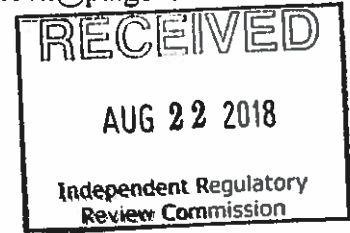




August 20, 2018

Submitted electronically to the Bureau of Labor Law Compliance bsmolock@pa.gov.

Mr. Bryan M. Smolock
Director, Bureau of Labor Law Compliance
Pennsylvania Department of Labor and Industries,
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:

TrueBlue, Inc. (“TrueBlue”) is pleased to submit this letter in response to the request for comments on the proposal from Department of Labor and Industries (“the Department”) revising regulations implementing 34 Pa. Code Chapter 231 to update Executive, Administrative, and Professional (EAP) salary levels to qualify for exemption from overtime. These revisions mirror similar federal efforts in 2016 to increase federal regulations interpreting the Fair Labor Standards Act (FLSA) overtime exemption salary threshold.

We appreciate the Department’s efforts to update the overtime rules to reflect the current state of the economy, labor environment, and bring state law into parity with federal law. TrueBlue supports the comments submitted by the Partnership to Protect Workplace Opportunity. Especially, given that the U.S. Department of Labor is currently undertaking rulemaking to revise the federal salary threshold, we urge Pennsylvania to allow that process to be completed before considering any Pennsylvania-specific thresholds. We would also like to take this opportunity to offer additional perspective on the Notice of Proposed Regulations.

This letter provides background on the unique role and nature of temporary employment in the American and Pennsylvanian economy. Our temporary employees are primarily non-exempt hourly workers and will not be affected by the proposed rule. The comments we offer focus on our internal professional, managerial, and operations employees. Second, this letter discusses the issue of applying non-discretionary bonuses and incentive payments towards the salary level test; changes to the duties test; and the timing of both the implementation of the new regulations and periodic increases to the minimum EAP.

TRUEBLUE

TrueBlue offers a continuum of staffing, workforce and recruiting solutions. As a leading supplier of temporary work, TrueBlue provides employment opportunities and a bridge to permanent jobs for many who otherwise face barriers to entering the workforce. TrueBlue connects as many as 500,000 people to work across the United States each year and helps more than 100,000 businesses be more productive. In 2017, we placed more than 15,000 people in permanent jobs, including more than 500 veterans in the state of Pennsylvania. We connect people to work by filling individual positions on demand, staffing entire facilities, and managing the recruiting processes for our business clients. Our customers include companies in industries such as construction, transportation, aviation, waste, hospitality, retail, renewable energy, pharmaceuticals, financial services, and manufacturing.

INCLUDE LARGER PERCENTAGE OF NONDISCRETIONARY BONUSES AND INCENTIVE PAYMENTS IN CALCULATION OF THE STANDARD SALARY LEVEL TEST

Currently the proposed regulations allow 10 percent of nondiscretionary bonuses and incentive payments to be used in the calculation of the standard salary level test. We strongly urge the Department to increase the percentage nondiscretionary bonuses and incentive payments (for example, incentives tied to productivity and profitability) to satisfy the salary level test; further, the allowance for nondiscretionary bonuses and incentive payments should be permitted without a percentage cap. Treating bonuses and incentives in this way reflects the treatment of the same types of non-discretionary compensation required when determining the overtime rate for non-exempt salaried employees as required by federal law (29 C.F.R. §§ 778.110(b) & 778.117).

Nondiscretionary bonuses and incentive payments are integral tools used in a range of industries. You acknowledge this fact by recognizing some portion of nondiscretionary bonuses and incentive pay be included in the standard salary level test. However, the 10 percent of total incentive pay does not reflect the benefit that this pay structure offers employees. In the context of TrueBlue, bonuses and incentive payments are an integral part of our employment package for branch managers, recruiting staff, and other operations team members.

Our company's incentive plan is designed to reward branch managers for meeting specified targets and growing Net Operation Income. This program: 1) encourages effective customer service; 2) provides competitive levels of cash compensation to branch managers; 3) encourages employee retention by rewarding hard work; 4) rewards employees for maintaining a safe workplace, finding jobs for our temporary employees, and complying with federal, state, and company policies; and 5) rewards, reinforces, and recognizes manager contributions to the company. Further, there is no maximum bonus rate, allowing managers to make a substantial amount above their base salaries. For example, a branch manager with a base pay rate of \$36,000.00 could actually earn \$80,000.00 through bonuses and commissions, which is why the program has the strong support of our managers.

We are concerned that simply raising the salary threshold across the board may actually harm employees rather than benefit them. If the Department raises the salary threshold across the board rather than separately accounting for greater percentage inclusion of non-discretionary bonuses and incentive payments, companies may be required to reclassify a sizeable portion of their employees as non-exempt. Companies may be under pressure to simply raise employee salaries to the threshold limit but eliminate their bonus and incentive programs altogether. Such a change would remove an important lever used by employers to incentivize employee

performance. Moreover, such a change would remove a significant opportunity for employees to increase their take-home pay. Furthermore, the elimination of non-discretionary bonuses and incentive payments may reduce employee retention, which will increase turnover and costs for employers. By contrast, including greater percentages of non-discretionary bonuses and incentive payments in the salary level test would help preserve these programs, which are important to employers and employees alike.

DUTIES TESTS ARE NOT BROUGHT IN LINE WITH FLSA DUTIES TEST STANDARDS CREATING CONFLICTS

We commend the state of Pennsylvania, who in directing a review of this issue, aimed to simplify it. However, proposals to change the duties test, especially failure to incorporate key definitions contained in the FLSA white collar regulations into the PMWA duties update, complicate it. This becomes glaringly apparent when considering the proposed PMWA duties tests requiring executive exempt employees to “customarily and regularly” exercise “discretionary power”. Duties tests for executive exempt employees under federal law do not contain these requirements and thus further complicate standards and how the courts interpret the differences between these two sets of regulations.

We highly recommend that the Department maintain the simple, easily administrable existing primary duties test under FLSA standards as opposed to developing tests that do not fall in line with federal duties tests.

PROVIDE ADEQUATE TIME TO IMPLEMENT AND ADJUST MINIMUM SALARY THROUGH REGULATORY REVIEW

Current regulations at the state level must be updated to match federal guidelines establishing the exempt salary rate at \$455 per week or \$23,660 per year. The proposed regulations *more than double* the federal salary threshold to \$921 per week or \$47,892 per year with *automatic triennial* increases. This increase will have a significant impact on employers and employees and we want to thank the Department for spreading these changes over the next four years. Time is needed to determine how best to respond, including reevaluating income and expense expectations and determining what operational changes may be needed in order to accommodate this incredible increase in costs.

We agree that, once established, and in order to avoid such drastic increases in the future, that the minimum salary requirement should be regularly reviewed. However, automatic adjustments do not give employers nor employees the opportunity to engage in the administrative regulatory review. Instead, the Department should schedule and complete regularly-timed reviews ahead of the triennial increase that includes employers and employees in the.

CONCLUSION

Thank you for the opportunity to comment on the proposed rulemaking process. TrueBlue’s non-discretionary bonus and incentive payment program plays an important role in our ability to succeed in a competitive economy and should be included at a greater level in the Department’s salary level test for the overtime rule exemption relating to executive, administrative, professional, outside sales, and computer employees. The Department should also

keep things simple by maintaining the primary duties test listed in the FLSA so as to not create confusion between the state and federal government. Furthermore, it should engage employers and employees in the three-year periodic formal review.

We look forward to working with the Department to address the issue of nondiscretionary bonuses and incentive payments moving forward. Thank you.

Sincerely,

[Signatory]
Patrick Beharelle
Chief Executive Officer

