



**Together  
Forward.**

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August 22, 2018

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 Society for Human Resource Management (SHRM) appreciates the opportunity to provide input as you consider the potential impacts of the Pennsylvania Department of Labor and Industry's (Department) proposed rulemaking regarding overtime pay under 34 Pa. Code Chapter 231.

SHRM is the world's largest HR professional society, representing 300,000 members in more than 165 countries with over 12,000 members in the Commonwealth of Pennsylvania. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. Building an engaged workforce, including properly classifying employees according to federal and state laws, is a key role for HR in the workplace.

In its proposed regulation, 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. The Department's proposal is largely based on the 2016 federal effort to update the overtime threshold. In drafting its proposal, the Department relied on input from the former chief economist and former solicitor who worked on the federal regulation at the U.S. Department of Labor (U.S. DOL). That rule was ultimately invalidated by a federal court.

The proposal would increase Pennsylvania's current salary threshold from \$455 per week (current threshold under federal law) to \$921 per week under Pennsylvania state law within two-years. This dramatic salary increase, like the one pursued by US DOL in 2016, undermines the traditional role of the salary threshold to identify those employees who are obviously non-exempt. Pennsylvania's increase will instead result in the new threshold becoming the sole arbiter of exempt status, a result that led to the court's invalidation of the US DOL regulation.

Here, the Department pegs its increase to the 30<sup>th</sup> percentile of full-time salaried workers in the Northeast census region rather than solely from the Commonwealth. The Northeast census region includes cities like Boston and New York City which have higher salaries than

Pennsylvania municipalities. Although the Department attempted to avoid the effects of the federal rule by choosing a different measure, the reality is that setting the minimum salary at the 30th percentile will invalidate any analysis of an employee's duties when classifying most Pennsylvania employees.

SHRM has a record of supporting reasonable increases in the salary threshold and we supported the federal FLSA increase proposed in 2003 and implemented in 2004. Pennsylvania's proposal, however, is too high and will present significant challenges for many employers and employees. We are concerned about the impact that the Department's proposal will have on Pennsylvania workplaces, especially small business and nonprofits and urge the Department to defer its rulemaking until U.S. DOL finalizes its overtime revisions which are currently under consideration.

SHRM and its members nationwide were very active in the analysis of the 2016 regulation, pointing out a myriad of concerns and adverse consequences that will flow from establishing an inappropriately high salary threshold. PA SHRM, our affiliate in Pennsylvania, and the Partnership to Protect Workplace Opportunity (PPWO), a coalition of employers of which SHRM is a member, have also submitted comment letters. We echo the concerns set out in those comments including:

- Increased administrative and operations costs for all employers to reclassify employees, particularly those employers in non-urban areas, small businesses, and non-profit sectors;
- Concerns about limited career advancement and diminished workplace flexibility for employees who have been reclassified and will need to track hours worked;
- Decreased morale for employees whose classification changes from exempt to non-exempt due to the new salary threshold;
- Disruption of employee use of mobile devices and remote electronic access to workplace resources, further limiting employee flexibility; and
- Increased litigation based on off-the-clock work claims.

While we will not reiterate the specifics of these issues which are explained in other comments, the impact of the Department's proposal on Pennsylvania nonprofits merits additional attention. Concerns about the impact on nonprofits were key to understanding the negative impacts of doubling the salary threshold at the federal level.

Yet, while the proposed Pennsylvania regulation mirrors the federal proposal, the Department minimizes its impact on the estimated 108,491 nonprofit organizations in Pennsylvania. In its regulatory analysis, the Department suggests that Pennsylvania 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." The Department also suggests that "the phase-in period provides these nonprofits with

the ability to adjust operationally and strategically with their funding requests.” These comments indicate a lack of awareness of the tight budgets and organizational realities of nonprofits.

In our response to the 2016 federal rulemaking, SHRM heard from numerous members working in the nonprofit sector. These nonprofits shared concerns about an inability to pass along costs associated with new wage mandates, the impact on services provided, and changes to work structures that would negatively impact employees.

For many nonprofits, the increased costs of reclassifying employees will result in decreased services. An HR professional working in a Manheim Pennsylvania nonprofit wrote:

Organization income is not tied to profit margins and sales growth but rather donations provided by donor's charitable giving. Many positions within our organization are supervisory or managerial in nature and have salaries below this new projected rate . . . The additional impact of increasing wages will have a direct impact on those organizations' ability to make a difference in their communities and the world.

Similarly, a Lancaster Pennsylvania nonprofit continuing care retirement community described the impact of raising the salary threshold in this way:

We provide housing - independent living and assisted living - as well as skilled nursing care to our older adult residents. We also provide subsidized housing to low-income seniors and provide approximately \$2,000,000 per year in benevolent -- free -- care to residents who have exhausted their financial resources (no one is evicted for inability to pay for housing or skilled nursing care). The average age of our residents is approximately 82 . . . Although we try hard to provide reasonable workloads and reasonable work hours, most of our salaried staff members do work more than 40 hours per week. If we must pay these staff members by the hour, and an overtime premium for work hours over 40 during a week, I have estimated my organization's overtime costs may increase by \$150,000 - \$200,000 per year. For a non-profit organization, this is a huge increase in costs to try to absorb. Our "customers" are our elderly adult residents, many of whom have fixed incomes, health issues, and/or dementia. We cannot pass our increased overtime costs through to them in the form of increased fees without negative repercussions . . . We cannot hire additional staff to compensate unless we generate more revenue to cover the cost. If it is not practical to reduce the work hours of over half our salaried staff, we will need to explore salary freezes and/or benefit reductions for all employees.

SHRM members working for nonprofits also pointed out that their inability to pass on costs means that they are more likely to take steps that may have a negative impact on employees such as ensuring that reclassified employees did not work overtime and restructuring jobs to rely on more part-time employees, often without benefits.

A SHRM member in Milan Pennsylvania summarized the concerns she had as an employee of a nonprofit organization:

I would like to share what the changes to the Exempt status is going to mean for myself and others in my situation at our organization. I work for a non-profit that will not be able to raise my salary or my co-worker's salary to the potential new amount. Because of this, I will be losing my exemption. Being paid overtime, does not make up for the flexibility that I am able to have with my schedule. As a working mother, I am tasked with picking my kids up if they are sick or taking them to their doctors' appointments. The fact that I can do this and not use any PTO time is crucial.

Due to the proposed rule's negative impact on Pennsylvania workplaces, especially nonprofits, and the Department's stated goal of updating Pennsylvania's overtime regulations in alignment with federal law, we believe the Department should withdraw its proposal. U.S. DOL is currently undertaking rulemaking to revise the federal salary threshold. Allowing U.S. DOL to complete its rulemaking will help Pennsylvania avoid the legal challenges and uncertainty employers experienced during the 2016 federal effort.

Respectfully Submitted,



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