ACCESS SERVICES
Creating better ways to serve people with special needs

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Independent Regulatory Review Commission

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Bryan M. Smolock
Director
Bureau of Labor Law Compliance
651 Boas Street, Room 1301, Harrisburg, PA 17121
Submitted via electronic mail at: bsmolock@pa.gov

**RE: Proposed Rulemaking- Minimum Wage Act of 1968 – IRRC Number 3202**

Dear Ms. Ziegler:

Access Services, Inc. appreciates the opportunity to comment on the proposed rule which is being considered again.

For over 30 years, Access Services has been developing innovative ways to provide support services for individuals with special needs in Southeastern Pennsylvania. Today, we are a large non-profit organization of about $32 million, with close to 635 staff members operating in eleven counties within Pennsylvania. We provide services for close to 5,000 people with intellectual and developmental disabilities, and/or mental health needs. Our mission is to empower and serve people in need of specialized supports by providing innovative services that improve their ability to live fulfilling lives in the community.

As you know the community-based health and human service industry is one of the fastest growing in the nation in response to the increasing demand for the provision of home and community-based services including mental health and intellectual disabilities and Autism. It is vital that the Department balance the equally important priorities of ensuring adequate compensation for all workers and ensuring that services and supports that individuals with disabilities and mental health needs rely on remain intact and viable. Agencies like ours strongly support policies that will lift up workers, increase wages, and provide economic stability for employees. However, any changes have to be done in a very carefully thought out and strategic way; especially due to the fact we are predominantly a single payer system reliant upon government funds for the services provided. Changes must take this in to account, and any increase also tied to and supported by an increase in the funding for such services.

**<u>Salary Threshold</u>**

As a Medicaid-funded nonprofit provider, our agency does not have the ability to negotiate rates or to pass on increased operating costs to the people we serve, or other entities.

***Recommendation:*** *We urge that state agencies collaborate to ensure that policies are requited that will result in appropriate funding is in place to meet the requirements of the rule moving forward.*

We are keenly focused on providing exceptional supports and services, compensating employees as aggressively as our industry enables, while managing within very constrained financial realities. In recent years, there have been many new unfunded federal and state regulations that providers have to comply with, without increased rates to accompany them. This has left many providers unable to comply with these pressures without scaling back wages, services, benefits, or all three. As operational costs continue to increase, the rates and reimbursements have not sufficiently kept up, and in previous years have been actually or effectively cut.

***Recommendation:*** *We urge that the threshold not be significantly increased unless or until adequate funding can be assured for publicly-funded providers in light of the recognition that the service delivery system is significantly overburdened.*

The currently proposed salary threshold would create significant hardship for our agency. Raising the threshold each 3rd year thereafter, to the 30th percentile of weekly earnings of full-time salaried workers' in the Northeast census region in the second quarter of the prior year as published by the US Department of labor, is too steep an increase for an agency like ours to absorb.

***Recommendation:*** *Adjust the 2004 salary level of overtime application to qualified employees under $23,660/year by inflation as the basis for setting the standard salary level. If this was done, the $23,660/year threshold would be raised to around $31,270/year (compared to the proposed year 3 threshold at $ 47,892/year).*

The proposed salary threshold increase does not account for the value of non-salary benefits, including health benefits, retirement plan contributions, and other employer-sponsored benefits those providers that are able to currently offer to their salaried employees. Given the importance to worker satisfaction and overall personal economic stability such benefits have, it is appropriate to consider an employee's total compensation rather than only take-home income.

***Recommendation:*** *We recommend that for purposes of meeting the salary threshold,* ***employee benefits*** *received for which the employer bears the financial burden be included in the calculation of total salary.*

The proposed rule does not take into account regional variances in costs of living. The effect of this is to disproportionately harm workers and individuals living in areas that are the least able to absorb additional costs.

***Recommendation:*** *We recommend establishing salary thresholds that are appropriate to clearly delineated geographic regions that account for regional variances in cost of living, following a standard similar to that the federal government already uses for its own employees, contractors, and eligibility for many federally-subsidized programs.*

**Automatic Adjustment of Salary Threshold**

Using percentiles rather than averages of national salary data creates the potential for significant discrepancies between the highest and lowest percentiles. Using an inflation index, particularly the CPI-U as suggested, does not take into account the variance between rural and urban markets. Any inflation index that is an average of national data has this same weakness; it will disproportionally impact different regions, potentially worsening the income disparity in this state, and inadvertently harming the workers the rule seeks to protect.

***Recommendation:*** *We recommend, between these two options, basing the threshold on regional salary data. However, we encourage the Department to consider other methods of setting and adjusting the threshold as outlined elsewhere in these comments. Additionally, we recommend that any increases in the salary threshold be accompanied by a requirement for a corresponding increase in Medicaid rates to accommodate the increase.*

**Duties Tests**

We recommend that the duties tests not be changed for these exemptions. Specifically, we recommend against setting a fixed threshold for time spent on non-exempt duties as it would be overly prescriptive and not take into account differences in duties and expectations that are present in different industries.

In our field, it is not uncommon for a supervisor to perform direct care work as a means of training or modeling to a subordinate how to properly perform the work. If this work were to be classified as non-exempt, it could impede a supervisor's ability to effectively manage his or her subordinate, and would also impose an additional recordkeeping burden. Additionally, given the nature of the work in our field, it is not uncommon for a supervisor to cover a shift for a worker. This is not typically scheduled or planned for, and exempt supervisory employees understand that part of the job may involve performing unscheduled or emergency care in order to ensure continuity of care for a person served. Either of these options would increase the administrative burden on exempt workers and providers, be overly prescriptive, and reduce the flexibility and discretion to perform duties as employees see fit. Finally, to further place limitations on how providers can be flexible for their employees is problematic, especially as generational differences in the workplace often drive interest in flexible work schedules.

***Recommendations:** We recommend against setting any type of bright line threshold. We recommend that changes not be made to the existing PA duties tests.*

**Impact on Worker Satisfaction and Turnover Rate**

If this rule was finalized as proposed, we may be forced to convert currently-exempt salaried employees to hourly workers. This may have a huge negative impact on worker morale and job satisfaction, as well as create operational challenges as we struggle to shift work from exempt employees to others.

It is estimated that this change would impact 11% of the salaried employees at the agency, about 63 people in total. This is a burden Access Services would be hard pressed to bear, and decisions would have to be made to remain financially viable.

Many workers who fall under these exemptions in our field started out as DSPs, and advanced into supervisory or administrative positions that require independent judgment and flexibility. We encourage-exempt employees to take part in various career and education enhancement and training programs in order to advance in their career paths. Placing restrictions on overtime for these employees would take away options for workers to pursue career-advancing extra activities, including participation in committee work and professional organizations that foster career growth and professional development of workers.

Additionally, many salaried exempt employees choose to spend additional time with their teams or individuals served outside of the work environment. Some of these activities are properly classified as work and would be required to count towards hours worked for non-exempt employees. Many providers would be forced to limit these activities if counted toward hours worked, which could have a devastating impact on employee morale (for both supervisors and subordinates), and also on the individuals served.

Therefore, unintended consequences of this rule as proposed previously include a chilling effect on the ability for providers to offer, and for employees to avail themselves of, opportunities for career advancement and personal enrichment.

**Treatment of Nondiscretionary Bonuses and Incentive Payments**

The Department requested comment on the treatment of nondiscretionary bonuses and incentive payments. These payments are awarded to employees that fulfill certain requirements set by the employer as part of their job description. As such, it is within the employee's power to perform in a manner that will result in the payment of such income. For salaried exempt employees, such payments serve as an incentive to perform work of the type that will advance them in their professional career path. This is squarely in line with the purpose of the exemptions affected by this rule.

***Recommendation:** We recommend that nondiscretionary bonuses and incentive payments remain included in the calculation of income that will meet the salary threshold.*

**Reduction in Benefits and Other Impact on Hourly/Non-exempt Workers**

The Department must understand the impact that this rule will have on industries and employers as a whole. There is the potential for serious and severe negative consequences for non-exempt workers if this rule is implemented as proposed.

We struggle to keep our positions filled with qualified employees. We are unable to pay higher wages to hourly workers, or salaries to mid-level workers, which worsens the turnover we experience and will create substantial salary compression for positions further making recruitment and retention difficult without also making substantial increases to several levels and positions to account for this. Since we cannot negotiate our rates or pass on increased costs, we have no choice but to scale back wherever we can, which means not being able to offer competitive comprehensive employee benefits comparable to companies in other industries.

**Implementation Timeframe**

Any significant increase in operational costs for publicly-funded programs requires action on behalf of the legislature to appropriate more funding. Increasing the salary threshold would mean that we could not adjust quickly enough to absorb the extra operating costs, because of the time it takes to appropriate funds through the budget process. It is imperative that our legislature be given sufficient time to plan for and allocate and appropriate funding

Without appropriately funded rates to address the increases that would be required, we would be forced to consider lay-offs, program and service reduction or elimination, and would face an overall degradation of ability to provide quality outcomes based services, which have proven time and again to save tax-payers millions of dollars. The result, in many ways, would be a fundamental destabilization of the system in a way the system is unable to handle.

***Recommendation:** We recommend that the final rule have a phased implementation timeframe of at least 5 years to minimize the negative impact that would accompany a steep increase.*

**Conclusion**

We are extremely concerned that that the implementation of any rule change without serious consideration of the above noted recommendations, would have negative unintended consequences for many workers and many people with disabilities and mental health needs we support. While we applaud the intent of the Department in considering this rule change, we seek to ensure that other issues that would prevent the rule from operating as envisioned are addressed prior to or simultaneously with the issues addressed by this rule. As Medicaid-funded entities, we are dependent on our state Medicaid programs to set appropriate rates, state legislatures to appropriate funding, and the Centers for Medicare and Medicaid Services (CMS) to provide strong oversight of Medicaid programs. We strongly urge you to consider our comments to avoid unintended consequences to disability service providers nationwide.

Access Services, along with our dedicated staff of over 600, as well as the close to 5000 individuals we support, appreciates your consideration of our comments to this rule. Thank you.

Sincerely, Andrew R. Ward

Andrew Ward, Vice President of Human Resources, and M. Christopher Tabakin, M.S., Director of Quality and Compliance, on behalf of Access Services Executive Management Team