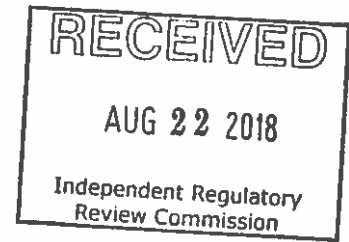




August 22, 2018



VIA ELECTRONIC FILING: bsmolock@pa.gov

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

Re: Regulation #12-106, Proposed Rule, Amendments to 34 Pa. Code Chapter 231 with respect to Overtime Pay

Dear Mr. Smolock:

The Pennsylvania Chamber of Business and Industry (the "PA Chamber") submits these comments in response to the Pennsylvania Department of Labor and Industry's (the "Department" or "DLI"), June 23, 2018 proposed rulemaking, as published in the Pennsylvania Bulletin, 48 Pa.B. 3731, which seeks to amend Chapter 231 of 34 Pa. Code to clarify the definitions of Executive, Administrative, and Professional (EAP) salaried workers who are exempt from receiving minimum wage and overtime pay pursuant to Section 5(a)(5) of the Pennsylvania Minimum Wage Act (PMWA), 43 P.S. § 333.105(a)(5).

The PA Chamber is the Commonwealth's largest broad-based business advocacy association, whose membership comprises close to 10,000 member businesses of all sizes and industry sectors throughout the state—from sole proprietors to Fortune 100 companies—representing nearly 50 percent of the private workforce in the Commonwealth. The PA Chamber's mission is to articulate and advocate on public policy issues that will expand private sector job creation and lead to a more prosperous Pennsylvania for all its citizens. The PA Chamber serves as the frontline advocate for business growth. Once laws and regulations are enacted, the PA Chamber is dedicated to helping our members understand and easily follow the complexities of complying with state and federal workplace rules.

The Department's proposed changes to the EAP regulations, if finalized in their current proposed form, will have a significant and far-reaching impact on our members. We write to express our support of the Department's laudable goals of (1) aligning and making consistent the duties tests for the EAP exemptions in the PMWA regulations with the U.S. Department of Labor's ("U.S. DOL") regulations interpreting the EAP exemptions found in the federal Fair Labor Standards Act (FLSA); and (2) providing clarity to employers and employees. While we appreciate the Department's acknowledgment that changes are necessary to address

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inconsistencies and ambiguity, we have significant concerns (1) that the proposed rules do not accomplish the Department's stated objectives, and (2) regarding the Department's piecemeal approach to effectuating their goals for the EAP duties test.

We strenuously oppose the Department's proposed plan to significantly raise and then automatically update the salary level necessary to qualify as an EAP exempt employee to a level in excess of the federal proposed salary level that was enjoined in 2016 and struck down as invalid in 2017 by a federal district court.

Based on these concerns, as explained in more detail below, the Department should withdraw its proposed rulemaking pending the expected January 2019 publication of the U.S. DOL's proposed rulemaking to update the FLSA, including the salary level for exempt status under federal law. At a minimum, the PA Chamber urges the Department to revise its proposed regulations to: (a) adopt a salary level that reflects the economic realities within the Commonwealth of Pennsylvania; and (b) achieve the Department's worthwhile goal of eliminating the conflicting regulatory scheme currently applicable in Pennsylvania. A detailed summary of the PA Chamber's comments and proposals are contained below.

I. THE DEPARTMENT SHOULD AWAIT U.S. DOL RULEMAKING

The Department's justification for its proposed rulemaking to increase the salary threshold is that "USDOL's EAP salary thresholds have not been updated since 2004" and thus "failed to keep pace with economic growth and the rising nominal salaries of exempt salaried workers." This rationale, however, ignores recent developments at the federal level with respect to the salary threshold under the FLSA.

In 2017, the U.S. DOL issued a request for information from the public regarding the regulations at 29 CFR part 541, which define and delimit exemptions from the FLSA's minimum wage and overtime requirements for executive, administrative, professional, outside sales and computer employees. 82 FR 34616 (July 26, 2017). These are the precise regulations the Department suggests are outdated. The U.S. DOL published its request "to gather information to aid in formulating a proposal to revise the part 541 regulations." The deadline for submitting comments was September 25, 2017. *Id.*

The U.S. DOL intends to issue a Notice of Proposed Rulemaking (NPRM) in January 2019 "to determine what the salary level for exemption of executive, administrative and professional employees should be." RIN: 1235-AA20. Since the U.S. DOL is expected to issue an NPRM in January 2019 for the specific purpose of resetting the salary level for exempt status under federal law, the prudent course of action for the Department would be to wait for the U.S. DOL to issue its NPRM before devoting additional time and effort towards amending the PMWA regulations. Any efforts at this stage to proceed with the Department's proposed rule will create a complex patchwork of proposed rules Pennsylvania employers must become

familiar with simultaneously in order to create plans for compliance. Any dissimilarity between the Department's proposed rules and the federal rules will lead to confusion and frustration. Waiting for the U.S. DOL would enable the Department to undertake a thoughtful review of the federal NPRM to gauge whether they remedy the Department's concerns regarding the salary test, and if not, what would be the most effective way to respond in light of the federal changes. This is the only course of action that avoids foisting costly and confusing compliance burdens on Pennsylvania's employers and harming the ability of Pennsylvania employers to compete with counterparts in other states.

II. SALARY LEVELS

A. The Proposed Salary Level Is Unprecedented And Would Result In A 268 Percent Increase From Current Requirements.

Pennsylvania's EAP salary thresholds have not been updated since the 1970s, and currently stand at just:

- \$250 per week (\$13,000 annually) under the so-called "short test" commonly applied under the PMWA;
- \$155 - \$170 per week (\$8,060 - \$8,840 annually) under the "long test."

By contrast, the FLSA sets \$455 per week (\$23,660 annually) as the minimum salary level. In 2017, 82,959 Pennsylvania full-time salaried (non-hourly) workers earned less than \$455 per week and were not eligible for an overtime exemption. This number is equivalent to 4.3 percent of all 1.9 million full-time salaried workers in Pennsylvania.

In its proposed rulemaking, the Department proposes to move from the current salary thresholds to the proposed salary threshold in three steps, as follows:

- \$610 per week¹ (\$31,720 annually) effective on the date of publication of the final rule in the Pennsylvania Bulletin (which the Department projects will occur in 2019);
- \$766 per week (\$39,832 annually) effective one year later; and
- \$921 per week (\$47,892 annually) effective one year later.

The Department estimated that the proposed salary increase could impact as many as 460,000 salaried employees in Pennsylvania by 2022. Based on 2016 Current Population Survey

¹ All salary figures are exclusive of board, lodging or other facilities. 48 Pa.B. 3731 (June 23, 2018).

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outgoing rotation sample data representing Pennsylvania workers, however, we estimate that approximately 505,194 Pennsylvanians who are reported in the data as non-hourly would be impacted by the Department's current proposed \$921 salary level.² Raising the salary level to the proposed \$921 level represents a 268 percent increase to the existing Pennsylvania salary threshold (and a 102 percent increase from the federal salary threshold), and would preclude approximately 25.6 percent of the full-time salaried workers in Pennsylvania from being classified as an overtime exempt employee on the basis of their salary alone.

Three years after the date of publication of the final rule, and January 1 of every third year thereafter, the salary threshold would reset automatically to the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the U.S. DOL, Bureau of Labor Statistics.

The Department's proposed salary level increase is dramatic and unprecedented, and will have a costly and material impact on employers in the Commonwealth. As an initial matter, employers will need to familiarize themselves with the final regulation, analyze their workforce, and determine how to comply. This process will require employers to identify all exempt employees earning a salary less than the new required level; evaluate whether to comply by providing a salary increase or reclassifying some or all of such employees to non-exempt status; decide whether to pay reclassified employees on an hourly or salaried basis; and draft new compensation plans for reclassified employees. Employers will also need to evaluate: whether to limit the hours employees work; whether they can still afford to pay bonuses; what adjustments are necessary to benefit plans; and how they will set the new hourly rates or salaries.

Organized labor and other proposal advocates have argued in the past that the increased costs of a higher minimum wage or paying additional overtime can be offset by simply raising prices. These advocates, and the Department, however, fail to consider the impact of a \$47,892 salary level on sectors that cannot raise prices. Among the employers who will be most impacted by the change in the salary threshold will be those in the nonprofit and medical provider sectors, as well as education and government employers. Non-profits, for example, primarily rely on private donations and government grants for their revenues. State and local governments rely on taxes that can be extremely difficult to increase at all, let alone to a level commensurate with the cost of these unfunded mandates. Many employers in the healthcare industry depend on reimbursements from Medicaid, Medicare and private insurance – which will not increase just because the Department raises the salary level for exempt employees. For example, in response to the proposed federal changes, the U.S. Chamber of Commerce published in December 2015 an article examining the impact of the proposed overtime rules on nonprofits and state and local governments. The article identified from the public comments submitted to the U.S. DOL

² See, Ronald Bird, Ph.D., *The Impacts on Pennsylvania Workers of the Proposed Increase of the FLSA Exemption Salary Test*, 1 (August 5, 2018).

examples of how these organizations, many of which offer their services to those in need in Pennsylvania, would be impacted by the lesser proposed salary increase to \$910:

- The Salvation Army expected that approximately *50 percent or more of its employees* nationally who were currently classified as “exempt” *would be reclassified* as non-exempt purely on the basis of their salary.
- The YMCA expected layoffs or a reduction in hours for reclassified employees (which in turn would result in reduced compensation).
- Operation Smile expected *an increased payroll cost of nearly \$1 million annually* affecting over 50 percent of their workforce, which is a programmatic cost that would *result in more than 4,000 cleft lip surgeries going unperformed*.
- Lutheran Services expected a *9.1 percent unfunded increase* in its budget nationally.³

None of these sectors can raise prices to increase the revenue needed to absorb the costs of a 268 percent increase to the salary level. The only option for non-profit, government, education and healthcare employers is to reduce services by decreasing employee headcount and/or hours worked. For healthcare employers, however, reducing services often is not an option because of laws requiring a minimum level of service. Thus, employers in these sectors will face significant hardships and the people who rely on their operations will be forced to go without these services. The impact these organizations faced in 2016 due to the U.S. DOL’s proposed salary increase is even smaller than the Department’s proposed increase here, which in turn means the Department’s increase will be even more painful to these organizations.

Although the Department views being reclassified as non-exempt as an advantage, in fact, PA Chamber members with vast experience managing private sector businesses know that limiting an employee’s work hours also limits opportunities for advancement. Exempt employees know this too, and many will no doubt view the reclassification to non-exempt status, as necessitated by the Department’s proposal, as a demotion. Employee morale will suffer as their work hours are closely regulated and monitored, they are forced to punch a clock, they fall out of the more generous employee benefit plans, and they are no longer eligible for incentive pay. Moreover, individuals who are currently paid a guaranteed salary as compensation for all hours worked (and who thus have the flexibility over decisions such as when to work) will lose that flexibility and will instead be forced to choose between earning their hourly wages or leaving work to attend to personal matters such as attending a child’s extracurricular or school-related activity.

³ <https://www.uschamber.com/above-the-fold/proposed-overtime-regulation-threatens-nonprofits-and-state-local-governments> (last visited August 16, 2018).

In addition, the Department's proposed salary level applies generally to all employees in the Commonwealth, without regard to location, industry, or other economic factors. However, the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of Pennsylvania. Worse yet, the Department relies on salary data from the Northeast Census region, which includes high-wage states such as New York, Massachusetts, and Connecticut rather than data from our neighboring states such as Ohio (Midwest Region) or West Virginia, Maryland, and Delaware (all in the South Region). Using salary from high wage states only serves to artificially increase the 30th percentile. The Department's choice to rely on Northeast Census data is particularly odd in light of their express recognition in the Regulatory Analysis Form that "Pennsylvania is one of the lower-wage states in the Northeast Census region." To be a fair proxy, yet without adding unnecessary complexity, any salary increase should be set either at points near the lower end of the current range of salaries of exempt employees in the lowest wage regions, in the smallest size establishment group, in the smallest-sized city group, or in the lowest-wage industry of the Commonwealth.

Finally, employers will need time to communicate the changes to employees and implement the changes. Many employers were required to go through this exercise in 2015/2016, and experienced a significant commitment of time and resources (for personnel involved in evaluation, planning, and decision-making) as well as costs related to increasing salaries for the small percentage of employees who employers sought to keep as exempt.⁴

B. The Department's Proposed Salary Level Is Higher Than The Salary Level Proposed By The U.S. DOL in 2015 And Struck Down As Unlawful In 2017

The Department's Regulatory Analysis acknowledges that the U.S. DOL's attempt to increase the EAP salary threshold from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually) was struck down by the United States District Court for the Eastern District of Texas, because the \$913 salary threshold was "so high it rendered the duties test for the EAP exemptions irrelevant."⁵

Indeed, the Texas court reviewed the language of the FLSA and Congressional intent, and determined that the U.S. DOL was delegated authority to define and delimit the duties that would constitute an employee working in a "bona fide executive, administrative, or professional

⁴ If the Department moves forward with any increase to the salary level, let alone a 268 percent increase, it should at least provide a one-year from publication in the Pennsylvania Bulletin effective date and phase in the salary increase over five years. Unless the Department lowers the salary level significantly in the final regulations, employers will need a significant period of time to prepare for and to comply with the new salary requirements. By phasing in the salary increase, employers would know well in advance what the salary level would be and be able to better prepare their budgets.

⁵ While the U.S. DOL appealed the district court's order, it requested that the U.S. Court of Appeals for the Fifth Circuit hold the appeal in abeyance while it undertakes further rulemaking as to an appropriate salary level.

capacity.” *Nevada v. United States Dep’t of Labor*, 275 F. Supp. 3d 795, 805 (E.D. Tex. 2017). To reach its conclusions, the court examined the plain meaning of the terms “define,” “delimit,” “bona fide,” “executive,” “administrative,” “professional,” and “capacity,” from at or near the time Congress enacted the statute in 1938. *Id.* at 805. The court expressly held that the U.S. DOL’s “authority is limited to determining the essential qualities of, precise signification of, or marking the limits of those ‘bona fide executive, administrative, or professional capacity’ employees who perform exempt duties and should be exempt from overtime pay.” *Id.* The U.S. DOL “does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1),” or “to categorically exclude those who perform ‘bona fide executive, administrative, or professional capacity’ duties based on salary level alone.” *Id.* Rather, a permissible salary level would merely act as a floor to identify and screen out categories of employees who are “obviously nonexempt,” thereby making an analysis of duties unnecessary. *Id.* at 806. And any new salary level “should also be somewhere near the lower end of the range of prevailing salaries” for obviously non-exempt employees or else risk eclipsing the duties test. *Id.* The U.S. DOL’s final rule more than doubled the existing \$455 per week salary level, which represented a significant increase “that would essentially make an employee’s duties, functions, or tasks irrelevant if the employee’s salary falls below the new minimum salary level.” *Id.* The Texas court found that this result “is not what Congress intended with the EAP exemption.” *Id.* The court also found the Final Rule’s automatic updating mechanism unlawful for the same reasons. *Id.* at 807.

The Department has not explained why its proposed salary threshold would not be susceptible to the same defect, and in fact we believe it is subject to the same infirmity and legal challenge.⁶ Therefore, raising the salary-level test to \$921 per week – a level where more than a quarter of salaried Pennsylvania workers would be precluded from being classified as exempt – effectively eliminates the duties test for these individuals. Although the legislature granted the Secretary of Labor the authority to define and delimit the EAP exemptions, it did not deputize the Department with the right or ability to set wages or salaries for these employees that alone excluded them from the exempt classification. Any increase in the salary levels from those contained in the present regulations must, therefore, have as its primary objective the drawing of a line separating exempt from *obviously* nonexempt employees rather than the improvement of the status of such employees. We suggest that the Department has exceeded the delegated scope

⁶ Indeed the Independent Regulatory Review Commission (IRRC) shoulders the first hurdle to the Department’s salary increase. The Regulatory Review Act makes clear that the IRRC must “first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.” 71 P.S. § 745.5b(a). For the same reasons as the U.S. DOL lacked statutory authority to set a \$47,476 salary level in 2016, the Department lacks the authority to adopt an even higher salary level now. Quite simply, the Department has not explained how its proposed rule will not be subject to the exact same legal challenge that proved fatal to the U.S. DOL’s effort.

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of its authority by setting the salary level for exemption so high as to include more than a half million employees.

C. The Department's Automatic Salary Level Increase Is Contrary To Legislative Intent, Ignores The Department's Obligation To Revisit The EAP Definitions "From Time To Time," Will Have An Unanticipated Ratcheting Effect, And Would Impose Significant Additional Burdens On Pennsylvania Employers

We are particularly concerned with the Department's proposal to automatically, and without further review and oversight, adjust the salary level tied to the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the U.S. DOL, Bureau of Labor Statistics. Such a proposal is a tremendous concern as it ensures the business community will never again be allowed to participate in a public debate regarding the salary levels. The Department's proposal for automatic salary level increases raises significant issues regarding the Department's authority and responsibility under section 5 of the PMWA – questions that could mire this rulemaking in litigation similar to that faced by its FLSA cousin. The PA Chamber suggests that the Department abandon this proposal entirely.

As a threshold matter, automatically increasing the minimum salary level every three years creates an unsustainable floor and creates tri-annual instability and uncertainty in employers' carefully calibrated compensation strategies and budgeting models. Employers operate on varying fiscal calendars. Preparing for tri-annual increases presents challenges in terms of budgeting and implementation. Potential tri-annual reclassification puts an undue burden upon employers who must in an extremely limited time period comply with state notice requirements, reprogram compensation systems and conduct additional training, much less conduct the necessary legal and compliance review to determine if reclassification is appropriate. Additionally, employers must contend not only with the costs of increased wage rates, but also must incur the additional expense of routine classification analysis, decision-making, and implementation of changes in response to the new salary level when it is announced.

Second, there is no evidence that the legislature intended that the salary level test for exemption under section 5 be indexed. In the 50-year history of the PMWA (and similarly in the 80-year history of the FLSA), the legislature has never provided for automatic increases of the minimum wage in perpetuity and tied to a consumer pricing or other index. Instead, the legislature has expressly and unambiguously stated in the PMWA that the Secretary is to define and delimit the EAP definitions "from time to time by regulations. . . ." 43 P.S. § 333.105(a)(5). There is every indication that the legislature intends for the Department to periodically revisit the EAP regulations. Such legislative intent should be embraced, not ignored, especially where there is no evidence of a contrary intention to put these regulations on auto-pilot.

Mandating tri-annual increases not only runs afoul of legislative intent but also presents an issue of parity, which the Department does not appear to have addressed through any kind of financial impact analysis. By continuously raising the salary floor, a cascading effect necessarily occurs. Businesses must face the prospect of either continual reclassification of employees otherwise performing exempt duties and an increase to overall labor costs as, arguably, those salaries above the minimum must be equally raised or risk compensation inequity.

Similarly, the Department's proposed methodology for determining the amount of the automatic tri-annual increase is not well thought out. Particularly troubling is the proposal to reset the salary level every year using the 30th percentile of weekly earnings of full-time non-hourly workers. This approach is inherently problematic: An index that recalibrates the 30th percentile, every three years, based on salaries of non-hourly paid employees, will be relying on an ever shrinking pool of such employees, causing a never ending, upward ratcheting effect. By increasing the minimum salary level from \$23,660 (the current FLSA level) to \$47,892, it is likely that a significant percentage of reclassified employees will be converted to hourly pay. We saw this result in 2016 when many employers chose to reclassify and begin paying on an hourly basis employees who earned less than \$47,476. There is no reasoned basis to believe employers will act differently in response to the Department's proposed increase to \$47,892. As a result, the employees who are reclassified to hourly will simply drop out of the 30th percentile calculation entirely, thereby raising the average salary of those remaining in the non-hourly pool for purposes of the 30th percentile calculation. Each time the salary level is raised, a portion of the lowest salary earners who fall below the threshold will be reclassified, thereby creating an ever increasing 30th percentile salary level. Such a spike in the BLS survey salary data is a significant and, we assume, unintended result of the Department's proposed automatic increases, which would only result in further flaunting the legislative intent that the salary should not be set at a level that excludes many employees who obviously meet the EAP duties tests.

In addition to an ever shrinking pool of employees, the salary level will also be impacted by inflation and a number of other economic factors that are difficult to predict. For example, our understanding is that the Department calculated its \$921 proposed salary level based on the 30th percentile of 2016 year Current Population Survey outgoing rotation sample data representing Pennsylvania workers. Just a year later, in the 4th quarter of 2017 CPS data, the 30th percentile rose by \$33 to \$954 per week. Assuming a \$33 per year increase from 2016 to 2024 (the first year for an automatic increase assuming a final rule is published in 2019), and ignoring any automatic ratcheting up due to lower salaried workers being reclassified and dropping out of the pool, the first automatic salary reset would increase the required salary level to \$1,185 per week (\$61,620 annually).

The Department also fails to consider the impact of automatic increases during a future economic downturn. The proposed methodology for setting new salary levels will be slow to

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reflect actual economic conditions. Implementing automatic increases in the salary threshold will guarantee increases at precisely the wrong times for employers and employees.

The complexities associated with indexing the current salary level clearly undermines the Administration's stated goal to "modernize and streamline" the current regulations.⁷ Contrary to the Department's representation in the proposed rulemaking, automatic tri-annual increases to the minimum salary levels will not "provide more certainty and stability for employers."⁸ Accordingly, the PA Chamber urges the Department to reconsider its proposal to implement automatic tri-annual increases in the minimum salary level upon the regulated community.

D. Inclusion Of Additional Nondiscretionary Bonuses, Incentives, and Commissions Should Be Permitted And Encouraged

The Department's proposed regulations provide that up to 10 percent of the salary threshold may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions that are paid quarterly or more frequently. While the PA Chamber supports the inclusion of bonuses, incentives, and commissions in calculating an employee's salary, the Department's proposal is unnecessarily limited and represents a fundamental misconception as to how businesses utilize these types of payments to reward and incentivize their employees.

First, many bonuses and incentive payments earned by exempt employees are paid less frequently than quarterly. Often, such earnings are paid semi-annually or annually. These payment cycles are not arbitrary, but instead are a function of the practical reality that the computational methods require longer earning cycles to access performance metrics. Excluding these payments from total compensation unduly burdens employers as they are often critical components of an employee's total wages. This is particularly problematic for industries where nondiscretionary bonuses and incentive payments are an important component of total employee compensation. Such compensation might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level. Doing so would have a negative impact on the workplace and would undermine managers' sense of 'ownership' in their organizations. We suggest giving employers real flexibility and permitting catch-up payments annually, rather than mandating them on a quarterly basis.

Similarly, the Department's proposed one-time catch-up payment ignores the practical reality for how commissions and other similar compensation are calculated. The Department's proposed rule would permit a "1-time payment equal to the amount of the underpayment *by the end of the next pay period of the next quarter.*" In effect, an employer would be given until the

⁷ <https://www.governor.pa.gov/governor-wolf-modernize-outdated-overtime-rules-strengthen-middle-class-provide-fairness-workers/> (last visited August 13, 2018).

⁸ 48 Pa.B. 3731 (June 23, 2018).

next pay period, often one to two weeks after the close of the quarter. Commissions, however, are often not calculated until well after the next pay period. Therefore, in practice, the Department's one-time catch-up payment does not provide a practical solution for employers and employees whose accounting does not close in time.

Second, the Department should also clarify the meaning of the term "nondiscretionary" bonus. We suggest adopting the FLSA regulation by reference and including language that a bonus is nondiscretionary unless it qualifies as a discretionary bonus under 29 C.F.R. § 778.211(b) (to qualify as a discretionary bonus, the employer must "discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid."). Confusion about what incentive pay may be included will be exacerbated if the Department does not provide clarification.

Third, the Department should allow employers to take credit for all types of compensation includable in the regular rate of pay under 29 U.S.C. § 207(e) – including commissions, per diem payments and car allowances that are not reimbursements for business expenses, and profit-sharing payments under plans that do not meet the requirements of 29 C.F.R. Part 549.

Fourth, unless the Department reconsiders its proposed \$47,892 salary level, a limit of 10 percent (or, \$4,789) is arbitrary and too low to provide meaningful relief or make the additional administrative burdens worth the effort. To take advantage of the 10 percent catch-up, an employee must still earn a salary of \$43,103. We propose permitting up to 75 percent of earnings to be satisfied by these types of payments.

E. Without A Pro-Rata Provision, The Department's New Salary Level Will Interfere With EAP Workers Who Are Otherwise Properly Classified Under The FLSA

The Department's proposed minimum salary level is so high that it would effectively prevent many current part-time professionals from maintaining their positions. One solution to this, other than reducing the salary level significantly, would be to provide a pro-rated salary level so that part-time professionals would be able to take advantage of the flexibility and benefits they have come to enjoy.

Under the current regulations, an employee who performs tasks that clearly meet one or more of the exemption duties tests can be classified as exempt so long as his or her salary exceeds \$23,660 per year (under federal law). Thus, a part-time employee working a 50 percent schedule can qualify as exempt so long as he or she works in a position that has a full-time salary of approximately \$48,000 per year. This is true not because the full-time equivalent salary is \$48,000, but because the part-time salary of \$24,000 is still in excess of the regulated minimum.

Under the Department's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, that employee working a 50 percent schedule would need to be working in a position earning more than \$100,000 on a full-time basis. Without a pro-rata provision, the number of employees who will be eligible for part-time exempt employment will be significantly limited. This limitation will have a disproportionate impact on women in the workplace, and, in particular, mothers who may be seeking to re-enter the workplace as professionals, but not on a full-time basis. Similarly, older workers looking to pursue a phased retirement would likely be disadvantaged by the Department's increased minimum salary level. If the Department permitted the salary level to be pro-rated, however, employers would be far more likely to encourage and engage in such arrangements. We therefore urge the Department to add a pro-rata provision to the regulations, regardless of the salary level ultimately adopted in a final rule.

III. THE DEPARTMENT'S EFFORTS TO MODIFY THE CURRENT DUTIES TEST ARE INCONSISTENT WITH THEIR STATED GOALS OF ALIGNING AND MAKING CONSISTENT THE PENNSYLVANIA DUTIES TEST WITH FEDERAL REGULATIONS

According to the Department, "the proposed amendments would align the duties test with the federal regulations in effect since 2004" and make the duties "consistent" with the FLSA regulations.⁹ The proposed amendments do not accomplish this objective.

A. The Department's Proposal Is An Odd Mix Of Excluding Important Provisions From The Federal Regulations From The Proposed PMWA Regulations, While Simultaneously Adding Requirements To The PMWA Regulations That Do Not Exist In The Federal Regulations

Existing PMWA regulations defining the relevant exemptions differ from existing federal regulations in substantial ways. For example, the PMWA regulations, as currently drafted, do not:

- include the FLSA's acknowledgement that "concurrent performance" of exempt and nonexempt work does not disqualify an employee from the executive exemption (29 C.F.R. § 541.106);
- include any version of the FLSA's regulation extending the administrative exemption to employees whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment (29 C.F.R. § 541.204);

⁹ 48 Pa.B. 3731 (June 23, 2018).

- include any version of the FLSA's regulation extending the professional exemption to employees with a primary duty of teaching at an educational establishment (29 C.F.R. § 541.303);
- include any version of the FLSA's regulation exempting salesmen, partsmen and mechanics employed by automobile dealerships (29 C.F.R. § 779.372);
- include any version of the FLSA's regulation exempting commissioned sales employees of retail or service establishments (29 C.F.R. §516.16);
- include any version of the FLSA's regulation exempting drivers, driver's helpers, loaders and mechanics under certain circumstances (29 C.F.R. §782);
- include any version of the FLSA's regulation exempting teachers, physicians and lawyers from the salary requirements (29 C.F.R. §§ 541.303(d) & .304(d));
- include any version of the FLSA's regulation exempting computer professionals who are paid on an hourly basis (29 C.F.R. § 541.400);
- align the outside sales exemption under the PMWA with its federal counterpart (29 C.F.R. § 541.500);
- adopt the streamlined test for the EAP exemptions applicable to "highly compensated" employees with total annual compensation of at least \$100,000 (29 C.F.R. § 541.601);
- provide guidance regarding what it means to be paid on a "salary or fee basis"—including whether deductions from an exempt employee's salary are authorized to the same extent they are permitted under the FLSA (29 C.F.R. § 541.602 - .606); and
- include several of the definitions set forth in the FLSA regulations, including:
 - the definitions of "department or subdivision," "two or more other employees," or "particular weight"—all of which are relevant for the interpretation and application of the executive exemption (29 C.F.R. §§ 541.103-105);
 - the definitions of "directly related to management or general business operations," "discretion and independent judgment"—all of which are relevant for the interpretation and application of the administrative exemption (29 C.F.R. §§ 541.201-202); and
 - the definitions of "primary duty," "customarily and regularly," "directly and closely related" or any of the other provisions of 29 C.F.R. Subpart H.

Inexplicably, despite professing to “align” the PMWA regulations with their federal counterparts so that they are “consistent” (in all ways except the salary threshold), the DLI’s proposed regulations do not address any of the foregoing differences. Moreover, the DLI’s proposed regulations include several requirements that do not exist in the federal regulations. For example, the proposed regulations:

- require executive exempt employees to “customarily and regularly” exercise discretionary powers, a requirement that does not exist under federal law; and
- require administrative exempt employees to “customarily and regularly” exercise discretion and independent judgment with respect to matters of significance, while the FLSA’s counterpart requires only that the employee’s primary duty “includes” the exercise of discretion and independent judgment with respect to matters of significance.

Indeed, the proposed regulations make only superficial changes to the duties tests (adding definitions of “general operation” and “management” to the regulations) while failing to address more than one dozen “latent discrepancies” between the PMWA and its federal counterpart. In short, the DLI’s proposed piecemeal approach to updating the PMWA’s duties tests fall far short of its aspiration to “align” the Pennsylvania duties tests for the EAP exemptions with their FLSA counterparts and to make them “consistent.”

Taking just one example of the Department’s failure to align Pennsylvania’s rules with the federal regulations involves the failure to include the FLSA’s acknowledgement that “concurrent performance” of exempt and nonexempt work does not disqualify an employee from the executive exemption. Currently, the federal regulations provide that “[c]oncurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met.” 29 C.F.R. § 541.106. Section 541.106 allows exempt employees such as store or restaurant managers to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity, without losing the exemption. Without an express provision in the PMWA regulations to address the performance of concurrent duties, retail and restaurant employers in Pennsylvania are left to guess whether the executive exemption applies to store managers who occasionally perform non-exempt tasks concurrently with their exempt duties. Yet despite claiming to seek to align the PMWA’s duties tests with their FLSA counterparts, the Department’s proposed regulations fail to expressly support this concept.

These differences put Pennsylvania businesses at a competitive disadvantage when compared to businesses operating in states that are truly aligned and consistent with the FLSA’s regulatory exemptions, make compliance more complicated and confusing, and raise the chances of time consuming and expensive litigation.

It is not clear how these differences would affect the application of the proposed EAP exemptions if they are adopted. In general, where a Pennsylvania law tracks the language of a federal law, Pennsylvania courts will look to federal authority for guidance on the meaning of the Pennsylvania law. *See Commonwealth v. Garrison*, 386 A.2d 971, 976 n.5 (Pa. 1978). Thus, to the extent the DLI's proposed regulations are read to "substantially parallel" the FLSA regulations, it is expected that courts will look to the FLSA for guidance (especially considering the DLI's stated objective of "aligning" the duties test with the FLSA and making them "consistent"), despite the differences between the proposed PMWA regulations and their FLSA counterparts. *Commonwealth v. Stuber*, 822 A.2d 870, 873 (Pa. Cmwlth. Ct. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004).

We simply cannot assume that courts will be willing to overlook and/or harmonize the many differences between the DLI's proposed regulations and the existing FLSA regulations. More likely, we fear that contrary to the DLI's stated objective, courts will cite these differences as evidence that the duties tests under the Pennsylvania EAP regulations deviate in material ways from federal law, thus not entitling them to the additional guidance the FLSA provides.

B. The Department's Non-Deliberate Inconsistency With Federal Law Has Been Exposed By Courts And Resulted In Significant Costs/Expenses For Law Abiding Employers.

The PA Chamber applauds the DLI for seeking to "align" the PMWA's duties tests with their FLSA counterpart. However, good intentions are insufficient when the actual words of the regulations are not, in fact, aligned. A recent example of an inadvertent deviation between Pennsylvania and federal law involved the payment of overtime to employees working in hospitals, nursing homes, and other healthcare facilities. While the default overtime rules under both the FLSA and PMWA are based upon hours worked over 40 per week, the FLSA has long permitted certain healthcare employers to adopt an "8/80" overtime plan, whereby employees receive overtime compensation if they work over eight hours in a single day or over 80 hours in a two-week period. Such 8/80 plans are favored by these institutions and their employees for providing daily overtime and scheduling flexibility within a 2-week period. While DLI has long accepted the use of 8/80 plans under the PMWA, the PMWA regulations did not include an actual provision expressly authorizing 8/80 plans. Thus, in *Turner v. Mercy Health System*, No. 03670, 2010 Phila Ct. Com. Pl. LEXIS 146 (Mar. 10, 2010), the court held that using an 8/80 plan violated the PMWA. This ruling caught many Pennsylvania healthcare employers by surprise. This non-deliberate inconsistency with federal law led to compliance challenges for healthcare employers who believed in good faith (consistent with the DLI's enforcement position) that their 8/80 plans were lawful, and exposed healthcare employers to a barrage of class-action lawsuits. In *LeClair v. Diakon Lutheran Social Ministries*, No. 2010- C-5793, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Jan. 14, 2013), for example, the court awarded \$670,532.11

plus prejudgment interest, costs and attorney's fees, against an employer that utilized the 8/80 approach.

The absence of an express 8/80 authorization in the PMWA regulations reflected no public policy against 8/80 plans, but rather a state law that simply failed to "keep up" with federal law. The Pennsylvania General Assembly acted quickly in response to these lawsuits, and on July 5, 2012, Governor Corbett signed into law H.B. 1820, which amended the PMWA to permit healthcare employers to use an 8/80 plan.¹⁰ Unfortunately, the amendment came too late for many Pennsylvania healthcare employers subject to litigation challenging their 8/80 plans.

As another example, it has long been accepted under the FLSA that an employee's "regular rate" for purposes of calculating overtime compensation was to be determined by dividing the employee's weekly wages by the number of hours that were compensated by those wages (whether fixed or variable). *See, e.g., Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). In 1968, the U.S. Department of Labor incorporated the concept of the so-called "fluctuating workweek" into its interpretive bulletin as an authorized method of calculating overtime. 29 C.F.R. § 778.114; see also 29 C.F.R. § 778.109 ("[T]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.").

Like the FLSA, the PMWA provides that overtime shall be compensated at one and one-half times the employee's "regular rate." *See* 43 P.S. § 333.104(c). However, unlike the FLSA, the PMWA regulations do not specifically address how to calculate the regular rate of an employee whose weekly wages are intended to compensate the employee for all hours worked. In 1998, the Pennsylvania Secretary of Labor, via Deputy Chief Counsel Richard C. Lengler, wrote that the Department "had assumed that a fluctuating workweek was permitted under Pennsylvania law." He explained:

[W]e would be inclined to interpret our law on the same plane as federal law—as opposed to advocating higher standards than those imposed by federal law. . . .

[I]t is obvious that this agency has not attempted rulemaking under the MWA on the same magnitude as the federal Wage and Hour Division has under the FLSA. *To do so, seemingly, would require the filling of possibly two volumes of the Pennsylvania Code....*

¹⁰ Act of July 5, 2012 (P.L. 987 No. 109), 43 P.S. § 333.105(b)(8).

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I am reticent to infer a conscious intention to reject the idea of a fluctuating workweek, simply based on the absence of regulatory language on the state level similar to 29 C.F.R. § 778.114. . . .

I believe that L&I will embrace the fluctuating workweek, since the MWA and existing regulations support such an interpretation, and because Pennsylvania employers will not be subjected to greater burdens than those imposed by federal law through, at best, a latent discrepancy between state and federal regulations.

(emphasis added). The Department's 1998 Letter is provided in *Appendix A*.

Notwithstanding the Department's good intentions that the PMWA would be interpreted to be consistent with the FLSA with respect to the calculation of the regular rate, the courts have struggled with the appropriate methodology, overlooking the Department's clear intent to interpret the PMWA "on the same plane" as the FLSA and relying instead on the regulation's silence on the issue as the source of their confusion. *See, e.g., Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280 (2017) (fractured decision of three-judge panel of the Superior Court proposing three different approaches to calculating an employee's regular rate and the resulting overtime obligation, in a case now pending before the Pennsylvania Supreme Court).

Mr. Lengler's 1998 letter was prophetic. Just as Mr. Lengler said in 1998, the Department now states in its proposed rulemaking that (with the exception of the salary level) it wishes to be "aligned" and "consistent" with the FLSA exemption regulations, yet its proposed regulations do not achieve that laudable objective because the words used do not match the Department's good intentions. In 1998, Mr. Lengler wrote that the Department wanted the PMWA to be interpreted "on the same plane as federal law" but that the PMWA regulations would not (could not) keep up with federal law due to the sheer volume of federal regulations (DLI "has not attempted rulemaking under the [P]MWA on the same magnitude as the federal Wage and Hour Division has under the FLSA" because to do so "would require the filling of possibly two volumes of the Pennsylvania Code"). It is understandable that the Department would not (and could not) keep up with the comprehensive federal regulatory scheme. But as the previous examples involving 8/80 and the regular rate make clear, the Department's good intentions are simply not sufficient to provide the required clarity that the PMWA is to be interpreted in a manner consistent with the FLSA, where the proposed regulations only add two definitions to the existing rules, and leave so much else unsaid.

There is a better way.

C. Instead Of Attempting To “Keep Up” With The FLSA Regulations, An Effort The Department Has Historically Been Unintentionally Unable To Accomplish, The Department Should Simply Incorporate The FLSA Regulations By Reference.

As the Department notes, Pennsylvania’s current EAP regulations “were established to mirror the federal regulations that were in place in 1977 and have not been updated since their original promulgation in 1977.” PA DLI Regulatory Analysis Form, p. 2. The Commonwealth’s failure to update the PMWA’s EAP regulations means that they differ significantly from the U.S. DOL regulations, which have been updated periodically. This creates a dual regulatory scheme for Pennsylvania employers, in which Pennsylvania’s outdated tests from 1977 still control whether an employee is exempt or nonexempt. Mr. Lengler referred to this disconnect as a “latent discrepancy” because the differences arose from the Department’s neglect, rather than from any deliberate intention to be different. The proposed regulations would not cure this defect.

The Department’s proposed regulations seek to “align with the duties test found in the U.S. DOL’s regulations,” to make them “consistent,” and to “provide clarity to employers and employees.” *Id.* 1-2. According to the Department, “[m]aking the Act’s regulations consistent with the FLSA’s regulations with regards to duties would make compliance easier for employers who would no longer have to make separate evaluations of an employee’s duties to determine whether they are exempt under both the Act and the FLSA.”¹¹ We wholeheartedly agree. The problem is that the proposed regulations do not accomplish this objective, since they fail to address any of the more than one dozen differences in the text of the regulations as outlined above.

If the DLI truly wishes to align the Pennsylvania duties tests for the EAP exemptions with their federal counterparts to make them consistent, a simpler, more straightforward and proven solution would be to simply incorporate the federal regulations by reference. Other states have accomplished this objective by incorporating by reference the FLSA standards into their laws, including several of Pennsylvania’s closest neighbors.

For example, Ohio law provides:

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee’s wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the “Fair Labor Standards Act of 1938,” 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended.

¹¹ 48 Pa.B. 3731 (June 23, 2018).

Ohio Rev. Code § 4111.03. In this manner, the exemptions are assured to be treated in the same manner under Ohio law as they are under the FLSA. If regulatory guidance under the FLSA evolves, there will be no reason to revisit the exemption test under Ohio law, because it will be updated automatically, by virtue of the express incorporation by reference.¹²

Similarly, Maryland adopts the EAP exemptions by reference to their federal counterpart. *See, e.g.*, Md. Code Reg. 09.12.41.01, et seq. (“‘Administrative capacity’ has the meaning stated in 29 CFR §541.200 et seq.”).

To the extent the Department wishes to adopt most, but for considered public policy reasons not all, of the duties tests of the FLSA, it could simply join New Jersey’s approach: “Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.” N.J.A.C. §12:56-7.2 (not adopting the provisions of part 541 that apply solely to State, county, and municipal government employers). *See also*, Nev. Admin. Code § 608.125 (“The Commissioner will refer to 29 C.F.R. §§ 541.1 and 541.2 to determine if an employee is employed in a bona fide executive or administrative capacity for the purposes of paragraph (d) of subsection 3 of NRS 608.018.”).

To the extent the Department wishes to adopt all of the duties tests of the FLSA exemptions, while implementing a different salary threshold, this is easily accomplished by incorporating the FLSA regulations *subject to enumerated exceptions*. For example, New Jersey law provides:

(a) Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.

(b) Not adopted by reference are those provisions within 29 CFR Part 541 that apply solely to those individuals employed by government employers, including, but not limited to, those individuals employed by State, county and municipal employers....

(c) “Administrative” shall also include an employee whose primary duty consists of sales activity and who receives at least 50 percent of his or her total compensation from commissions and a total compensation of not less than \$400.00 per week.

¹² By way of example, the following states have incorporated in full or in part the FLSA (or implementing regulations) by reference in their statute or regulations: Ohio, Missouri, Alaska, Maryland, Massachusetts, New Jersey, North Carolina, District of Columbia, Montana, Arkansas, California, Florida, Illinois, Iowa, Kansas, Kentucky, Michigan, Missouri, Nevada, New Mexico, Oklahoma, Wisconsin, Vermont. These states either expressly incorporate the FLSA’s definitions, interpretations, and jurisprudence (*see, e.g.*, Ohio Rev. Code. Ann. § 4111.03, Alaska Stat. § 23.10.055, N.J.A.C. §12:56-7.2, N.C.G.S.A. §95-25.14, R.I. Gen. Laws 1956, §28-12-4.3, D.C. Code §32-1004(a), Mont. Admin. R. §24.16.211), or state that their state laws do not apply to individuals who are covered by the FLSA. *See, e.g.*, Mo. Rev. Stat. § 290.500

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N.J.A.C. §12:56-7.2.

The fact that the DLI desires to align the duties tests with federal law while adopting a higher salary threshold is no impediment to the simplified approach. For example, Alaska law expressly states that “bona fide executive, administrative, or professional capacity” has “the meaning and shall be interpreted in accordance with 29 U.S.C. 201 - 219 (Fair Labor Standards Act of 1938), as amended, or the regulations adopted under those sections” except that “an individual employed in a bona fide executive, administrative, or professional capacity shall be compensated on a salary or fee basis at a rate of not less than two times the state minimum wage for the first 40 hours of employment each week, exclusive of board or lodging that is furnished by the individual’s employer.” Alaska Stat. § 23.10.055. In this manner, the duties tests for the relevant exemptions are incorporated by reference and assured to be interpreted in a manner consistent with their federal counterparts, while the salary threshold is established at a higher level.

Similarly, while Arkansas law “adopts by reference and incorporates herein 29 C.F.R. Part 541” it also establishes a lower salary threshold for employees of “charitable and religious organizations” as well as for small businesses. Code Ark. R. 010.14.1-106.

Currently, the PMWA regulations include outdated definitions of the terms “outside salesmen, executive, administrative and professional” in 34 Pa. Code §§ 231.81 - .85. The proposed regulations make only superficial changes to the duties tests (adding definitions of “general operation” and “management” to the regulations) while failing to address more than one dozen “latent discrepancies” between the PMWA and its federal counterpart.

The Department need not attempt to “keep up” with the FLSA by piecemeal adoption of definitions at a rate of two new definitions every forty years (or even to attempt to “fill two volumes of the Pennsylvania Code” all at once). Rather, the Department should do what it says it wishes to achieve—PMWA regulations that are “aligned” and “consistent” with their FLSA counterparts—in a single, simple amendment to 34 Pa. Code § 231.81:

The term outside salesmen, executive, administrative and professional capacity shall be interpreted in accordance with 29 U.S.C. 201 - 219 (Fair Labor Standards Act of 1938), as amended, and the regulations adopted under those sections, be defined in these §§ 231.81-231.85 (relating to special definitions), and employment in those classifications shall be exempt from both the minimum wage and overtime provisions of the act.

In this manner, 34 Pa. Code §§ 231.82-.85 could be deleted entirely. To the extent that the Department insisted on including an additional increase to the salary threshold, such objective could be accomplished with a new sentence following the one above:

Notwithstanding the foregoing, an individual employed in a bona fide executive, administrative, or professional capacity shall be compensated on a salary or fee basis at a rate of not less than \$ ____.

This simplified approach would achieve the DLI's stated objective of having the duties test for the relevant exemptions align and be consistent with their FLSA counterparts, while avoiding the confusion that is likely to result from the DLI's piecemeal proposed amendments.

To be clear, the PA Chamber applauds the Department for seeking to amend the PMWA regulations to ensure that the duties tests for the PMWA exemptions are aligned and consistent with their federal counterparts. The PA Chamber respectfully submits, however, that the Department's proposed piecemeal approach of adding just two definitions to an existing regulatory scheme is woefully insufficient to overcome the numerous significant (and latent) discrepancies between state and federal law. The PA Chamber encourages the Department to follow the lead of our neighbors in adopting a simple and straightforward "incorporation by reference" approach, thus ensuring that the duties tests for the PMWA exemptions will be aligned and consistent with their federal counterparts.

IV. DLI FAILED TO COMPLY WITH SECTION 5 OF THE REGULATORY REVIEW ACT

In 1982, the Pennsylvania legislature passed the Regulatory Review Act (RRA). In Section 2, the legislature observes that their delegation of authority to administrative departments and agencies within the executive branch has resulted in "regulations being promulgated without undergoing effective review concerning cost benefits, duplication, inflationary impact and conformity to legislative intent." 71 P.S. § 745.2(a). As a result, the legislature passed the RRA to establish a procedure "to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania." *Id.*

Among other requirements, the RRA requires the Department to provide:

- Estimates of the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector. 71 P.S. § 745.5(a)(4).
- A schedule for review of the proposed regulation, including the date by which the agency must receive comments; *the date or dates on which public hearings will be held*; the *expected date of promulgation of the proposed regulation as a final-form regulation*; the *expected effective date of the final-form regulation*; the date by which compliance with the final-form regulation will be required. 71 P.S. § 745.5(a)(7).

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- An identification of the financial, economic and social impact of the regulation on individuals, small businesses, business and labor communities and other public and private organizations and, when practicable, an evaluation of the benefits expected as a result of the regulation. 71 P.S. § 745.5(a)(10).
- For any proposed regulation that may have an adverse impact on small businesses, an economic impact statement that includes several additional pieces of information. 71 P.S. § 745.5(a)(10.1).
- A description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected. 71 P.S. § 745.5(a)(11).

The IRRC is tasked with reviewing the Department's proposed regulations to determine whether they are in compliance with the RRA, but also, and more importantly, to ensure that the proposed regulation "is in the public interest." 71 P.S. § 745.5b(a). In making the determination, the IRRC "shall, first and foremost, determine whether the agency has the *statutory authority* to promulgate the regulation and whether the regulation *conforms to the intention* of the General Assembly in the enactment of the statute upon which the regulation is based." *Id.*

If the IRRC finds that the regulation is consistent with the statutory authority of the agency and with the intention of the General Assembly, the commission must consider the following (among other items) in determining whether the regulation is in the public interest:

- Economic or fiscal impacts of the regulation, which include the following:
 - Direct and indirect *costs to the Commonwealth*, to its political subdivisions *and to the private sector*.
 - *Adverse effects* on prices of goods and *services*, productivity or *competition*.
 - The nature and estimated cost of legal, consulting or accounting services which the public or private sector *may incur*.
- The clarity, feasibility and reasonableness of the regulation to be determined by considering the following:
 - Possible conflict with or duplication of statutes or existing regulations.
 - Clarity and lack of ambiguity.

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- Need for the regulation.
- Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.
- Whether acceptable data is the basis of the regulation.
- Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

71 P.S. § 745.5b(b)(1), (3), (4), (7). By any measure, the Department entirely failed to comply with the RRA's requirements. For these reasons, the IRRC should indicate these failures via their comments to the Department for its consideration for possible withdrawal or at a minimum revision of their proposed regulations.

A. The Department Failed To Identify The Costs And Financial Impact Associated With This Proposed Rulemaking, Including The Adverse Impact On Small Businesses

The Department failed to apply seriously the principles of a thorough and objective regulatory economic cost/benefit analysis envisioned in the RRA. Instead, and entirely ignoring the inconvenient truth about the costs associated with and financial impact of the proposed regulations, the Department suggests that "[s]ome of these [small businesses] will not be affected by the regulation because they do not have salaried employees who earn more than the current Pennsylvania EAP salary threshold but less than the proposed threshold." While likely true that "some" small businesses may not be impacted, the Department entirely ignores the *many* who are guaranteed to be affected. The Department's failure to address these direct and indirect costs is a clear violation of the RRA. At a minimum, this should result in the IRRC disapproving of the Department's proposed regulations.

B. The Department Failed To Set Forth The Required Schedule

The Department failed to provide a schedule for review of the proposed regulation, including the date or dates on which public hearings will be held, the expected date of promulgation of the proposed regulation as a final-form regulation; and the expected effective date of the final-form regulation. These dates are particularly important where, as here, significant changes to employee classifications will occur upon publication of the rules if the proposed rules become final. The Department's failure to provide these dates reduces the public's knowledge regarding the timeline implementation, and makes it more difficult for employers to plan for compliance.

C. Such A Substantial And Automatic Increase To The Salary Threshold Represents A Quintessential Policy Decision Of Such A Substantial Nature That It Requires Legislative Review

Any significant changes to the salary threshold, like the minimum wage rate, will have deep and significant economic and public policy impact. If the legislature had intended to delegate authority over those changes, it surely would have done so expressly. Here, no such express delegation exists. In fact, the clearest expression of legislative intent – that the Department is to revisit the EAP definitions “from time to time” – is directly contrary to such a conclusion. Therefore, the legislature, not the Department, should be tasked with deciding whether to increase the salary threshold as an initial matter, and then automatically thereafter, since these questions are quintessential policy decisions of a substantial nature. The RRA makes clear that the Department’s overstep is not in the public’s interest.

D. The Department’s Reliance On The Current Population Survey As The Sole Source Of Salary Data Is Inappropriate And Unacceptable

Our understanding is that the Department examined 12 months of 2016 year Current Population Survey outgoing rotation sample data representing Pennsylvania workers for purposes of calculating their proposed salary level. The Current Population Survey, however, was never intended or designed to serve as a basis to inform regulatory decisions regarding the salary level for the PMWA EAP exemptions, and thus, the CPS data is inappropriate as the sole or primary data source to rely upon to inform a regulatory decision on the minimum salary threshold for at least two reasons. First, the CPS data is generally inappropriate because it does not provide information on key questions that need to be answered to reasonably determine the minimum salary for exemption. Identification of bona fide exempt workers is the essential first step leading to a description of the range of salaries and the range of duties. The CPS only provides occupational titles; there are no questions about duties, authority, or other factors critical to the statutory definition of exempt workers. This shortcoming of the CPS data is complicated by the fact that the job title and other information may be incomplete or erroneous for several reasons. The survey is based on brief, limited individual verbal responses. There is little follow up, so the interview record of Benjamin Franklin, for example, would miss important detail if his initial response was modestly to describe his occupation as “printer.” The CPS interviews are brief and provide no opportunity for in-depth inquiry about job functions, duties and other details that are relevant to exempt status determination. Since the CPS data only includes this imprecise and potentially incomplete or erroneous job title information, it totally fails to identify whether a person performs the duties of exempt EAP employees. The Department could have and should have obtained additional and more relevant data.

Second, the Department has chosen to rely on a subset of the available CPS data that is particularly inappropriate. The CPS data does not address the details required to determine

whether or not employees are paid a fixed and guaranteed salary (or fees), regardless of hours worked. The CPS data relied upon by the Department distinguishes only workers paid on an hourly basis (implying that weekly earnings vary with the hours worked) and categorizes all others as “non-hourly.” All salary or fee based wages are included in non-hourly CPS data, but an unknown number of other non-qualifying wage payment methods are also included. For example, the “non-hourly” CPS data would include non-exempt inside sales employees paid 100 percent on commission and non-exempt employees paid on a piece rate. The CPS non-hourly worker category is at best a rough and imprecise measure of workers paid on the basis required for exempt status. No known evaluation studies or interviews have ever been conducted to determine what proportion of non-hourly workers represented in the CPS data actually are paid on a true salary basis.

The CPS also only provides a rough delineation of workers paid on an hourly basis versus those paid on all other bases, of which a fixed salary is a subset. The data collected in the CPS survey on hours worked – usual weekly hours and hours actually worked during the survey reference week – provide only a limited glimpse of the dimensions and context of employees’ work schedules which may vary significantly over the course of a year.

Knowing with some certainty the proportions of the employees in the “non-hourly” CPS data set who are paid on a salary basis and perform exempt job duties, and knowing the variation of weekly earnings of such employees in comparison to the weekly earnings of “non-hourly” employees who do not meet the requirements for exemption is necessary for both setting the salary test level and for estimating the economic impact of a proposed change in the salary test level. The CPS data does not provide information necessary to make these determinations and distinctions. Other tabulations of the CPS data should have been considered by the Department to inform its salary test level determination. Consideration of the full range of alternative data tabulations necessarily leads to a different and lower minimum salary level.

V. CONCLUSION

For the foregoing reasons, the PA Chamber asks the Department to abandon its proposed rulemaking in its entirety. Finalizing the current proposal will create significant disruptions to employers, and most importantly will not achieve the Department’s stated goals of aligning and making consistent the duties tests, providing clarity to employers and employees, and eliminating the duplicative and conflicting regulatory scheme currently applicable to Pennsylvania’s employers and employees.

In the alternative, the Department should postpone its rulemaking efforts at least until after the U.S. DOL has issued its proposed rulemaking. If the Department insists on moving forward with its current rulemaking, it should revisit its proposed regulations with an eye

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towards the federal proposed changes and the direct and indirect impacts that the dual changes will have on employers.

At a minimum, the PA Chamber urges the Department to revise its proposed regulations to more successfully achieve the Department's important and worthwhile goals of eliminating the duplicative and conflicting regulatory scheme currently applicable to Pennsylvania's employers and employees. If the Department is committed to increasing the minimum salary threshold required for the EAP exemptions, it should adopt only a modest increase consistent with the legislative intent of not allowing the salary level to usurp the duties tests and it should phase in the increase over at least a five year period. Neither congressional intent nor the regulatory history of section 5 supports automatic increases to the salary level. Accordingly, this approach should not be finalized under any circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read "Gene Barr", written in a cursive style.

Gene Barr
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November 12, 1998

Judith R. Harris, Esquire
MORGAN, LEWIS & BOCKIUS, LLP
Suite 2000, One Logan Square
Philadelphia, PA 19103-6993

Re: ~~XXXXXXXXXX~~

Dear Ms. Harris:

This letter is intended to represent this agency's views of the issues discussed in your September 3, 1998, letter.

I.

The first issue that should be examined is the possible exemption of the employees under 34 Pa. Code § 231.43(f), which applies to certain employees of retail or service establishments. This is because the remaining issues are seemingly moot if the employees are exempt under this regulation.

I located no previous letters or internal opinions discussing this exemption. However, the exemption appears to mirror the federal exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(f), for retail or service-establishment employees. Accordingly, interpretations of federal law are likely to be persuasive in applying the state-law exemption. See, e.g., *Commonwealth v. PLRB*, 527 A.2d 1097 (Pa. Cmwlth. 1987). Executive Order No. 1996-1 requires a compelling Pennsylvania interest to justify adoption of regulations that exceed federal standards. 4 Pa. Code § 1.374(b)(16). While this directive unquestionably came after this agency's adoption of minimum-wage regulations, it provides an insight into how executive agencies should be construing and applying

Letter to Judith E. Harris, Esquire

Re: **Williams-Sonoma**

November 12, 1996

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their regulations. Consequently, this agency is not inclined to construe regulatory exemptions more narrowly than their federal counterparts, in the absence of a clear intention that is evidenced by significant differences in language between the federal and state exemptions. In the case of the retail- and service-establishment overtime exemptions, we discern no notable differences between federal and state law. Indeed, it seems as if the state regulation was modeled after 29 U.S.C. § 207(f).

In terms of the mechanics of the exemption, they appear to be relatively straightforward, with one possible exception. The regular rate of pay must exceed one and one-half times the statutory minimum wage, which was \$4.25/hour prior to September 30, 1996. In this regard, Section 4(a.1) of Pennsylvania's Minimum Wage Act ("MWA"), 43 P.S. § 333.104(a.1), incorporated the federal minimum wage under an emulator clause adopted in 1988. Hence, the regular rate (which includes commissions under 34 Pa. Code § 231.43(a)) must have been at least \$6.38/hour (\$4.25 x 1.5) during much of the period covered by the litigation against your client. Obviously, commission payments are going to have to be either allocated, or apportioned, to specific weeks to determine the employee's regular rate of pay, since the workweek is the basic unit of measure under both federal and state law.

Next, a determination must be made as to the percentage of the employee's compensation representing commissions over a representative period; if it exceeds 50 percent, then the exemption applies. The regulation also makes clear that all earnings resulting from commissions are to be counted as commissions, without regard to whether they exceed any draw or guarantee. This means that where commissions exceed the draw, the amount of commission includes both the draw and the additional commission earnings. On the other hand, if the commissions fall short of the draw, only the actual commission earnings are counted. Finally, if the employee receives either his draw or actual commission earnings, whichever is greater, federal regulations suggest that the draw cannot be considered as commissions, because the draw is actually a salary. 29 C.F.R. § 779.416.

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The state regulation exemption for retail and service establishments further defines a "representative period" to be not less than one month. Regulations supplement the statutory exemption on the federal level by requiring the period to be as follows: (a) as recent to the current workweek as practicable; (b) sufficient in length to reflect seasonal or temporary changes; (c) not more than one year; (d) recomputed as often as necessary to reflect gradual changes in the characteristics of employment; (e) representative with respect to the particular employee and dependent on his individual earning pattern; (f) the same period may be used for each person in a group having substantially similar employment; and (g) it must be established in accordance with a specific formula designated and substantiated in the employer's records. 5 C.B.C., *Employment Coordinator*, 7C-12,209 (1993), citing 29 C.F.R. § 779.417(a)-(d). Although an argument could be made that the federal criteria are not found in state regulations, and, therefore, should not be utilized, we believe that they possess a persuasive value and should be consulted in applying the state-law exemption. Because many employers are subject to dual coverage under the FLSA and the MWA, we wish to avoid, to the largest extent possible, the burdening of employers and the employees with two different sets of standards. Therefore, we most likely would borrow the federal criteria for interpreting our regulations.

The more problematic issue (alluded to above) concerns what is a retail or service establishment. Neither the MWA nor its regulations define retail or service establishment. Consequently, we would again refer to federal law for guidance. Here, we encounter two issues: (1) whether a travel agency fits within the exemption's concept of retail; and (2) how much of the sales must be retail for the exemption to apply. Addressing the second issue first, we find a federal regulation setting up a 75% test; i.e., 75% of the goods, services, or both must not be predicated on sales for resale. 29 C.F.R. § 779.411. An argument can be made, however, that the "75% standard" is a substantive standard, rather than simply an interpretation of the term *retail or service establishment*. On the other hand, a logical construction of the term would appear to require at least a majority (i.e., greater than 50%) of the sales to be at the retail level. We are not sure how far

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beyond 50% Pennsylvania courts may be willing to go in interpreting Section 231.43(b) without crossing the line into legislating.

The final issue enumerated above concerns whether travel agencies fit within the concept of retail. Your opponent cites a case, *Winters v. Healy*, 227 F.Supp. 123 (D.C. Ill. 1964), which denies the federal exemption to employees of a travel agency. Similarly, federal regulations place travel agencies outside of the retail concept. 29 C.F.R. § 779.317. I am not sure why travel agencies are outside of the exemption, while other service establishments can claim the exemption. Indeed, one commentary points out that "the term retail has been held alien to . . . business activities (including some quite similar to some of the . . . businesses which were held entitled to the exemption)." Annot., 7 A.L.R. Fed. 624, 656 (1971). Nonetheless, given our frequent consultation of federal law in applying the MWA, I predict that this agency will accept *Healy* and the federal regulation as authority placing travel agencies outside of the exemption.

II.

The next issue raised by your letter concerns 34 Pa. Code § 231.43(e). This exemption corresponds to the federal government's exemption for "Belo" agreements. A Belo arrangement (named for the Supreme Court's decision in *Walling v. A. H. Belo Corp.*, 316 U.S. 624 (1942)), allows the employee and employer to agree to an artificial "regular rate" to be used in determining overtime for employees who work irregular hours. 5 C.B.C., *Employment Coordinator*, ¶C-16,290 (1997). Without going into the complicated details of Belo agreements, it appears that the arrangement used by ~~the agency~~ is not a Belo arrangement. There is nothing in the documentation you provided to suggest fluctuations in overtime and non-overtime hours to justify a Belo agreement. More importantly, a Belo contract cannot provide for commissions in addition to the regular rate, because the regular rate agreed to by the parties does not control the employee's total compensation. *Ibid.* at ¶C-16,290, citing 29 C.F.R. § 778.405(e). As the federal regulations explain: "For this reason, it is not possible to enter into a

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guaranteed pay agreement" 29 C.F.R. § 778.408(e). A requirement for a guaranteed pay is likewise found in 34 Pa. Code § 231.43(c)(2).

III.

The third exemption raised by your letter is 34 Pa. Code § 231.43(d). Subsections (1) and (2) of that section speak about piece rates, and are skipped over in this analysis because there is nothing to suggest that the representative worker (whose contract was supplied to us) worked at piece rates. Subsection (3) addresses basic rate agreements, a concept that is better understood by reference to federal law. Under this type of arrangement, the parties agree to use what amounts to an average rate for overtime-pay computation purposes, instead of the "regular rate." 5 C.B.C., *Employment Coordinator*, ¶C-16.325 (1997). I find no opinions in our files addressing this concept.

There appears to be little question that the "basic rate" exemption does not apply to the employee's base earnings under the sample contract you have furnished. This portion of the employee's compensation package consists of a salary, not the substitution of an average wage that is substantially equivalent to the employee's hourly earnings.

Similarly, the commission portion of the ~~employee's~~ compensation package does not appear to be a "basic rate." In this regard, past earnings are not utilized to compute an average rate to facilitate on-going, weekly computation of overtime. Rather, commissions are calculated and paid quarterly.

IV.

The major issue which you did not raise, and which I believe could be at the center of this dispute, is whether Pennsylvania recognizes a fluctuating workweek. In this regard, overtime is computed under paragraph "3.2a" of the employment contract using base earnings for the week, and a variable number of hours worked.

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This arrangement is permitted under the FLSA. 5 C.B.C. Employment Coordinator, 9C-16,277 (1997). However, a federal court decision suggests that such an arrangement is not permitted under Pennsylvania law. *Friedrich v. U.S. Computer Services*, 833 F.Supp. 470 (E.D. Pa. 1993). The Department of Labor and Industry ("L&I") did not participate in this case, and it has only been within the last year that the ramifications of *Friedrich* have been called to our attention. Previously, we had assumed that a fluctuating workweek was permitted under Pennsylvania law, although this issue never appears to have been the subject of an in-depth analysis. We have yet to issue any pronouncements regarding *Friedrich*, subsequent to being made aware of its ramifications.

A federal court's analysis of state law, of course, is not binding on the state courts. *Lilley v. Johns-Manville Corp.*, 596 A.2d 203 (Pa. Super. 1991). Therefore, *Friedrich* is not precedent in the strictest sense of the term. This brings us to the question of whether we would embrace *Friedrich*. At this point, without having been called upon to prosecute an actual wage claim, I would venture to say that if a plausible construction could be made of the MWA and/or its regulations that would allow a fluctuating workweek on the same terms as the FLSA, this agency would embrace such a construction. This is because we would be inclined to interpret our law on the same plane as federal law—as opposed to advocating higher standards than those imposed by federal law.

In this regard, I am hesitant to place the same weight, as the *Friedrich* court did, on the absence of state rulemaking adopting a regulation equivalent to 29 C.F.R. § 778.114. The federal regulation, according to the source note in the *Code of Federal Regulations*, was adopted January 26, 1968. While it is true, as the *Friedrich* court observed, that the Pennsylvania minimum-wage and overtime regulations were promulgated in 1977, I am unable to assume (as the *Friedrich* court apparently did) that these regulations were adopted from scratch. Rather, the 1977 rulemaking took existing (and presumably pre-Commonwealth Documents Law) regulations and "revised" them, "improved" upon them and revised them to eliminate "inconsistencies between the existing regulations and the act, as

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amended." 7 Pa.B. 25 (Jan. 1, 1977). While the preambles accompanying both the proposed and the final rulemaking are meager by today's standards, it is important to realize that prior to the enactment of the present-day MWA, there was a statute on the books known as the "Minimum Wage Act of 1961," act of September 13, 1961, P.L. 1313, 43 P.S. §§ 333.1-333.18 (repealed). That statute, in turn, contained authority for the adoption of regulations: 43 P.S. §§ 333.9(a), 333.12 (repealed). Accordingly, there is a possibility that the 1977 regulations passed under the MWA were substantially a re-codification of regulations promulgated under the 1961 act before the federal government's adoption of 29 C.F.R. § 778.114.

Second, it is obvious that this agency has not attempted rulemaking under the MWA on the same magnitude as the federal Wage and Hour Division has under the FLSA. To do so, seemingly, would require the filing of possibly two volumes of the *Pennsylvania Code*. By the same token, Pennsylvania has not been nearly as vigilant in updating its regulations; rather, it appears that the last substantial changes to the regulations occurred in 1979. In short, I am reticent to infer a conscious intention to reject the idea of a fluctuating workweek, simply based on the absence of regulatory language on the state level similar to 29 C.F.R. § 778.114.

The next step is the analysis to determine whether support for a fluctuating workweek can be derived from the MWA or the existing regulations. In *Jay R. Reynolds, Inc. v. Department of Labor and Industry*, 661 A.2d 494, 497 (Pa. Cmwlth. 1995), the court recognized that an agency may render (and rely on) interpretative law as long as the interpretative rule tracks the meaning of the statute that it interprets, and does not expand the plain meaning of that statute. In my view, the concept of a fluctuating workweek can be accommodated under existing law. Not only is there no language forbidding a fluctuating workweek, or defining 40 hours as the standard for determining the employer's regular rate for overtime purposes, but the language of 34 Pa. Code § 231.43(b) seems to support this concept. That regulation requires that an employee's regular rate be calculated by

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total hours actually worked in the workweek for employees paid by the day or the job. The logical extension of this methodology, in my view, encompasses the fluctuating workweek by using total hours actually worked to determine the actual rate. Indeed, the fluctuating workweek simply gives recognition to the fact that some employees are paid a fixed salary without regard to hours, and quite logically allows their regular rate to be determined by using the hours actually worked, and not an artificial standard. The mandating of a 40-hour standard for non-exempt employees paid salary, when determining their regular rate, would appear to be the more expansive construction of the statute, and the one requiring the specific adoption of regulations. Consequently, I believe that L&L will embrace the fluctuating workweek, since the DFWA and existing regulations support such an interpretation, and because Pennsylvania employers will not be subjected to greater burdens than those imposed by federal law through, at best, a latent discrepancy between state and federal regulations.

V.

The last item of possible concern involves the method used by ~~XXXXXX~~ to average commissions. Once again, we would place great stock in federal interpretations. While federal regulations sanction both deferred overtime on commissions, 29 C.F.R. § 778.119, and the subsequent allocation of equal amounts of commissions to each week through averaging methods, 29 C.F.R. § 778.120, the particular method used by ~~XXXXXX~~ differs somewhat from the example in the materials I have reviewed. See, 5 C.B.C., *Employment Coordinator*, FC-16,266 (1997). I simply bring this difference to your attention, but admittedly cannot say that ~~XXXXXX~~'s methodology is necessarily wrong—particularly since I have been unable to produce any substantial numerical disparity, in favor of the employer, between the compensation due under ~~XXXXXX~~'s formula and the amount of overtime calculated by the method prescribed in the materials I consulted.

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Specifically, your client's example contains a step "b", whereby the total overtime hours in the quarter are divided by the number of weeks in which overtime was worked, to produce a figure as to average overtime hours per week, and then overtime compensation for the quarter is calculated using the average number of overtime hours per week. In contrast, the illustration in the *Employment Coordinator* recommends the computation of overtime pay on a week-by-week basis using the average weekly commission earnings and the actual number of overtime hours (not an average) worked in each week. Because your client's formula automatically excludes weeks in which overtime was not worked in calculating the average overtime hours, I am unable to discern any substantial difference that works against the employee. For instance, page 5 of the employment contract, which you furnished me, sets forth an example whereby the overtime attributable to commissions is \$17.84. Using the *Employment Coordinator* methodology, I came up with a slightly less amount (\$17.67), as follows:

a. $\frac{\$1,000.00}{13} = \76.92 (Average additional compensation)

b. Hypothetical distribution of 20 overtime hours over eight weeks:

<u>Week #</u>	<u>Actual Overtime Hours</u>
1	1
2	1
3	1
4	1
5	3
6	3
7	5
8	5

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VI.

In summary, the existence of authority on the federal level denying the *retail* or *service* exemption to travel agencies will likely dictate the same approach on the state level, as far as this agency is concerned. Similarly, I do not believe the exemptions set forth in 34 Pa. Code §§ 231.43(e) and (d) are implicated. I also believe that there is an issue involving the recognition of the fluctuating workweek under Pennsylvania law, and, in the process, suggest that the construction of Pennsylvania's MWA regulations by the *Friedrich* court is open to question. Finally, I note a possible discrepancy between the method used by ~~Unemployment~~ to average commission payments, and the illustration used in the *Employment Coordinator*, which appears to track the examples prescribed by 29 C.F.R. § 778.120.

L&L's Bureau of Labor Law Compliance ("BLLC") does not have any special forms for self-audits, and usually accepts what is submitted by employers. If necessary, BLLC can specially devise a form for your client's use in this manner.

I hope that this information is helpful to you.

Very truly yours,

Richard C. Lengler

Richard C. Lengler
Deputy Chief Counsel

c: Robert E. Moore, Director, BLLC
Mark A. Sereni, Esquire
File