#3202 Remarks

Independent Regulatory Review Commission

January 31, 2020

Department of Labor & Industry Regulation #12-106 (Minimum Wage): Overtime Threshold

Good morning, Chairman Bedwick and members of the commission. My name is Rebecca Oyler, and I am the Legislative Director for the National Federation of Independent Business (NFIB) in Pennsylvania. NFIB is the premier small business advocacy organization with about 13,000 members in Pennsylvania and approximately 300,000 members nationwide. We appreciate your allowing us to be here today to speak on behalf of Pennsylvania's small businesses on the Department of Labor & Industry's (L&I's) proposal to raise the income threshold for overtime, along with other changes affecting minimum wage.

More than 99% of Pennsylvania's businesses are small, and these businesses employ almost half of all the workers in our state. They create two out of every three new jobs. They are truly the engine of growth.

But because of their size, they are highly sensitive to government rules like the one we are here to discuss today. The Commission has received many comments from our members and other small business owners about the impact of the proposed rule on their businesses and their employees. I know you have already reviewed their comments and concerns about how they will manage the costs and operational problems of such a drastic increase in the salary threshold for overtime pay, including: limiting employee flexibility, reducing hours or service, denying overtime pay, letting employees go or not hiring new ones, raising prices, cutting benefits, managing compliance hassles with differing state and federal thresholds, and for some, even closing their businesses.

You also received NFIB's written comments on the proposed rulemaking, which address many of these concerns. For the purposes of today's meeting, I will focus on three specific criteria within the Regulatory Review Act that we believe the Commission should carefully consider when determining whether this regulation is in the public interest: 1) economic impacts, including costs to the private sector and impact on the prices of goods and services; 2) the need for the regulation; and 3) whether the regulation is a policy decision that requires legislative review.

Economic Impacts

L&I's final regulatory package includes a detailed assessment of costs and benefits to the commonwealth of the proposal. NFIB and its members have already provided extensive comments on the costs of these regulations on small businesses. Today, we would like to focus on economic benefits L&I claims will be provided by the rule. The economic benefits that L&I anticipates include: induced spending and jobs created as a result of increased salaries; a reduction in public assistance needed; and more time outside work for employees to pursue other interests. NFIB does not believe that these benefits are realistic due to many of the assumptions made.

First, L&I's estimates of induced spending, which total over $12 million per year after the regulation is fully in effect, assume that all eligible workers will receive increased pay as a result of the change. However, we know that this is not the case. Even L&I's analysis acknowledges that, of the four options employers have to manage the effects of the rule, two do not necessarily involve a pay increase ("limit non-exempt employee hours to 40 hours a week to avoid overtime costs" and "allow for some overtime but reduc[e] base pay or benefits"). For small businesses, which generally operate on tight margins, the increased cost will be difficult to manage.

Unfortunately, money doesn't appear out of thin air just because the government mandates it. If they are unable to raise their prices, employers will minimize the impact of the cost increase on their businesses by cutting hours, converting employees to part time, and adjusting wages so that net take-home pay is roughly the same. As a result, employees of small businesses (46.7% of Pennsylvania's workforce)[1] will likely not see pay increases, and in fact, many employees will see decreases in wages or benefits, and some will lose their jobs altogether.

NFIB members made this case strongly in their comments on the proposed rule. One owner of a small painting company stated that "[w]e will be forced to deny overtime...and we won't even be able to consider adding benefits." One rental company owner anticipates "reduced hours and potentially less take home pay" for his employees. Another small employer notes that the rule will "force me to reduce the number of employees I have and...the amount of benefits I provide."

A review of other similar employer comments makes it apparent that L&I's estimates of induced spending and jobs created as a result are inherently flawed because they are based on an assumption that the rule will raise wages for everyone affected. This is simply not the case, and the harmful impacts were not fully assessed in the cost analysis.

Further, if the public good of induced spending is a factor in L&I's calculation of benefits, they must also consider the public harm of reduced spending by businesses in local communities as a result of the rule. If they do pay their employees more, the labor cost increases will reduce the cash small employers have to reinvest in their businesses. For example, they may put off buying a new computer or printer they need or replacing a truck. They may stop covering health insurance for their employees or reduce other benefits. This lost investment limits the benefit of induced spending and further illustrates the rule's flawed assumptions regarding costs.

Second, L&I states that the rule would result in fewer people qualifying for public assistance. Again, this assumption is flawed due to an overestimate of the pay effects and an underestimate of employment effects. One small business providing recreation services offers an example. Several of its employees are in salaried positions, which "offer[s] them overall more money than they would make otherwise, allow[s] them to have a steady stream of income all year long...regardless of the weather and the ample vacation time they are now offered." The owner is proud that "we are able to offer those employees a much better quality of life than otherwise." When they are moved to temporary positions, these employees may need unemployment benefits for part of the year. If they are converted to hourly employees, with reduced salary, they may qualify for food stamps or other public assistance. Other businesses will be forced to cut hours, benefits, and sometimes positions, all of which

[1] https://cdn.advocacy.sba.gov/wp-content/uploads/2018/11/23101830/2018-Small-Business-Profiles-PA.pdf

will lead to an increased need for social services and assistance for these workers. Again, these costs were not considered by L&I.

Third, L&I anticipates the rule will lead to more time off work for employees to pursue other interests or spend time with their families, another benefit. This assertion assumes that these employees are not already offered time off to spend with their families and that they are not already fairly compensated for their work. Many commenters emphasized the value of the flexibility they offer to their employees, a benefit that cannot be easily offered when these workers move to hourly positions. When employers must manage their employees and track their hours much more closely, this changes the relationship many small businesses have with their workers. One truck sales company's salaried employees "enjoy freedom to come and go without worrying about punching a time clock...we would be forced into watching their minutes and hours." The owner laments, "when our employees need to visit doctors, attend their children's events, or just skip out early, we currently allow this without question. A timeclock would change all of this for them as they would miss out on pay that they currently get through their salary position."

Employers are facing a workforce crisis unprecedented in recent history, and they are doing everything they can to attract and retain good employees. Workplace flexibility, including flexible hours, comp time, and work from home, are key benefits that many small employers are happy to offer their workers. These employees do enjoy time off, and despite L&I's assertion that they are working overtime for "free," they are paid fairly for their work. Placing a government mandate on employment terms prevents many of Pennsylvania's workers and their employers from reaching an agreement that benefits them both. As one small business owner put it, "I do NOT advocate that employers not pay for services rendered, rather allow EMPLOYERS AND EMPLOYEES to determine what works best for their particular circumstances...we do not need big government mandating one-size-fits-all policies."

Need for the Regulation

In its rulemaking, L&I makes a good case that aligning Pennsylvania's duties test with the federal test to the extent permitted under state law is necessary to facilitate compliance. Indeed, employers, especially small businesses without HR or legal staff, find it difficult to know who qualifies for exemption under either federal or state law when the rules are so disparate. Additionally, aligning the state threshold with the new federal threshold is justified.

However, less convincing is the agency's justification for the need to raise the salary threshold for exemption far above the new federal threshold. As stated in L&I's rulemaking, the state last raised its salary threshold for exemption in 1977—when it did so to align the threshold with the federal rule. Since that time, the federal threshold has been updated three times, with the latest update effective on January 1, 2020. So, it is true enough that Pennsylvania's threshold has become outdated as compared with U.S. DOL's federal salary test. That might well justify a rule realigning Pennsylvania with the federal standard. But it is not clear why Pennsylvania should have a higher salary requirement than required at the federal level.

L&I states that it will be monitoring employer response to the new threshold and analyzing the costs and impacts to the regulated community of compliance. This is wise, but we question why the agency believes that it is reasonable to move ahead to finalize this rulemaking prior to completing this

analysis. It will take some time for the results of the new federal threshold to become apparent, and rushing to set in place two additional increases (and an automatic escalator) over the next few years before the impact of the federal increase is known is irresponsible. The analysis may find that a state threshold above the new federal level is not necessary at all.

Further, the market is working without the government mandating how employers must compensate their workers. Studies indicate that wages are growing faster since 2015, particularly in the lower end of the wage spectrum[2] with employees overall expected to see a 3.3% wage increase in 2020, after a 3.2% increase in 2019 and a 3.1% increase in 2018.[3] These increases are happening without state-mandated changes to the overtime threshold. It is possible that the recently increased federal threshold will reverse these positive trends, but the timing of this rulemaking will prevent that analysis.

Due diligence mandates that the state should wait and see the economic impact of the new federal threshold on employment, wages, and business growth and investment prior to mandating a leap above it. This is itself a compelling reason for the commission to disapprove the rule.

Legislative Review

NFIB believes that this rulemaking constitutes a policy decision of such a substantial nature that it requires legislative review for several reasons.

Concerns about the cost of raising the overtime threshold so far above the federal level have been well documented by many commenters, including lawmakers, throughout the regulatory process. L&I itself estimates the direct cost to the employers to be between $121,602,063 and $130,720,050 over the next five years. This does not include the cost of lost wages due employers cutting of salaries, benefits, and overtime for affected employees, as discussed above. It also does not include indirect costs, which many commenters have noted (loss of flexibility, employee morale, perceived demotion, etc.).

On the benefits side of this rule, L&I estimates that worker wages will increase (assuming, optimistically, as discussed above, that all workers eligible will receive more income) by between $77,549,572 and $86,667,560 over the first five years, substantially below the total costs estimated to employers over the same time period. When such a disparity exists between costs and benefits, it is appropriate for such a proposal to be considered by the General Assembly, which is in a unique position to weigh the pros and cons and the impact on all Pennsylvanians. The legislature is also best suited to deliberate the prudence of pushing this rule through now without the benefit of studying the impact of the federal overtime rule on employers and employees. This is especially true in this case. Many workers who would be affected by the change may not be aware of this regulatory process or their ability to have commented. The legislative process permits constituents to influence policymaking more directly through their representatives.

In fact, the comments from lawmakers on this rulemaking indicate that many are aware of the concerns their constituents have, but they have limited ability through the regulatory process to affect

[2] https://www.federalreserve.gov/newsevents/speech/powell20191125a.htm

[3] https://www.shrm.org/ResourcesAndTools/hr-topics/compensation/Pages/2020-salary-budget-average-increase-just-above-3-percent.aspx.

the outcome. As the ultimate arbitrator of what is or is not in the public interest in Pennsylvania, the state legislature is the most appropriate venue for this change to be considered.

Lastly, the state Minimum Wage act requires that the Secretary of Labor and Industry "shall make and, from time to time, revise regulations, with the assistance of the board." It is clear that the General Assembly intended the secretary to promulgate regulations relating to minimum wage. It is also clear that the law requires the agency to go through the process provided by the state's Regulatory Review Act every time such an update is made. However, the automatic escalator provision that is included in the rulemaking clearly obviates this statutory requirement by putting into place an undefined, limitless cost multiplier on employers far into the future. Neither the regulated community nor the legislature—or even the agency—as proposed, will have an opportunity to assess the future costs and benefits to the state of raising the threshold every three years. Factors that should be at play, such as the condition of the state's economy, natural wage growth, unemployment, and competitiveness of surrounding states, will not be able to be considered with an automatic escalator. If such an extreme policy choice is chosen, it should certainly be the state's General Assembly that chooses it.

We urge the commission to consider disapproving this rulemaking under the Regulatory Review Act's provisions because the costs to Pennsylvania's economy are seriously underestimated, the regulation is unnecessary at this time, and the rule proposes a policy change that deserves the consideration of the General Assembly.

Thank you again for the opportunity to speak today on behalf of Pennsylvania's small businesses. I would be happy to answer any questions.

Stephen Herzenberg, Keystone Research Center, Testimony, Independent Regulatory Review Committee Public Meeting on Final Proposed Overtime Rule
January 31, 2020

Members of the Commission, thank you for the opportunity to testify today on the final regulation proposed by the Pennsylvania Department of Labor and Industry to restore overtime pay and the 40-hour week for all Pennsylvania salaried workers earning below $45,500. This new Pennsylvania threshold will make roughly 200,000 more Pennsylvania workers automatically eligible for overtime than the new federal overtime threshold set at $35,568.

For decades after the passage of federal and state overtime laws it was accepted that most U.S. salaried workers should receive overtime pay for working over 40 hours and that only highly paid salaried employees would be exempt. In 1975, 63% of US salaried workers were automatically eligible to receive overtime pay. Today, fewer than one in 10 U.S. salaried workers automatically receive overtime pay if they work over 40 hours. Even under the new federal standard, only 15% of salaried workers will automatically get overtime pay.

Compared to a 2016 proposal under President Obama, the new federal rule takes the 40-hour week and overtime pay away from over 8 million US salaried workers as well as several hundred thousand in Pennsylvania. Department managers at big box stores, fast food shift supervisors, paralegals, manufacturing team leaders, office managers, and other salaried workers work for free over 40 hours. They often work 50 or 60 hours per week for an effective hourly rate that could be under $12 per hour even with the new federal rule.

Fortunately, just as states have the right to establish a minimum wage higher than the federal minimum wage, they have the right to set a higher overtime threshold. Neighboring New York and the state of California have thresholds in place that will reach around $60,000 in a few years. Washington State last December finalized a rule that will reach about $83,000 by January 1, 2028. Nine days ago, Colorado finalized a rule that will reach $55,000 on January 1, 2024.

Three other states—Maine, Massachusetts, and Michigan—are on a path to match or exceed the Obama threshold. Keep in mind, moreover, that the Obama threshold was a moderate benchmark pegged to the 40th percentile of weekly earnings in the nation's lowest-wage Southern region—far below the more than 60% of US full-time salaried workers once automatically eligible for overtime.

In sum, the Wolf final rule, pegged below the Obama threshold, is a compromise of a compromise that partly accommodates a reality in which many employers have disregarded the law, cheated hundreds of thousands of Pennsylvania workers of overtime pay or time with their family, and gotten away with it. Meanwhile, law-abiding businesses that genuinely treat workers as their greatest asset, such as Altoona-based Sheetz, show that paying salaried workers fairly can enhance productivity and profitability.

Even though we believe a higher standard is warranted, at $45,500, the Wolf proposed final rule is a big improvement on the new federal rule. It will make Pennsylvania's economy a little less rigged against moderately-paid salaried workers.

Many of the same forces that opposed the 40-hour work week over a century ago—and every other requirement that businesses must honor basic and fair labor standards—are still reflexively opposing Governor Wolf's common-sense proposal. Fortunately, the Governor has the authority under state law to implement a new threshold at or above $45,500. We look forward to your approval of the state regulation to put a higher threshold in place.

#3202

Littler

Littler Mendelson, P.C.
625 Liberty Avenue
26th Floor
Pittsburgh, PA 15222

Robert W. Pritchard
412.201.7628 direct
412.201.7600 main
412.774.1957 fax
rpritchard@littler.com

November 19, 2019

VIA EMAIL (CBRANDT@IRRC.STATE.PA.US)

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: IRRC Number 3202
Department of Labor and Industry
Regulation #12-106: Minimum Wage

Dear Commissioners:

I write on behalf of the Workplace Policy Institute (WPI) of the law firm Littler Mendelson, P.C. with respect to Final Rulemaking #12-106 (IRRC #3202), which would update the executive, administrative and professional (EAP) exemptions from the minimum wage and overtime provisions of the Pennsylvania Minimum Wage Act of 1968 (PMWA). WPI facilitates the employer community's engagement in legislative and regulatory developments that affect their workplaces and business strategies. With more than 1,500 lawyers, Littler is the largest law firm in the world with a practice devoted exclusively to the representation of employers in employment and labor law matters. Approximately fifty of our employment attorneys are located in the Commonwealth of Pennsylvania. On a regular basis, we advise Pennsylvania employers with respect to their compliance with the PMWA and represent Pennsylvania employers in disputes arising under the PMWA.

THE FINAL REGULATION DOES NOT ALIGN THE DUTIES TESTS OF THE PMWA'S EAP EXEMPTIONS WITH THEIR FEDERAL COUNTERPARTS.

According to the Pennsylvania Department of Labor and Industry (the "Department"), "alignment of the duties test [of the PMWA's EAP exemptions] with the federal regulation is in the public interest." [Notice of Final Rulemaking at 12]. We agree.

According to the Department, its final regulation "updates Pennsylvania's duties test to align with USDOL's language." [Regulatory Analysis Form at § 15]. Unfortunately, the final regulation does not accomplish the stated objective. As described below, the final regulation does not conform to the intention of the General Assembly in the enactment of the PMWA (or to the Department's own intention in promulgating the regulation) that the EAP exemptions should align with the corresponding FLSA regulations.

The intent of the General Assembly in enacting the PMWA in 1968 was not to deviate from federal law with respect to the EAP duties tests.

The FLSA permits states to adopt laws that provide employees greater protection than federal law. [Regulatory Analysis Form at § 9, citing 29 U.S.C. § 218(a), *Bayada Nurses, Inc. v. Dep't of Labor and Indus.*, 8 A.3d 866, 883 (Pa. 2010)]. However, the intent of the General Assembly when it enacted the PMWA in 1968 was not to adopt a higher standard for its EAP exemptions than the well-established federal tests. Indeed, the 1968 version of the PMWA excluded from its protections those employees who were already covered by the FLSA. Rather, the General Assembly merely desired to extend minimum wage and overtime protections to those Pennsylvania workers who were not already covered by the FLSA.

Not surprisingly, when the Department first promulgated regulations to define and delimit the EAP exemptions in 1977, it purposefully aligned them with their federal counterparts. As the Department explained, Pennsylvania's EAP regulations "were established to mirror the federal regulations that were in place in 1977." [Regulatory Analysis Form, p. 2 & § 9; *id.* at § 10 ("Pennsylvania's current regulation aligns with the federal law as it existed in 1977."); *see also* Notice of Final Rulemaking at 12].

In 1988, when the General Assembly became concerned about the stagnating FLSA minimum wage, it acted on those concerns by amending the PMWA to eliminate the exclusion for workers covered by the FLSA and to increase the minimum wage for all Pennsylvania workers. *See* SB 1222 (Act 1988-150); Pa. Legislative Journal (Senate), Session of 1988, No. 64 (Nov. 21, 1988) at 2857-69 (noting failure to increase FLSA minimum wage since 1981 and intent to increase minimum wage for all Pennsylvania workers). As this example demonstrates, when the General Assembly desires to deviate from federal law and provide greater protection to Pennsylvania employees, it does so clearly and unambiguously. Notably, the General Assembly never expressed that deviating from federal standards with respect to the duties needed to qualify for an EAP exemption under the PMWA was in the public interest.

The current PMWA EAP duties tests are outdated and obsolete.

Pennsylvania's EAP regulations "have not been updated since their original promulgation in 1977." [Regulatory Analysis Form, p. 2 & § 9.] "[T]he current Pennsylvania regulations contain an outdated duties test." [Notice of Final Rulemaking at 3]. Since 1977, the U.S. Department of Labor ("USDOL") has "significantly changed" the duties tests under federal law. [*Id.* at 12; Regulatory Analysis Form at § 10 (explaining that when USDOL simplified its duties test, no change was made to Pennsylvania's regulation)]. As a result, "the duties test in the MWA's current regulation is out of date and no longer aligns with the USDOL duties test." [Regulatory Analysis Form at § 10].

The Department's failure to update the duties tests for the EAP exemptions creates a complex and unwieldy dual regulatory scheme for Pennsylvania employers, in which outdated and obsolete tests from 1977 still control whether an employee is exempt or nonexempt. As the Department aptly noted, "[t]wo different duties tests make it difficult for employers to accurately determine which employees are exempt from receiving overtime." [Regulatory Analysis Form at § 10; *see also id.* ("[T]he discrepancies between Pennsylvania's regulation and USDOL's regulation made it difficult for Pennsylvania employers to know if

white-collar salaried employees are entitled to receive overtime."); *id.* at § 15 (The current discrepancies between Pennsylvania's long and short duties test and USDOL's single test make it difficult for employers to understand who is truly an exempt employee.")]. The Department explained that the current regulations are "obsolete" because "the duties test in the current regulations is out of date and no longer aligns with the USDOL duties test as it once did." [Notice of Final Rulemaking at 12].

The public interest favors aligning the Pennsylvania EAP duties tests with their federal counterparts.

The Department expressed its "agreement with many commentators that Pennsylvania's duties test should align with the federal regulations." [Notice of Final Rulemaking at 25; *see also* Comment and Response Document at 6-7 ("The Department agrees that Pennsylvania's duties test should align with the Federal regulations.")]. "Updating Pennsylvania's duties test ... is essential to meet the intent of the overtime exemption regulation." [Notice of Final Rulemaking at 12].

As the Department recognizes, "aligning Pennsylvania's duties test with the federal duties test will assist employers with compliance." [Regulatory Analysis Form at § 10]. Aligning the PMWA's duties tests with their federal counterparts will eliminate a "burden" on employers by "making it easier for employers to comply with the law and for employees to know if they should be classified as an exempt or non-exempt EAP employee." [*Id.* at §§ 10 & 15]. "[T]he duties to qualify for each exemption have become outdated and need to be clarified to prevent the improper classification of employees and to be more consistent [with] the duties for the EAP exemptions found in the FLSA's regulations defining the EAP exemptions." [Notice of Final Rulemaking at 4]. As the Department concluded, "making the Act's regulations consistent with the FLSA's regulations with regard 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." [*Id.* at 4].

The final rule does not align the Pennsylvania duties tests with their federal counterparts.

The Department claims that its final regulations "mirrored the duties test set forth in the federal regulations." [Notice of Final Rulemaking at 25; Regulatory Analysis Form at § 26]. Despite its stated objective to align the duties tests under the PMWA's EAP exemptions with their federal counterparts, however, the final regulation makes only modest revisions to the duties tests. For example, the rule:

- eliminates the requirement that executive exempt employees "customarily and regularly" exercise discretionary powers; and

- eliminates the requirement that administrative exempt employees "customarily and regularly" exercise discretion and independent judgment (instead requiring that their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance).

However, the final regulation continues to differ from existing federal regulations in significant ways. For example, the regulation does not:

- include the FLSA's clarification 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 confirming that the administrative exemption applies 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);

- include any version of the FLSA's regulation confirming that the professional exemption applies 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 business owners, teachers, physicians, lawyers, and certain computer professionals from the salary requirement (29 C.F.R. §§ 541.101, .303(d), .304(d), .400);

- adopt the streamlined test for the EAP exemptions applicable to "highly compensated" employees (29 C.F.R. § 541.601);

- align the outside sales exemption under the PMWA with its federal counterpart (29 C.F.R. § 541.500);

- 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 of 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.

In its September 21, 2018 comments to the proposed rulemaking, the IRRC cautioned that the proposed rule did not achieve the Department's stated goal to "align the duties tests" of the PMWA's EAP exemptions with their federal counterparts. [IRRC Comments at 4]. Unfortunately, the Department largely ignored the IRRC's concerns and persisted in promulgating a final regulation that does not fully align the duties tests of the PMWA's EAP exemptions with their federal counterparts.

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 confirmation 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 must guess whether the executive exemption applies to store managers who occasionally perform non-exempt tasks concurrently with their exempt duties. Despite the Department's claim that the final regulation aligns the PMWA's duties tests with their FLSA counterparts, the text of the regulation fails to provide guidance on critical elements of what it means to be an exempt EAP worker in Pennsylvania.

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 uncertain, and raise the chances of time consuming and expensive litigation.

The Department's excuses for failing to align the Pennsylvania duties tests with their federal counterparts are without merit.

The Department claims that it "cannot create a computer exemption because that exemption does not exist in the Act." [Notice of Final Rulemaking at 9 & 15 (claiming "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. That is not correct. Section 5(a)(5) of the PMWA authorizes the Department to promulgate regulations to define and delimit the terms "administrative" and "professional" capacity. While it is true that the FLSA includes a separate statutory provision designed to ensure that certain computer employees could also be classified as exempt even if paid on an hourly basis (29 U.S.C. § 213(a)(17)), there is no reason why the Department could not define the terms "administrative" and "professional" capacity to include those very same hourly-paid computer employees. After all, the Department chose to include a "salary" requirement for the administrative and professional exemptions (*see* 34 Pa. Code §§ 231.83 - .84), and it could just as easily choose to define and delimit those exemptions to include certain hourly-paid computer employees.

The Department claims that it would not be appropriate to include "exemptions for highly compensated employees." [Notice of Final Rulemaking at 9 & 15 (claiming that "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. Again, this is not correct, and the Department's excuse reflects a fundamental misunderstanding of the EAP exemptions under federal law. There is no discrete exemption for "highly compensated employees" under the FLSA; indeed, the FLSA statute does not even mention the concept of "highly compensated employees." Rather, federal regulations merely provide streamlined EAP duties tests for employees with total annual compensation of at least $100,000 ($107,432 effective January 1, 2020). *See* 29 C.F.R. § 541.601. In other words, highly compensated employees still must qualify as executive, administrative, or professional employees to be

exempt under the FLSA; the duties tests are just simplified. There is no reason why the Department cannot adopt the same streamlined EAP duties tests for highly compensated employees under the PMWA.

The Department claims that it would not be appropriate to include an exemption for "business owners." [Notice of Final Rulemaking at 9 & 15 (claiming that "there are some federal exemptions that the Act simply does not empower the Department to adopt")]. Again, this is not correct. There is no discrete exemption for "business owners" under the FLSA. Rather, federal regulations merely recognize that the executive exemption includes certain business owners (those who own at least 20% of the enterprise and are actively engaged in its management). *See* 29 C.F.R. § 541.101. In other words, business owners still must qualify as executive employees to be exempt under the FLSA; the duties test is just simplified. There is no reason why the Department cannot adopt the same streamlined duties test for business owners within the executive exemption under the PMWA.

Finally, the Department acknowledged commentators' observations that its proposed rulemaking did not adopt federal principles and definitions such as "concurrent duties," "primary duty" and "salary basis." [Notice of Final Rulemaking at 15]. While the Department assured employers that it would "look to federal law for guidance for interpreting its regulations" for enforcement purposes [Notice of Final Rulemaking at 15], the IRRC should not simply assume that courts will be as willing to overlook and/or harmonize the many remaining differences between the regulation and the FLSA.

The Department should revise the regulation to align the Pennsylvania duties tests with their federal counterparts.

If the Department truly wishes to align the Pennsylvania duties tests for the EAP exemptions with their federal counterparts to make them consistent (as it claims), then 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." 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.

Similarly, Maryland and New Jersey define the EAP exemptions by reference to their counterparts in the federal regulations found at 29 C.F.R. Part 541. *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."); N.J.A.C. §12:56-7.2 ("Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.").

The Department need not attempt to "keep up" with the FLSA by piecemeal amendments. Rather, the Department should do what it says it wishes to do—align the PMWA regulations with their FLSA counterparts—in a single, simple amendment to the Pennsylvania Code:

> 34 Pa. Code § 231.81. Definitions.
>
> The term outside salesmen, executive, administrative and professional capacity shall be ~~defined in these §§231.81 - 231.85 (relating to special definitions)~~ defined in accordance with the Fair Labor Standards Act of 1938 and 29 C.F.R. Part 541, as amended, and employment in those classifications shall be exempt from both the minimum wage and overtime provisions of the act.

This simplified approach would achieve the Department'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 Department's piecemeal proposed amendments.

The Final Regulation's Salary Thresholds Do Not Conform To The Intent Of The General Assembly.

The final regulation would increase the EAP salary threshold under Pennsylvania law to:

- $684 per week ($35,568 annually) effective January 1, 2020;
- $780 per week ($40,560 annually) effective January 1, 2021; and
- $875 per week ($45,500 annually) effective January 1, 2022.

The first increase would align the PMWA's salary threshold with the new FLSA salary threshold that also takes effect January 1, 2020. Beginning in 2021, however, the PMWA's salary threshold will significantly eclipse the FLSA standard.

Effective January 1, 2023 (and each third year thereafter), the salary threshold would reset automatically to an amount equal to the 10th percentile of all Pennsylvania workers who work in salaried exempt EAP jobs. In other words, every three years, those workers whose salaries are among the lowest 10% of all salaried exempt EAP workers in Pennsylvania will need to have their salary adjusted to a new threshold in order to maintain their exempt status.

The Department's salary level increase will have a costly and material impact on employers in the Commonwealth. Among the employers who will be most impacted by the dramatic change in the salary threshold will be those in the nonprofit, education and medical provider sectors. For these employers (who cannot simply raise prices to offset the costs of salary increases or additional overtime obligations), the salary increase amounts to an unfunded mandate. The only option for such employers will be to reduce services by restricting hours worked by a new class of nonexempt employees. We encourage the IRRC to consider carefully the many comments from employers who expressed concerns about the

economic impact of the regulation and the adverse effects that the regulation will have on services provided by employers—especially those in the nonprofit, education and medical provider sectors.

In these comments, however, I will focus on the Department's attempt to distinguish its regulation with the federal regulation that was struck down by a federal district court in *Nevada v. United States Department of Labor*, 275 F. Supp.3d 795 (E.D. Tex. 2017). In that case, as the Department acknowledges, the court held that the U.S. Department of Labor's attempt to raise the salary threshold to $913 per week was improper because it excluded from the EAP exemptions large numbers of people who performed exempt duties, rendering the duties test irrelevant. [Regulatory Analysis Form at § 9]. The Department claims that it "does not anticipate a similar legal challenge to its regulation" and argues that its regulation differs from the rule struck down by the Texas federal district. [*Id.*]. The Department's attempt to distinguish its regulation from the federal regulation falls short.

In the federal case, the court reviewed the language of the FLSA and Congressional intent, and determined that the USDOL was delegated authority to define and delimit the duties that would constitute an employee working in a "bona fide executive, administrative, or professional capacity." *Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795, 805 (E.D. Tex. 2017). The relevant language reflecting the legislative intent of the General Assembly when enacting the PMWA tracks the relevant policy language from the FLSA. *Compare* 29 U.S.C. § 202 (statement of purpose) *with* 43 P.S. § 333.101 (declaration of policy). The relevant language reflecting the delegation of authority to the Department to define and delimit the EAP exemptions in the PMWA tracks the corresponding language from the FLSA. *Compare* 29 U.S.C. § 213(a)(1) (EAP exemptions) *with* 43 P.S. § 333.105(a)(5) (EAP exemptions).

In the federal case, 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. 275 F. Supp. 3d at 805. The court expressly held that the USDOL'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 USDOL "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. Thus, any 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 USDOL's proposed salary level of $913 per week "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 Department has not explained why its proposed salary threshold would not be susceptible to the same defect. Raising the salary threshold to $875 per week would make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. Although the General Assembly granted the Department the authority to define and delimit the EAP exemptions, it did not

deputize the Department with the authority to set the salary so high that individuals employed in a *bona fide* executive, administrative, or professional capacity are nonetheless unable to qualify as exempt.

Any significant changes to the salary threshold will have deep and significant economic and public policy impact. If the General Assembly 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" (not once every 42 years)—is directly contrary to such a conclusion. Therefore, the General Assembly, 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 Department's overreach is not in the public's interest.

The Department justifies the new salary level by arguing that it will "increase earnings" for Pennsylvania workers, reduce "the use of public assistance," provide more "free time" for individuals, "increase consumer demand, create more jobs, and increase the economic multiplier effect on local economies in the Commonwealth." [Regulatory Analysis Form at § 10]. As relevant here, however, the PMWA only delegated authority to the Department for the limited purpose of defining what it means to be a "*bona fide* executive, administrative, or professional" employee—***not*** to make policy judgments about how to arbitrarily set the salary threshold so high that a *bona fide* EAP exempt worker is nonetheless excluded from the exemption in furtherance of unrelated policy objectives. Any increase in the salary level must have as its only objective the drawing of a line separating out obviously nonexempt employees from the exemption, rather than pursuing unrelated policy objectives (no matter how laudable).

The Department attempts to distinguish the regulation from the invalidated federal rule by noting that the Department's increase in the salary threshold is smaller than the 2016 USDOL rulemaking and that the Department used a different methodology to calculate the salary threshold. [Regulatory Analysis Form at § 9]. To be sure, the Department's approach resulted in a salary level at an amount 95.8% as high as the invalidated federal rule. The Department does not explain why this 4.2% difference is so material that it would survive legal challenge. It cannot be disputed that setting the salary level so high disqualifies many *bona fide* EAP exempt individuals from the exemption. Thus, it clearly exceeds the scope of the Department's authority.

The Department also attempts to distinguish the regulation from the invalidated federal rule by pretending that "the Department's increase in the salary threshold is part of a comprehensive effort to update the duties test to qualify for the EAP exemption, including eliminating the "long" and "short" tests. [Regulatory Analysis Form at § 9]. This is simply not true. As noted above, the minor revisions to the duties test hardly qualify as "comprehensive" reform in light of all of the inconsistencies that remain between the regulation and the federal EAP duties tests. Also, the so-called "long" test has been obsolete since at least 2004. The "long" test only applies to individuals earning a salary below $250 per week. Since the FLSA established a $455 salary threshold in 2004, it is reasonable to assume there are zero EAP exempt workers in Pennsylvania who earn less than $455 per week. In other words, eliminating the "long" test is not "comprehensive" regulatory reform; it is eliminating an obsolete regulation that has been of no effect since at least 2004. In any event, even if the regulation was part of a "comprehensive" effort, the fact

remains that setting the salary level so high disqualifies *bona fide* EAP exempt individuals from the exemption and thus clearly exceeds the scope of the Department's authority.

The regulation's provision to automatically, and without further review and oversight, adjust the salary level every three years to the 10th percentile of all Pennsylvania workers who work in salaried exempt EAP jobs 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 counterpart. There is simply no indication that the General Assembly intended that the salary level test for exemption under section 5 be indexed. Indeed, in the entire history of the PMWA (and similarly in the history of the FLSA), the General Assembly never provided for automatic increases of the minimum wage in perpetuity. Instead, the General Assembly expressly and unambiguously stated that the Department is to define and delimit the EAP definitions "from time to time" by regulation. 43 P.S. § 333.105(a)(5). Clearly, the General Assembly intended for the Department to revisit the EAP regulations from time to time (not once every 42 years). 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 conflicts with legislative intent.

An index that recalibrates every three years based on salaries of EAP exempt employees will be relying on an ever-shrinking pool of such employees, causing a never ending, upward ratcheting effect. Every three years, those workers whose salaries are among the lowest 10% of all salaried exempt EAP workers in Pennsylvania will need to have their salary adjusted to a new threshold or (more likely) be reclassified to non-exempt and removed from the pool of salaried EAP exempt employees from which the 10th percentile is calculated. Whichever choice the employer makes, the change will automatically force the 10th percentile ever higher, without regard to then-current economic conditions.

CONCLUSION

The Regulatory Review Act makes clear that the IRRC must determine "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). The Commission should issue a **disapproval order** and encourage the Department to resubmit the regulation with revisions that actually achieve the General Assembly's intention and the Department's stated objective: (a) to align the duties tests of the PMWA's EAP exemptions with their federal counterparts; and (b) to adopt a salary threshold that only excludes obviously nonexempt employees, so that *bona fide* executive, administrative, and professional employees are not excluded from exempt status. It has been more than 40 years since the Department attempted to define and delimit the scope of the EAP exemptions. The Department should not squander this opportunity to get it right.

Very truly yours,

/s/ Robert W. Pritchard

Robert W. Pritchard

PA Chamber™
of Business and Industry

Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Public Meeting on Regulation #12-106 Minimum Wage

Before the:
Pennsylvania Independent Regulatory Review Commission

Presented by:

Alex Halper
Director, Government Affairs

Harrisburg, PA
Jan. 31, 2020

417 Walnut Street
Harrisburg, PA 17101-1902
717.720.5471 phone

Chairman Bedwick and members of the Independent Regulatory Review Commission, my name is Alex Halper and I am Director of Government Affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy association in the Commonwealth. Our members include employers of all sizes, crossing all industry sectors throughout Pennsylvania. Thank you for the opportunity to offer some brief comments today regarding the Department of Labor and Industry's Regulation #12-106.

The PA Chamber submitted comments to the Commission on Aug. 22, 2018 related to the proposed regulation and on Nov. 19, 2019 related to the final form regulation. Both sets of comments include information, analysis and employer perspectives too extensive to cover today but my understanding is they will be included in the record.

In the brief time I have I'd like to review the Department's final form regulation in the context of the comments your Commission submitted to the Department on Sept. 21, 2018, which were based on criteria in the Regulatory Review Act.

Reaching of consensus: You acknowledged receiving "hundreds of comments highlighting numerous and significant outstanding concerns." You said you "believe the issues raised deserve careful contemplation" and encouraged the Department to continue engaging in dialogue with impacted parties. We were very happy to work

with Department officials to help coordinate roundtable meetings with local chambers and other employers to provide their insights. Each of the five meetings featured a diverse group of employers who varied in size, industry, workforce composition and demographics, status as for-profit or not-for-profit, urban, rural, suburban, etc.

The concerns and suggestions raised by these employers were generally the same as those raised by hundreds of other employers and advocates: the proposed salary threshold for exempt status is too high; the automatic escalator will exacerbate challenges going forward; the method proposed for automatically setting new thresholds would inherently create a cascading effect of larger and larger increases; and workplace morale will suffer as employers are forced to shift salaried employees into hourly positions in which work hours are closely regulated and monitored, employees may lose the flexibility and benefits associated with earning a salary and could see their wages reduced if hours in a week fall below 40.

Numerous participants applauded the Department's *desire* for better alignment between state and federal law; but noted that the rule falls short of that goal, unnecessarily and unintentionally making compliance more complicated and confusing.

The meeting participants with whom I spoke appreciated the opportunity to share their serious concerns with high-ranking Department officials, each of whom was exceedingly cordial and generous with their time. There is no disputing the Department followed your directive to continue engaging in dialogue. But dialogue is not an objective in and of itself. Dialogue is a means to an end. And that end was your ultimate directive to the Department: "Reaching of consensus." In this, I am afraid the Department has fallen short: the final form regulation submitted after stakeholder meetings had only minimal differences; still increases the salary too aggressively; still mandates automatic increases that will preclude stakeholder input going forward; still utilizes a flawed method for automatically increasing the threshold and still falls far short of the Department's stated goal of better aligning federal and state overtime law.

I would note for the record that the following state associations have signed a joint statement opposing the Department's rule:

Associated Builders and Contractors of Pennsylvania
Association of Independent Colleges and Universities of Pennsylvania
Hospital and Healthsystem Association of Pennsylvania
Insurance Agents & Brokers
LeadingAge PA
National Federation of Independent Business
Pennsylvania Apartment Association
Pennsylvania Association of Community Banks
Pennsylvania Association of Community Health Centers
Pennsylvania Builders Association
Pennsylvania Chamber of Business and Industry
Pennsylvania Council of Children, Youth & Family Services
Pennsylvania Council of General Contractors

Pennsylvania Credit Union Association
Pennsylvania Food Merchants Association
Pennsylvania Health Care Association
Pennsylvania Homecare Association
Pennsylvania Institute of Certified Public Accountants
Pennsylvania Manufactured Housing Association
Pennsylvania Manufacturers' Association
Pennsylvania Restaurant & Lodging Association
Pennsylvania Retailers Association
Pennsylvania Ski Areas Association
Pennsylvania Society for Human Resource Management State Council
Rehabilitation & Community Providers Association

I am aware of numerous other constituencies who have privately expressed concerns but are reluctant to do so publicly given the sensitivities over this issue.

Legislative comments: You said "We encourage the Department to work with the standing committees and state lawmakers to address their issues…" While I cannot speak for anyone in the legislature, at least one standing committee chair publicly stated that the Department did not work with the committee to address their issues and both the House and Senate Labor and Industry Committees have passed disapproval resolutions related to this rule.

Economic or fiscal impacts of the regulation; Protection of the public health, safety and welfare: In your comments you note that "the estimated costs of compliance that were provided by nonprofit and higher education employment sectors appear to contradict the Department's estimates." This is a critical point, as

many of the employers likely to be impacted by the proposed rule are nonprofits and those in the medical provider sector that provide important health and social services to vulnerable populations. Non-profits, for example, primarily rely on private donations and government grants for their revenues. Many employers in the healthcare industry depend on reimbursements from Medicaid, Medicare and private insurance. The Department rather casually suggests these employers can simply increase salaries to maintain exempt status or pay overtime – yet it is unlikely that revenue will increase commensurate with the higher costs from this rule.

Their only option may be to cut staff and reduce their vital services. You directed the Department to "consult with the regulated community to gain a thorough understanding of the fiscal impacts of this proposal and address those findings." You later commented that the Department does not address the "potential negative consequences that have been reported by employers" and directed the Department to "account for these potential impacts on individuals." Again, it appears the Department has fallen short of this directive.

Clarity, feasibility and reasonableness; Possible conflict with or duplication of statutes or existing regulations. This section of your comments conveys one of the most frustrating aspects of Pennsylvania overtime law: the inability of Pennsylvania employers to follow federal law – not based on any intentional policy decision, but

simply as a result of inaction and state law lacking a mechanism to simply stay aligned with federal law unless the Department or General Assembly wishes to deviate. Many employers become aware of this misalignment after being found to have violated state law; though they were following federal law and therefore believed they were in compliance. Other employers who only operate in Pennsylvania may never know they are at a distinct disadvantage compared to their counterparts in other states.

As previously noted, many in the regulated community were thrilled when they read of the Department's desire to align federal and state law; only to be disappointed when actual regulatory language fell so short of this stated goal. You asked the Department to address "how it will handle future misalignment with revised federal regulations." There does not appear to be a sufficient answer to this question.

Later on, you noted that "There appears to be some confusion as to whether this proposal applies to public employers." The Department did seem to address this question; yet, though I cannot speak for public employer representatives, I can tell you there is still confusion over applicability within the public sector.

Reasonableness of requirements, implementation procedures and timetables for compliance; Statutory authority; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review: Parts of

this section focus on the Department's proposal to require regular automatic updates to the salary threshold. You posed a number of important questions in this section, including "What opportunities exist for the regulated community to have input or provide feedback to the Department regarding a new salary threshold?" In its response, the Department simply says "the adjustment would be reviewed by the Minimum Wage Advisory Board and published in the Pennsylvania Bulletin at least 30 days in advance of the effective date." This is simply insufficient and practically ensures there will no input and no real opportunity for feedback going forward.

Putting these important policy decisions on auto-pilot with no real opportunity for input from impacted stakeholders will become more and more problematic and unacceptable as the salary threshold grows higher. The proposal already calls for three significant increases in three years and their chosen method for determining future increases would have an exponential effect, since it is determined by a formula based on the population of exempt, salaried employees. Every increase will result in employees at the lower end of that salary scale being converted to non-exempt, hourly and therefore removed from that population. As that group grows smaller, the average salary will grow higher, as will the salary threshold for exempt status. And there will be nothing the regulated community can do about it. It is for this reason that the next section of your comments is really the crux of the concern:

Whether this regulation represents a policy decision of such a substantial nature that it should receive legislative review. You even seem to suggest some skepticism, asking "Has the Department sought input from the legislature?" and further encouraging the Department to "work with legislators and the standing committees as it advances this rulemaking to the final stage of regulatory review." It does not appear this has occurred and, as an important policy change in the Commonwealth, it should have.

Both federal and state law require employers to pay overtime; but both have also always limited who is subject to this requirement, recognizing that universal application would do more harm than good for certain positions, industries, etc. Significantly increasing the salary threshold and requiring an automatic escalator utilizing a formula that will cause exponential increases represents a policy change that will disrupt the balance for which these laws have always strived.

A permissible salary level should serve to screen out categories of employees who are obviously nonexempt, and for whom it is therefore unnecessary to even review job responsibilities, the so-called "duties test" to determine exempt status. The Department has seemingly disregarded the ruling of the United States District Court for the Eastern District of Texas, and the Judge, an appointee of President Obama, who concluded that a comparable federal proposal rendered the duties test for the

EAP exemptions irrelevant. The same applies to the Department's rule: while the Pennsylvania Generally Assembly delegated authority to the Secretary of L&I to occasionally adjust the salary threshold to potentially qualify as an employee working in an executive, administrative, or professional capacity, it did not delegate authority to render the duties test irrelevant.

It is clear the Department did not sufficiently address many important questions and directives you outlined in your Sept. 21, 2018 comments. We therefore urge you to disapprove of this rule.

Again, thank you for the opportunity to address you today.