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November 18, 2019

Mr. Bryan Smolock
Director, Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas Street
Room 1301
Harrisburg, PA 17121

RE: Department of Labor and Industry Final Regulation #12-106
(IRRC# 3202): Overtime Pay

Dear Mr. Smolock:

These comments are submitted on behalf of the National Federation of Independent Business in Pennsylvania (NFIB PA) in response to the final regulation #12-106 for Title 34, PA Code Chapter 231, Part XII: Overtime Pay. NFIB is the nation's leading small business advocacy association, representing nearly 13,000 members in Pennsylvania and 300,000 throughout the United States. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB acknowledges that the final regulation has incorporated some of the feedback submitted during the notice and comment period for the proposed regulation. However, the changes in the final regulation have not gone far enough in addressing our membership's fundamental concerns. We reiterate our opposition to the regulation and urge the Department of Labor and Industry (the Department) to withdraw the rule for the following reasons. First, the final regulation inordinately burdens small businesses while providing minimal benefits to employees. Second, the final regulation does not go far enough in aligning with federal standards. Lastly, the increased salary exemption threshold amounts to unfair surprise, upsetting the settled expectations of businesses throughout the Commonwealth.

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The Department has responded to many criticisms of the proposed regulation by noting that "affected businesses will likely adapt to the regulation in the least costly way possible." The adjustments the Department has recommended include: "[p]ay non-exempt employees overtime; [l]imit non-exempt employee hours to 40 hours a week to avoid Overtime Costs; [a]llow for some overtime but reducing base pay or benefits; [r]aise non-exempt employee salaries to above the threshold." The Department seems to recognize that the practical effect of the final regulation will not result in increased wages to employees in many circumstances. There are other possibilities that the Department has overlooked.

For example, suppose a business employs a salaried, full-time administrator who on average works 50 hours per week. If that employee is no longer an exempt employee under the new salary thresholds in the final regulations, the employer could respond by hiring another part-time employee and shifting the currently salaried employee to a part-time schedule as well. Under such an arrangement, two part-time employees working 25 hours per week would replace the single full-time salaried employee. From an employee's perspective, such an arrangement has serious drawbacks, including the loss of wages and the loss of other benefits of full-time employment. A business has other choices as well, including the relocation of the business or closing the business if its economic model is no longer feasible. These outcomes do not align with the Department's goal of imputing additional benefits to Pennsylvania workers.

In any case, NFIB maintains that the final regulation will harm small business competitiveness by restricting employer flexibility. One of the greatest strengths of small business is flexibility. In comparison to larger firms, small businesses are often cited as being nimbler, such as by providing more flexible working arrangements for employees. The Department's response to this concern has been inadequate. Many businesses are engaged in work that is seasonal or cyclical in nature, with work hour needs fluctuating over a longer time frame. An employer may

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need a salaried employee to work over 40 hours during busy seasons and 40 hours or less during slow seasons. Again, under the final regulations an employer may be tempted to avoid paying overtime by switching to part-time hourly employees. These hourly employees would be faced with fluctuating income streams, an inadequate situation for lower wage workers that are already extremely sensitive to slight deviations in weekly income. While there are undoubtedly some workers that would benefit from the final regulation, the Department ignores that many workers would see their fortunes significantly reduced by a switch to an hourly employment scheme.

One concern that our members shared was the additional burden that a dual compliance scheme would create. We appreciate that the Department has listened and has taken steps to align Pennsylvania's duties test with the federal duties test. Unfortunately, the final regulations will still result in a dual compliance scheme for employers. In particular, certain exemptions present in the federal Department of Labor (DOL) regulations are not present in the Department's final regulation. These exemptions include computer employees, highly compensated employees, business owners, and employees of educational establishments. While we agree that the Department lacks the authority to create exemptions for broad classes not already promulgated by statute, we urge the Department to work more closely with the Legislature to achieve conformity with federal law.

Finally, we question why the Department has not once exercised its purported authority to promulgate overtime salary thresholds in the past 52 years. In contrast, the DOL has periodically adjusted the federal overtime salary thresholds to account for rising wages and inflation. The Department has not. As a result, business owners in the Commonwealth have come to rely on the salary thresholds established by the DOL in determining whether their workers were exempt. The final regulation no doubt upsets the settled expectations of Pennsylvania business owners that they could continue to rely on the federal salary thresholds. Although the Department has provided an additional phase-in period to account for

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the increased salary thresholds in the updated DOL regulations, the fact that the Department has acted within this area at all amounts to unfair surprise. Furthermore, the Department has not provided any explanation at all as to why it is taking such a startling reversal of course other than that the state salary thresholds have not been updated since 1977. While true, this explanation does not account for the many opportunities that the Department has had to update the thresholds in the past. Surely the citizens of the Commonwealth deserve a more reasoned explanation before an administrative agency takes such a dramatic about face.

For the foregoing reasons, we urge the Department to withdraw and reconsider the final regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Gordon R. Denlinger", written in a cursive style.

Gordon R. Denlinger
State Director