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Independent Regulatory Review Commission
333 Market St., 14th Floor
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Submitted by email to irrc@irrc.state.pa.us

Re: Comments on the Department of Labor and Industry's proposed final amendments to 34 Pa. Code Chapter 231 to clarify the definitions of Executive, Administrative, and Professional salaried workers who are exempt from minimum wage and overtime pay requirements – Minimum Wage Act #12-106 (IRRC #3202)

Dear Commissioners:

The National Employment Law Project (NELP) submits these comments on the Pennsylvania Department of Labor and Industry's (the Department's) proposed final amendments to the Minimum Wage Act, 34 Pa. Code Chapter 231 (the Act) clarifying the definitions of Executive, Administrative, and Professional salaried workers who are exempt from receiving minimum wage and overtime pay (EAP exemptions).

The Department's proposed final amendments advance the Act's goals through an updated bright-line salary threshold of $45,500 and revisions to the current duties tests that will more effectively differentiate between salaried executive, administrative and professional employees who ought to be overtime-protected and those who should properly be classified as exempt. This is true especially in comparison to the Trump Administration U.S. Department of Labor (US DOL)'s 2019 final overtime rule, which raises the federal salary threshold for these exemptions to just $35,568 – a significant rollback from the stronger overtime protections that US DOL had issued in 2016 under the Obama Administration. Under the Department's final amendments, by 2021 approximately 200,000 more Pennsylvania workers will enjoy overtime protections under the proposed final salary threshold of $45,500 than under the Trump Administration final overtime rule.

However, NELP respectfully suggests that the Wolf Administration reconsider the decision to shift away from the Department's original stronger proposal to set the salary threshold at the 30th percentile of the salary distribution in the Northeast Census region. That original proposal was already very modest. It roughly tracked the Obama Administration's proposed overtime rule, which was a national proposal and was calibrated to be appropriate for states like those in the Southern Census Region that have lower wages and costs of living than Pennsylvania. In fact, over time, we would urge that Pennsylvania act to restore overtime protections for salaried workers to the level of the mid-1970s, with a salary threshold that phases up to the 40th, 50th and then 60th percentile of the Northeast Census Region's salary distribution.

A strong salary threshold for Pennsylvania's EAP exemption, and the ensuing expansion of automatic overtime coverage, will mitigate decades of neglect in maintaining basic protections for most workers, and begin reversing decades of wage declines that have harmed America's middle class. Under the Regulatory Review Act, the Independent Regulatory Review Commission's goal is to determine whether a proposed regulation is in the public interest.[1] The first and primary concern is whether the regulation complies with the agency's statutory authority and the legislative intent.[2] If the Commission determines the regulation meets those requirements, it then considers the economic impacts and the clarity, feasibility, and reasonableness of the regulation.[3]

I. The Department's proposed final amendments defining the EAP exemption reinforce and advance the purposes of the Act's overtime provisions, but not as well as the original proposal did.

The Minimum Wage Act begins with a declaration of policy in which the Pennsylvania legislature stated its intention to protect employees from "unreasonably low" wages "not fairly commensurate with the value of the services rendered."[4] In the Act, the legislature adopted a broad rule guaranteeing overtime pay to most workers, but also recognized that some white-collar employees enjoy executive decision-making authority, bargaining power, and discretion over time and work, along with higher pay, that justifies exempting them from overtime pay and minimum wage coverage.[5]

Despite steadily improving job growth and a declining unemployment rate, real wages for all but the highest-paid workers have remained stagnant for decades, in part because of the growth in involuntary part-time and other forms of insecure employment.[6] At the same time, an astounding 25 percent of salaried employees report they regularly work 60-plus hours each week, and another 25 percent say they work between 50 and 59 hours weekly.[7] In an economy where many

[1] 71 P.S. §745.5b.
[2] 71 P.S. §745.5b(a).
[3] 71 P.S. §745.5b(b).
[4] 43 P.S. § 333.101 (1968).
[5] 43 P.S. §§ 333.104-105 (1968).
[6] DaSilva, Drew, For most U.S. workers, real wages have barely budged in decades, Pew Research Center (August 7, 2018).
[7] Saad, Lydia, The Forty-Hour Workweek is Actually Longer—by Seven Hours, Gallup (August 2014).

workers receive fewer work hours than they want and need, while others are putting in excessive overtime hours for which they receive no pay at all, the Department must strike a sounder balance in defining and delimiting the EAP exemptions to ensure that it is once again advances the purposes of the Act.

The original proposal from the Department did just that and the proposed final regulation does so too, although to a lesser degree. Both proposals harmonize the overtime threshold and job duties tests with the original intent of the legislature and economic and workplace realities. Under the current regulations in Pennsylvania, last updated in 1977, the minimum annual salary threshold for the exemption is either $8,060 or $13,000, depending on job duties.[8] These amounts are so low that they are below the minimum wage of $15,080 annually for a full time worker. They have thus become entirely irrelevant in determining exempt status, and cannot in any scenario truly describe an executive, administrative or professional employee.

If the Department had tied the salary threshold for the duties test it proposes to inflation, the threshold would now equal $55,998, in today's dollars. In 1975, 62 percent of full-time salaried workers were automatically eligible for overtime nationally, According to the Pennsylvania Chamber of Business, today only 4.3% of Pennsylvania salaried workers are automatically eligible for overtime.[9] And under the Trump Administration's new US DOL rule, just 15% of salaried workers will automatically get overtime.[10] Moreover, because of inflation, the current thresholds now represent a large reduction in purchasing power from the 1977 thresholds. The increased thresholds initially suggested by the Department, rising to $47,892 in two years and the proposed final regulation raising to $45,500 in two years merely return these standards to a level more consistent with the purpose of the Minimum Wage Act's overtime protections.[11]

II. Indexing automatically to update the salary level threshold is a fair, predictable, and efficient way to ensure that the scope of the exemptions continues to keep pace with the Act's intended reach.

The Department proposes to index the salary thresholds to rise automatically every three years, pegging them to the weighted average of the 10th percentile of earnings of approximately 300 occupations that are generally exempt from overtime based on their duties. Automatic indexing fulfills the goals of providing predictability for employers and employees and eliminates the need for regular rulemaking to update the salary levels. The Department retains the statutory authority to update the scope of the EAP exemptions, as discussed above. Indexing would simply be a means to ensure the threshold remains current rather than continuously erode. The

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[8] 34 Pa. Code Sections 231.82-231.84

[9] See Comment of Pennsylvania Chamber of Business and Industry, p. 3, available at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf

[10] Economic Policy Institute, More than eight million workers will be left behind by the Trump overtime proposal (March 2019), available at https://www.epi.org/publication/more-than-eight-million-workers-will-be-left-behind-by-the-trump-overtime-proposal-that-number-will-grow-to-11-5-million-in-the-first-10-years-of-implementation/

[11] Since the Trump Administration has set the salary threshold under FLSA at $35,568 the final proposal to set the threshold at the federal level in 2020 is sound.

Department is acting reasonably and is entirely within its statutory authority to adopt indexing as a means to "define and delimit" the EAP exemptions.

The Department's proposal to index the salary threshold also make good policy sense, as it provides predictability for employees and employers and ensures stability because it does not depend on constant rulemaking. History has shown that the current method of setting fixed levels results in outdated thresholds and subjects a ballooning number of workers to employer misclassification as exempt. Since 1977, Pennsylvania has not updated its salary thresholds and, prior to the federal government's 2016 regulation, the FLSA level had been updated only once since 1975. There is no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. Pennsylvania's failure to update the salary level on a regular basis has caused the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions. Thus, not only does the Department have the authority to index the salary threshold to adjust salary levels appropriately, indexing is by far the most reasonable, efficient and predictable way to ensure that the standard for exemption remains true to the statute's intended purposes.

III. Pennsylvania Workers will benefit from this proposal.

While it is impossible to predict exactly what employers will do in response to the rule changes, history shows that employers will likely make a few adjustments. Illustrative studies of employer behavior from Goldman Sachs looking at historical employer behavior following the federal government's 2004 rule changes, and from the National Retail Federation (NRF) predict that:

- Some employers will raise salaries for employees near the new threshold in order to maintain those employees as exempt;[12]
- Some employers will continue to demand that workers newly reclassified as non-exempt perform overtime, and those workers will be compensated for that extra work;
- Other employers will reduce hours for workers working more than 40 hours in a week and shift work to under-40-hour employees and hire additional workers, too – the NRF predicted that 117,000 new jobs would have been added and Goldman Sachs' study predicted 120,00 new jobs;[13]
- And some employers could lower the wages of some salaried properly exempt workers to save on overall payroll costs and continue to require them to work long hours.

Once this proposal is finalized, workers will benefit. Some workers will see more money in their pockets: either a bump in their salary above the new level, or time-and-a-half pay for any

[12] See, e.g. Goldman Sachs letter to investors, available at http://www.businessinsider.com/overtime-rules-will-affect-payrolls-more-than-pay-2015-7

[13] The National Retail Federation's report, Rethinking Overtime, available at https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf, estimates that 117,000 jobs will be created in the retail and restaurant sector alone. Goldman Sachs says 120,000 jobs will be created. See also Susann Rohwedder & Jeffrey B. Wenger, The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage, RAND Labor & Population (August 2015), p. 37.

overtime hours. The increased income resulting from this proposal may result in reduced need for social assistance (and by extension reduce social assistance expenditures by the government).[14] In addition, when workers' incomes rise, so does consumer spending and tax revenues of the State and its local governments.

For overworked employees who see no additional compensation for their hard work, reduced hours will be a good thing. Working long hours is correlated with an increased risk of injury or health problems. It also prevents workers from spending time with their families and in their communities. Long work hours are related to stress and injuries in the workplace.[15] Long hours also contribute to a significant increase in risk of contracting specific chronic diseases, such as chronic heart disease, non-skin cancer, arthritis, and diabetes.[16] As weekly work hours increase, so too does the risk for diagnosis of hypertension,[17] and mortality rates rise by nearly 20 percent.[18]

Costs of work-related stress to American businesses due to absenteeism and employee turnover alone exceed $300 billion annually.[19] Another study this year found that the estimated annual health care expenditures related to workplace stress could be as high as $190 billion per year, with long hours, shift work, and work-family conflict all factoring into the cost.[20]

In 2014, approximately 70 percent of women with children were either working or looking for work.[21] On the days they did household activities, women spent an average of 2.6 hours on such activities, while men spent 2.1 hours.[22] The combination of hours at work and at-home after hours work leaves families with little non-work time, generating work-family conflict that increases the odds of self-reported poor physical health by about 90 percent.[23] However, by encouraging employers to build greater efficiencies into their organizations or share work more broadly among employees to avoid overtime pay premiums, the Department's proposal has the potential to alleviate work-family conflict-related stresses too. As Professor Lonnie Golden

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[14] Benefits for which currently exempt EAP workers may qualify include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and school breakfasts and lunches.
[15] Galinsky, E., Bond, J. T., Kim, S. S., Backon, L., Brownfield, E., & Sakai, K. (2005), Overwork in America: When the way we work becomes too much. New York: Families and Work Institute.
[16] Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period, Presentation at American Public Health Association Meeting on November 18, 2014, on National Longitudinal Survey of Youth.
[17] Yoo et al., Effect of Long Working Hours on Self-reported Hypertension among Middle-aged and Older Wage Workers, Annals of Occupational and Environmental Medicine 2014, 26:25; Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.
[18] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.
[19] European Agency for Safety and Health at Work, Calculating the costs of work-related stress and psychosocial risks, 2014, citing 2001 estimated data compiled by Rosch.
[20] Goh, J, Pfeffer, J, & Zenios, S. (2015), The Relationship Between Workplace Stressors and Mortality and Health Costs in the United States. Management Science.
[21] Bureau of Labor Statistics, Employment Characteristics of Families – 2014, April 2015.
[22] Bureau of Labor Statistics, American Time Use Survey – 2014 Results, Released June 2015.
[23] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.

found, using data from the General Social Survey (GSS) to analyze whether salaried workers stand to lose flexibility by gaining overtime protections:

> Because salaried workers in the affected pay brackets already work mandatory overtime at the same frequency as hourly workers and more days of overtime in general than hourly workers, raising the overtime threshold for them would not increase and in fact could decrease the work stress and work-family conflict associated with mandatory overtime.[24]

The last option (reducing wages for some salaried employees) is a possibility and some employers may implement it. However, at a time when the labor market is tightening, and even notoriously low-wage employers are voluntarily raising their starting and minimum wages because they need to compete to attract and retain a qualified workforce, we believe that reducing nominal wages of workers would result in exceedingly bad morale and higher-than-normal turnover. [25] We also believe that many employers are well aware that this is a foolhardy business practice, and though many of their representatives in national organizations issue such doomsday prophesies, employers are simply too smart and too dependent on good personnel to implement such shortsighted and self-defeating strategies.

IV. The proposal will lead to less misclassification of workers and decreased litigation.

Misclassification of workers as exempt from overtime under the EAP exemptions remains a significant problem. A Rand study using relatively recent 2014 survey data to estimate the share of salaried workers misclassified as exempt from overtime finds that among hourly-paid employees who work over 40 hours in a week, 19.0 percent were paid less than the "time-and-a-half" standard for overtime.[26] Among salaried workers, those purportedly earning above a specified threshold and having professional-level duties that together exempt them from overtime compensation rules, 11.5 percent did not actually meet the exemption criteria and were thus misclassified. Some examples of this misclassification and of close cases that may or may not have been misclassification are cited.[27]

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[24] Golden, Lonnie, Flexibility and overtime among hourly and salaried workers, Economic Policy Institute (September 30, 2014).

[25] Wal-Mart Raising Wages as Market Gets Tighter, Wall Street Journal, Feb. 19, 2015, available at http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742; T.J. Maxx, Marshall's to Hike Minimum Wage for Workers," CNN Money, Feb. 25, 2015, http://money.cnn.com/2015/02/25/news/companies/tj-maxx-minimum-wage/index.html; McDonalds to Raise Pay at Outlets it Operates, New York Times, April 1. 2015.

[26] Susann Rohwedder and Jeffrey B. Wenger, The Fair Labor Standards Act Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage, RAND Labor & Population (August 2015), available at http://www.rand.org/content/dam/rand/pubs/working_papers/WR1100/WR1114/RAND_WR1114.pdf

[27] See, for example, Kelly-Myers v. Mercy Health System of Southeastern Pennsylvania, Slip Copy (2017) 2017 Wage & Hour Cas.2d (BNA) 347,299;
Calli v. ARC Maintenance, Inc., (2016) 2016 Wage & Hour Cas.2d (BNA) 16,044;
Galdo v. PPL Electric Utilities Corporation, 2016 Wage & Hour Cas.2d (BNA) 32,851;
Sloane v. Gulf Interstate Field Services, Inc., Slip Copy (2018), 2018 Wage & Hour Cas.2d (BNA) 63,593;
Rifai v. CMS Medical Care Corporation, 2016 Wage & Hour Cas.2d (BNA) 55,373, 2016 A.D. Cases 57,401.

Increasing the salary level will decrease the litigation risk created when employers must apply the duties test to employees. As the US DOL noted in 2015, the number of wage and hour lawsuits filed in federal courts increased substantially in the period between 2001 and 2012, from approximately 2,000 to approximately 8,000 per year.[28] Stakeholders advised the Government Accountability Office that one of the reasons for the increased litigation was employer confusion about which workers should be classified as EAP exempt.[29] Setting an appropriate salary level and maintaining the salary level with automatic updates will assure that the salary level will once again serve as a clear and effective line of demarcation, thereby reducing the potential for misclassification and litigation. The DOL has long recognized that the salary tests "have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary."[30] Thus, reduced litigation will be one of the beneficial impacts of the proposal.

V. Many commentators' opposition to the original proposal was based upon a misunderstanding of how the overtime provisions of the Act operate.

Many commentators had expressed concerns that they could not afford to raise the salaries of their employees now classified as exempt to the then proposed salary level. NELP anticipates that similar concerns will be raised about the proposed final rule. However, they did not seem to understand that employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may: (1) increase the employee's salary to the new salary level to retain his or her exempt status; (2) pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked; (3) reduce or eliminate overtime hours; (4) reduce the employee's base salary (provided that the employee still earns at least the applicable hourly minimum wage) and pay overtime for hours worked over 40 in the workweek; or (5) use some combination of these responses.

Some commentators had expressed concerns about the possibility of increased costs with some or all these options. However, for the small costs that employers may incur, they also have options in how to adapt to those small increased costs. They can find efficiencies in their business practices, spread employment by hiring additional workers, pass some costs onto consumers, or decrease profits. It is up to employers to figure out what approach makes the most sense for their business considering the conditions in their industry. Other commentators have expressed concern over the amount of the increase. It is true that this proposal will, over two years, increase the salary level about 90% over the current federal level of $23,660 and a little less than 30% above the new Trump Administration level of $35,568). However, the 2004 federal rule increased the salary level almost 300% (from $155 to $455) and yet no commentator (to our knowledge) has provided examples of hardships business experience in adapting to that change.

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[28] See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,515 at 38,531, July 6, 2105.

[29] Id.

[30] 81 Fed. Reg. 32,500 quoting Weiss Report, p. 8.

VI. Many commentators' opposition to the original proposed Rule was based upon a misunderstanding of how the recordkeeping provisions of the Act operate.

Some commentators had argued that the original proposal would be difficult for employers to implement because they will have to track workers' hours if they decide not to raise salaries above the threshold and NELP anticipates similar concerns about the proposed final rule. The opponent employer's purported record-keeping concerns seem to be predicated on the notion that businesses are not *already* required to record the work hours of employees classified as exempt executives, administrators, or professionals. In this regard, however, the employers seriously misinterpret the Act.

Neither the Act nor its accompanying regulations contain any suggestion that an employer is excused from keeping basic payroll data for overtime-exempt employees.[31] To the contrary, the Act's record-keeping mandate intended to, among other things, assist the Department in the event of an investigation.[32] Since many investigations concern alleged white-collar misclassification, it makes good sense for employers to be expected to maintain basic timekeeping data for all employees. Such a practice enables the Department to assess damages in the event of a misclassification determination.

In fact, it seems especially reckless for an employer to fail to track the work hours of purportedly exempt workers whose earnings fall well below the average salary. Agency investigations and judicial outcomes (including multi-million-dollar settlements) make it clear that such low-salary employees are particularly likely to be the subjects of misclassification investigations and lawsuits. An employer who neglects its basic record-keeping obligations in the face of such investigatory and litigation risk is following a reckless course, which should not be condoned by the Department.

Furthermore, almost every employer already has systems and policies in place for dealing with overtime-eligible employees, so the rule is not introducing any new obligations for employers or requiring them to adopt new systems. These existing systems can be used for newly overtime-protected employees impacted by the proposal. There is no requirement that employees "punch in" and "punch out."

Employers and employees have flexibility in designing systems to make sure appropriate records are kept tracking overtime hours.[33] As long as records are complete and accurate as to the number of hours worked each day, employers may use any method they choose. For an employee who works a fixed schedule, an employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule. Only when the employee deviates from the schedule is the employer required to record the changes to the hours worked. For employees with a flexible schedule, an employer does not need

[31] See 43 P.S. sec. 333.108; 34 Pa. Code sec. 331.31.
[32] See 43 P.S. sec. 333.107; 34 Pa. Code sec. 231.35.
[33] See 34 Pa. Code sec. 231.31(6) (merely requiring employer to maintain record of "[t]he number of hours worked daily and weekly").

to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee.

Therefore, an employer could allow an employee to provide just the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period. Many employees, both exempt and non-exempt, who maintain flexible work schedules track their daily and weekly hours by simply recording their hours worked for the employer.

VII. The Proposed Final Rule does not reduce employee's flexibility.

Some employers expressed the view that eligible employees will lose flexibility under the original proposed rule and NELP anticipates similar objections to the proposed final rule. However, the act does not require minimum or maximum hours for a shift or prohibit split shifts. There is no requirement that a worker must have a predetermined schedule or restrictions on where the work is performed. There is also no restriction on when the work may be performed. Nor does the Act require overtime-eligible workers to punch a clock. Any employer in compliance with the Act can provide its employees with flexibility.

For example, take an overtime-eligible employee with a flexible schedule that does not require that the employee work particular hours but requires that she work at least 40 hours per week. In a particular week, the employee might leave early on Monday to go to her daughter's soccer game, finish some work from home late Monday night, stay late on Tuesday and Wednesday to catch up on a priority project, leave on Thursday midafternoon to attend a gym class and then return to work. Her employer does not require her to "clock in or out" each time she comes to work or leaves. The employer must keep an accurate record of the number of daily hours worked by the employee, as it would for any employee. By the end of each pay period, the employee provides her employer with the total number of hours she worked each day, including the number of overtime hours, if any.

VIII. Employer's concern about "employee morale" is misplaced.

Some employers expressed the view that employees believe that being paid hourly denotes a loss in status and employee morale will decrease if any proposal is finalized. However, nothing in the either proposal requires employers to convert salaried employees to hourly pay status even if they become eligible for overtime.

Employers have the authority to determine how to structure the pay plans of the newly overtime-eligible employees, and employers need not structure their pay plans in a manner that results in the potentially adverse effects that the employers identified. Salaried workers may be paid overtime and overtime-eligible workers may be paid a salary. Employers are not required to change employees' pay basis from salaried to hourly simply because they are no longer exempt. Employers may continue to pay employees a salary, even when the employees are entitled to overtime pay if they work in excess of 40 hours per week. Moreover, even if newly overtime-eligible employees are converted to hourly status, employers are not required to dock such employees for the hours they take off.

In NELP's experience, most people want to be – and should be – paid fairly and adequately for the hours they work. NELP has repeatedly heard from workers and their representatives that employees' status is derived from how fairly they are treated on the job, much they make and how much responsibility they have, not whether they are paid on a salary or hourly basis. They do not equate overtime compensation with a loss of status. DOL made similar conclusions in 2016 when they observed, "The Department believes that for most employees their feelings of importance and worth come not from their overtime exemption status but from the increased pay, flexibility and fringe benefits that traditionally have accompanied exempt status, as well as from the job responsibilities they are assigned. None of these are incompatible with overtime protection."[34]

Other commentators had claimed that raising the salary threshold will result in workers being demoted and denied opportunities for advancement and NELP anticipates similar concerns about the proposed final rule. This is completely in the hands of employers and need not be a reality for employees. An employer that understands the value and potential of its employees can continue to create promotion opportunities, advancing employees to lower- and middle management jobs with added duties and responsibilities—and surely should not demote valuable employees just because of a rule change governing their overtime classification. That same employer can bestow upon them whatever job titles are appropriate. The only difference is that once this proposal becomes operational, those same employees, who are learning new skills and advancing their careers, can't be forced to work long hours for free in order to gain that added experience unless their earnings exceed the salary threshold, and their work is characterized by the independent judgment and discretion required for exemption. The proposal does not require any demotions, changes in title, or other form of diminution of an employee's status and stature within a workplace. As with the employer who decides to lower hourly rates to account for the proposed changes, the employer who resorts to demotions will also surely find that its actions have overwhelmingly negative consequences.

IX. The Department's Proposed Final Rule does not inappropriately reduce the role of the duties test.

Some commentators had opposed the original proposal on the basis that it substantially reduces the importance of the duties test and NELP anticipates similar objections to the proposed final rule.[35] Others argued that the salary level is so high that there will be some workers who would pass the duties test but will be overtime eligible.[36] Both arguments should be rejected. Instead of a liability, reducing reliance on the duties test is a plus, both for employers and for employees. As discussed above, it has long been recognized that a robust salary level is the ''best single test'' of exempt status under these "white-collar" exemptions. Application of the duties test is

[34] 81 Fed. Reg. 32,419.
[35] Comments of Representative Rob Kauffman, July 12, 2018, available at, http://www.irrc.state.pa.us/docs/3202/COMMENTS_LEGISLATIVE/3202%2007-12-18%20REP%20ROB%20KAUFFMAN.pdf
[36] Comments of Senator Kim Ward, July 31, 2018, available at http://www.irrc.state.pa.us/docs/3202/COMMENTS_LEGISLATIVE/3202%2007-31-18%20SEN%20KIM%20WARD.pdf

often a subjective based assessment that often leads to misclassification of overtime-eligible employees as exempt.[37] Since the Pennsylvania salary levels are below the minimum wage, there has been, in effect, only a duties test under the Act. Thus, as discussed above, reducing reliance on the duties test will lead to more appropriate classification under the Act.

Nor is it true, as a factual matter that the duties test is irrelevant. As discussed above, in 2016 when US DOL proposed to raise the salary level to a level similar to this proposal, it determined that 47 percent of the total number of white-collar workers who fail the duties test earned above that salary level. For these overtime-eligible salaried workers, the duties test rather than the salary test would dictate their exemption status. Since the proposed final salary threshold is lower than 2016 DOL salary threshold, that number will be even higher. Moreover, since the Department is proposing to eliminate the long test, there will be employees who would have failed the long test (and been overtime eligible) but will not fail the more lenient standard duties test (and be exempt). A robust salary level is necessary to protect them. Thus, the duties test remains important, but not will no longer be the exclusive test under the Act.

X. The Department should not adopt the Trump Administration salary threshold.

Although NELP believes that some commentators will urge that Pennsylvania abandon this rulemaking in favor of the final US DOL overtime salary threshold of $35,568, that option should be rejected for four reasons. First, the final US DOL rule fails to uphold the purpose of the Act and its EAP exemptions, which are meant to cover only "bona fide" white-collar employees. Like the Pennsylvania exemptions, the Federal EAP exemptions apply only to "bona fide" EAP workers, to distinguish them from a general exemption for white collar workers or even from the subset of all EAP employees."[38] Of the exemptions included in the originally-enacted FLSA, the EAP exemptions are the only ones to use the qualifier of "in a bona fide capacity" for the class of workers to which the exemptions apply.[39] These exemptions are based on the understanding that bona fide EAP employees have more power in the workplace such that they can set their own schedules and negotiate their own pay.[40] The EAP definitions were meant to be limited to workers who typically earned salaries well above the minimum wage and those that earned privileges above the baseline fringe benefits that set them apart from nonexempt workers entitled to overtime pay.[41] Congress also anticipated that exempt workers performed the type of work that was "not easily standardized to a particular period and could not be easily spread to other workers after 40 hours in a week."[42] The low salary level combined with a lax "standard duties test" does not appropriately identify "bona fide" white collar workers.

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[37] Id.

[38] Congressional Research Service Report R45007 (October 31, 2017), pp. 3-4, ("As noted in the supporting analysis for the 1940 rule, 'if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act.'"). See Harold Stein, "Executive, Administrative, Professional ... Outside Salesman Redefined," U.S. Department of Labor, Wage and Hour Division, Washington, DC, October 10, 1940, pp. 6-7.

[39] Congressional Research Service Report R45007, p. 4.

[40] Report of the Minimum Wage Study Commission, volume IV, pp. 236 & 240 (June 1981).

[41] Id.

[42] Id.

Second, The US DOL's low salary threshold paired with the standard duties test perpetuates the mismatch problem created by the 2004 Rule, arbitrarily leaving too many workers out of coverage. In 2004, the US DOL paired a relatively low salary threshold with a the less rigorous duties test that was previously used to determine bona fide EAP status only at much higher salary levels. When the US DOL examined the results of this pairing for the 2016 Rule, detailed economic analysis demonstrated that the 2004 regulation created what it termed a "mismatch" between the salary level and the duties test, such that far more people were classified as overtime exempt, well outside of historical ranges. As noted in the 2016 Final Rule, "[r]ather than pair the standard duties test with a salary level based on the higher short test salary level, . . . [the Department] tied the now standard duties test to a salary level based on the long duties test. This resulted in a standard salary level that, even in 2004, was too low to effectively screen out from the exemption overtime eligible white collar employees."[43] The US DOL final Rule continues the 2004 error of pairing a low salary level with a duties test that allows the exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense.

Third, the US DOL final rule fails to provide for automatic indexing of the salary threshold. US DOL has updated the salary threshold only eight times in 75 years, and only once since 1975. Pennsylvania has not ever updated the salary threshold since it was adopted in 1977. There is thus no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. Indexing would ensure predictability for workers and employers alike and eliminate the need for time-consuming regulations. Moreover, indexing provides a crucial planning tool for the regulated community and for affected workers.

Fourth, the workers who will not get overtime protection under this US DOL final rule are precisely the workers who most need the protection. The workers losing protections under the final US DOL Rule, as compared to the Obama-era 2016 Rule, are the very ones meant to get coverage: those without the requisite power to protect themselves in their job hours and including a disproportionate number of women and people of color. The Economic Policy Institute estimates that 8.2 million workers will be left behind by this proposed rollback of the Obama Rule.[44] Of those workers, 4.2 million are women, 3.0 million are people of color, 4.7 million are without a college degree, and 2.7 million are parents with children under the age of 18.[45] Leading categories of jobs left behind by this NPRM include retail, health, education, services, and manufacturing.

Conclusion

While NELP supports the Department's proposed final rule, we respectfully suggest that the Wolf Administration reconsider the decision to shift away from the 30th percentile of the Northeast Census Region which the Department originally proposed, and which was already a very modest standard for Pennsylvania. And in no event should Pennsylvania abandon this

[43] 81 Fed. Reg 32,391 at 32404 (May 23, 2016).
[44] And because the Trump Administration's final rule does not index, this number rises to 11.5 million workers left behind in ten years. Economic Policy Institute, More than eight million workers will be left behind by the Trump overtime proposal (April 2019), available at https://www.epi.org/publication/trump-overtime-proposal-april-update/
[45] Id.

rulemaking effort in favor of the final US DOL rule, which is manifestly inadequate to protect the Commonwealth's workers.

Thank you for the opportunity to submit these comments and do not hesitate to contact me for further information.

Very truly yours,

Christine L. Owens

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