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STATE SENATOR
LISA BAKER
26TH SENATORIAL DISTRICT



Senate of Pennsylvania

August 27, 2018

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AUG 27 2018

Independent Regulatory
Review Commission

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

David Sumner, Executive Director
PA IRRC
333 Market Street
Harrisburg, PA 17101

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

Gentlemen:

There is widespread realization that Pennsylvania's minimum wage law has not kept pace with the changes in the federal Fair Labor Standards Act (FLSA). An unfortunate practical consequence is that Pennsylvania employers following federal standards can inadvertently find themselves in conflict with state law. Simply stated, disputes over compliance drive up costs and further damage our reputation as a good place to do business.

This difficulty was underscored in a recent court decision denying employers the use of a fluctuating work week for determining overtime payments. This outcome occurred despite the Pennsylvania Department of Labor and Industry's (DLI) indication of acceptance of the mechanism.

The regulation being proposed does not cure several of the notable shortcomings as there are number of other components of federal and state wage and hour law that are inconsistent and, therefore, cause confusion, or worse. Among these are:

- Federal standards allow for exemptions for highly compensated employees while Pennsylvania does not.
- Federal standards include an exemption for "computer" employees while Pennsylvania does not.
- Federal law treats outside sales differently than state law.

The regulations being proposed by DLI do not address any of these discrepancies. Instead, the regulations create additional and extremely harmful differences between federal and state law. Primarily, the regulations increase the salary threshold (the amount an employee must be paid

in order to even be considered “exempt” from certain overtime requirements) from \$455 per week or \$23,660 per year (the FLSA amount) to \$921 per week or \$47,892 per year, over a three year period. This amounts to an increase of over 100%. Moreover, the regulations would apply an escalator to these amounts every third year thereafter.

The United States Department of Labor (DOL) attempted to enact nearly identical regulations approximately two years ago. A federal court stayed that attempt because, among other reasons, the new salary thresholds were so high that they made another critical component of the exemption determination (the “duties” test) irrelevant. Many commentators seem to agree that the federal government will almost certainly seek to increase the salary threshold to a more reasonable number in the near future.

Reaction received indicates there are adverse implications for employers and for employees as businesses reconfigure their workforce and payrolls in anticipation of higher costs. The net effect of the regulation is to aggravate the cost of doing business component of the economic situation, while missing the chance to improve compliance with the law.

My view is that the problem of improper alignment is one best solved through legislation. I have introduced SB 587, the Statutory Construction of Wage and Hour Laws Act. The bill would align federal and state law so that employers in this state would be able to follow one clearly articulated set of rules, the FLSA and its regulations, while continuing to allow the state legislature to determine when a different approach should apply.


In so doing, Pennsylvania would be joining several other states making similar revisions including the surrounding states of Maryland, New Jersey and Ohio, as well as Alaska, Massachusetts, Missouri, Montana, North Carolina, Rhode Island, and the District of Columbia. Additionally, this approach was advocated by numerous testifiers during a joint hearing of the Senate Appropriations Committee and the Senate Labor and Industry Committee held on June 21, 2016, and is supported by numerous business, community and governmental entities.

In addition, enactment of SB 587 would allow the state to see what steps DOL will be taking regarding the salary threshold in the near future, and then follow – or not follow – those steps as it deems appropriate.

Doing otherwise and implementing the proposed regulations would make Pennsylvania and its businesses less competitive and would exacerbate the problem of inadvertent violations of Pennsylvania law. The regulations would also be subject to legal challenge and would hurt rather than benefit the very employees we are seeking to help.

I ask that the regulations not be adopted in their current form and instead that DLI review and work toward passage of SB 587.

Sincerely,


Lisa Baker
Senator