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Youth Advocate
PROGRAMS, INC.
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Independent Regulatory
Review Commission

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*(submitted by email to bsmolock@pa.gov)*

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

Re: **Comments of Youth Advocate Programs, Inc. to the <u>Proposed PA Overtime Exemption Rule Changes</u>**

Dear Director Smolock:

These are the comments of Youth Advocate Programs, Inc. ("YAP") to the proposed PA Department of Labor and Industry changes to the regulations for minimum wages under the Minimum Wage Act, IRRC Number 3202. YAP is a 501c3 youth services program that has been headquartered in Harrisburg, PA since 1975. YAP provides community-based alternatives to young people who may otherwise be institutionalized either because they have been charged with a juvenile or criminal offense, have been deemed to be dependent because of truancy or a lack of family support, and/or have been diagnosed with a clinical disorder. YAP's origins can be traced back to a PA Attorney General decision which determined that youth could no longer be housed at the State Correctional Institution at Camp Hill. Today, YAP provides programs throughout PA as well as in twenty-one other states and the District of Columbia.

L&I's proposed rulemaking updates the required duties for Executive, Administrative and Professional ("ESP") exemptions and substantially increases the minimum salary which EAP workers must receive. In its first year, the proposed changes to Chapter 231 of L&I's Title 34, Part XII would increase the minimum EAP exempt salary by 34%, from $455/week to $610/week. The next two years would see additional increases to $766/week and $921/week, respectively. Further increases would result thereafter based on U.S. Department of Labor statistics. Even if consideration is limited, however, to the already specified projections, the proposed EAP exempt salary would increase a startling 102% in only three years.

YAP supports L&I's "duties test" clarifications. Particularly the revised definition of management functions should prove helpful in eliminating the types of abuses that L&I prudently targets. For example, the proposed rulemaking would address situations in which a retail employee routinely stocks shelves or runs a cash register but is denied overtime because s/he is left in charge of a department or even a small store during off-hours.

Conversely, for the reasons set forth below, YAP urges that the new proposed salary thresholds for EAP exemptions should not be applied to certified non-profit corporations. Instead, in light of the generally lower salary structure that exists particularly among executives in the non-profit world, YAP urges that the EAP salary threshold for non-profits not be increased by more than $100 per week (*i.e.*, to a minimum salary of $555 per week). Alternatively, the salary threshold for non-profits could be set at the higher of either $555 per week or an amount equal to no less than 10% of the non-profit CEO's salary. This type of proportionality requirement would fulfill the remedial purpose of the PA Minimum Wage Act while not disregarding the different salary scales that irrefutably exist in for-profit versus non-profit corporations. Annual self-reporting by PA certified non-profits of their compliance with such a 10% EAP salary requirement could be required and easily completed.

YAP urges that the EAP salary level test not be increased for certified non-profits in the same manner it may be increased for profit-driven enterprises because of plain and demonstrable differences between the non-profit and for-profit worlds. Many if not most people chose to go to work for charitable entities because they want to do charitable things. Part of their "compensation" is non-monetary and related to the belief that their work "matters" in the same way that governmental service matters. As a result, non-profit executives typically expect and receive substantially less in the way of monetary benefits than do their for-profit counterparts. This is readily demonstrated by, among other things, a comparison of CEO salaries. In its June 2014 Issue Brief (#380), the Economic Policy institute found that average CEO compensation (salaries, bonus, stock incentives, etc.) at the top 350 U.S. firms ranked by sales (in 2013) to be just over $15 million/year. By comparison, a January 2014 article by the NonProfit Times put median executive salaries in the non-profit world at $100,000/year, with the average CEO salary of the largest non-profits (those with operating budgets of more than $50 million) to be just over $300,000 per year.

The vast compensation differences noted above in CEO salaries are indicative of those which exist among other executives in the for-profit versus non-profit worlds. Indeed, this is the very conclusion reached by the United States Bureau of Labor Statistics ("BLS") based on its 2007 compensation study and affirmed by the Nonprofit Quarterly ("NPQ") based on its analysis of more recent (2009) data:

> When you compare salaries across all industries by occupational category, the BLS study found that, except for administrative jobs, which had comparable pay, nonprofits had lower salaries on average than their corporate counterparts. NPQ's analysis indicates that the differences exist primarily in nonprofits with more than 100 employees; salaries for smaller nonprofits were generally comparable to smaller for-profit companies. The largest differences were for high-level management and executive jobs, with <u>for-profit organizations paying executive salaries two-thirds higher than nonprofit executive salaries.</u>

S.McDonnell, "Salary Difference Between Corporate & Nonprofit Industries" (emphasis added), http://work.chron.com/salary-difference-between-corporate-nonprofit-industries-24453.html.

Because of the very different pay scales that exist among executives in the for-profit versus non-profit worlds, it would be illogical and inequitable to apply the same exempt salary test in both settings.

YAP's pay structure well illustrates the compensation patterns noted by BLS and others. Approximately 30% of YAP's program directors are paid less than the proposed EAP minimum salary in its third year -- $47,892 per year ($921/week). More than 80% of YAP's Assistant Program Directors are paid less than $921/week. Nevertheless, these program directors and assistant program directors are bona fide executives. Their time is spent supervising and managing direct service employees who are engaged in trying to bring peace and order to chaotic family lives. No good would be served by forcing agencies such as YAP to choose between closing programs or paying salaries that may be appropriate in the for-profit world.

Undoubtedly, salary may be one useful indicator of whether an employee needs the protection of minimum EAP salary requirements. Salary must be viewed in context, however. If top executives at the ABC Corporation make $2,000,000 per year, then a new employee with a college degree who is paid $40,000 may well need L&I protection in order to avoid unfair assignments that require overtime but do not pay for it. Conversely, if the top executives at Charitable Care Corporation are earning $160,000, then the same $40,000 salary may be consistent with a level of respect, responsibility and autonomy that would render an overtime exemption appropriate so long as all "duties tests" are also satisfied.

YAP recognizes that page 6 of L&I's Proposed Regulatory Analysis Form mentions the more than 100,000 non-profits which exist in PA. Respectfully, however, the suggestion that non-profits may mitigate the impact of the proposed rule-making by increasing revenues and making operational adjustments during the phase-in period is unrealistic. When the U.S. Department of Labor proposed similar EAP minimum salary requirements in 2015, YAP attempted to increase programmatic efficiencies and to increase revenues by seeking contract increases. The simple truth is that the governmental entities with which YAP contracts have been unable to increase their payments to contractors because their own social service budgets have been stagnant or even reduced. While some, very targeted initiatives, such as those which are intended to address the opioid crisis have received additional funding, most have not. Please permit me to provide some specifics.

In the mid-1990s, YAP began providing behavioral health services throughout Pennsylvania. These services are provided either by Bachelors level employees, called Therapeutic Staff Support (TSSs), or Masters level employees designated as Behavioral Specialist Consultants or Mobile Therapists (BSC/MTs). Generally, intervention plans are created and supervised by the BSC/MTs and implemented by the TSSs. Accordingly, most of our behavioral health hours are provided by TSS staff who are paid on an hourly basis. While L&I's currently proposed rulemaking would not directly impact TSSs, who are non-exempt, the compensation that YAP receives for their services well illustrates the facile nature of the suggestion that non-profits should be able to respond to the 102% increase in the EAP minimum salary by increasing revenues and efficiencies during the three-year phase in period. More specifically, when YAP began providing behavioral health services in PA, the prevailing compensation rate (the rate which YAP is paid) for TSS services was approximately $30/hour. Today, almost twenty years later, the prevailing compensation rate to YAP is approximately $32/hour. This extremely modest increase is all that YAP has been able to receive despite requests for increases based on cost of living adjustments and increased costs of doing business.

While the hourly compensation rates in YAP's contracts to provide juvenile justice services to young people who have been charged with delinquent acts have increased somewhat more than in the behavioral health arena, the size of such initiatives funded in many of the Commonwealth's large cities, has been substantially reduced because of decreased rates of delinquency and increased use of diversion programs which remove young people from the juvenile justice system without any formal adjudications. While YAP celebrates both of these developments from a social welfare perspective, they both limit YAP's ability to respond to increased labor costs such as that now proposed by L&I.

In summary, while YAP applauds L&I's efforts to protect workers who have been unfairly designated as exempt solely to avoid paying them overtime compensation, such protection must be extended where it is most needed and where its associated costs can be absorbed by top corporate executives and/or fairly passed on to consumers. In the non-profit setting, neither of these circumstances exists. Moreover, in the non-profit setting, the gross disparities between upper management and entry level salaries, which suggest the need to protect modestly paid EAP employees, also are not found. Accordingly, YAP urges that L&I should set its proposed EAP salary requirements at a lower level in the non-profit setting than in the for-profit setting.

Respectfully submitted,

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