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From: Anna Caporuscio <acaporus@sheetz.com>
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To: IRRC
Subject: Regulation #12-106: Minimum Wage

The following include Sheetz, Inc's comments on Proposed Regulation #12-106, amendments to 34 Pa. Code Chapter 231 with respect to Overtime Pay.

1. Computer Professional Exemption: While the move to align with the federal Fair Labor Standards Act is positive, it still leaves gaps that Pennsylvania employers must address. The most significant gap is that which relates to computer professionals. As the law stands today, there is a "computer professional" exemption recognized by the FLSA but that same exemption is not recognized by PA state law. These new regulations do not address this gap and requires employers to continue considering computer professionals under PA state law. This difference in law adds to the complexity of compliance for many employers as computer professionals are typically integral to the operation of a business. The FLSA regulations include a provision describing how certain computer employees may qualify for the professional exemption, whether compensated on a salary basis or an hourly basis. 29 C.F.R. § 541.400

2. Multi-State Requirements: As an employer with operations in six states, the idea of states continuing to make law in this arena is daunting. The test for whether an employee is employed in a bona fide executive, administrative, or professional capacity, or in the capacity of an outside sales employee, shall be the same as the test for such employees under the federal Fair Labor Standards Act. A much more attractive solution that that currently proposed would be for the DLI to forgo its proposed regulations on the duties test and instead promulgate an "incorporation by reference" regulation that simply adopts the FLSA regulations by reference as providing the applicable duties tests. We think that is much easier and eliminates the possibility of unintended differences between the PMWA and FLSA

3. Salary Threshold: The salary threshold outlined in the proposed regulations increases every year for three years; every third year thereafter, the threshold is set based on the 30th percentile of weekly earnings of full-time non-hourly workers in the Northeast Census region. If the salary threshold continues to increase indefinitely, there is concern that it would outpace the rate at which employers typically increase wages and therefore exemption would be lost by many currently exempt employees.

   When an employee loses exempt status it often brings additional burdens related to timekeeping that don't currently exist when the employee is exempt. Often challenges of tracking time, determining break periods, etc. can be expensive for employers and challenging for employees because they lose flexibility that they have as an exempt employee. For example, an exempt employee can flex their time at work based on job demands, however, many employers require flexing of time for non-exempt employees occur within the same workweek because of the expense associated with overtime payments when it is flexed outside of the same workweek.
4. Bonus amounts satisfying a portion of the salary threshold: Under the proposed regulations an employer may satisfy up to ten percent of the salary threshold with nondiscretionary bonuses, incentives, and commissions that are paid quarterly or more frequently. While this approach definitely recognizes the way that many employees are paid, it doesn't take into account the burden of making quarterly adjustments. Using this

adjustment approach, employers could potentially be adjusting payroll up to four times every year for every exempt employee for which a non-discretionary bonus, incentive, or commission is used to satisfy the salary threshold. Any type of adjustment to set payroll procedures are time consuming, costly and confusing for employees.

5. Implications to Market Rates of Pay: Employers may have the difficult choice of paying an otherwise exempt employee (i.e. they meet the duties test) as an hourly employee if the salary threshold required by the regulations outpaces the market rates of pay for a particular position. For example, the market rate of pay for an Office Manager might be $42,000 in a particular geographic region. If this Office Manager meets the duties test for one of the exemptions an employer would be forced to pay above market for this position just to be able to have the position be exempt from overtime. The alternative is to make the position non-exempt at the market rate of pay of $42,000 and the position loses the flexibility that often comes with exempt positions. The other scenario that would occur is that in the first two years, the position could be exempt from overtime (it meets the salary threshold and the duties test) but in the third year the market rate of pay would be significantly under the proposed salary threshold and thus an employer may be forced to now make the position non-exempt. Changing positions from exempt to non-exempt is very unsettling for employees because the law is difficult to understand and employees often equate exempt status with "professional" jobs and when an individual's job is changed from exempt to non-exempt, it is often perceived as a demotion by some individuals.

Lastly, the US Department of Labor is currently engaged in rulemaking and is expected to announce its proposed rulemaking in January 2019. This proposal further exacerbates existing discrepancies between state and federal requirements which will add to the complexities of compliance in an already difficult area of employment law.

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