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COMMENTS ON THE DEPARTMENT OF LABOR AND INDUSTRY'S PROPOSED RULEMAKING FOR 34 PA CODE, CHAPTER 231
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Mr. Smolock:

Thank you for the opportunity to provide comments regarding the above-referenced proposed rulemaking. I have ten years of experience as a management-side labor and employment attorney and frequently counsel clients concerning federal and state wage and hour litigation, audits, and compliance. I have several comments concerning the proposal to increase the minimum salary level required to meet the Pennsylvania Minimum Wage Act's ("PMWA") overtime exemptions, as well as comments concerning the efforts to align the duties tests regulations for the PMWA's "white collar," or "EAP," exemptions with similar EAP duties-test regulations in the Fair Labor Standards Act ("FLSA").

PROPOSED INCREASE IN THE MINIMUM WEEKLY SALARY REQUIRED FOR EXEMPT STATUS

Presently, the minimum weekly salary required to meet the EAP exemption in Pennsylvania is $455 per week, which is the same minimum currently required by the FLSA. The proposed rulemaking seeks to increase that amount over a three-year period, ultimately setting the minimum at $921 per week. That means that over a three-year span, Pennsylvania employers who have properly classified employees as exempt under the current EAP regulations will either need to: (1) significantly increase employees' salaries to maintain the exemption; or (2) lose the exemption and be required to pay significant amounts of overtime. Unfortunately, this is almost certain to result in job losses. For example, a company that previously employed three salaried employees to each work 50 hours per week may decide to continue to employ only two employees, raise their salaries to the new minimum threshold, schedule them to work 65 hours per week, and expect them to work even harder. This scenario is unpleasant for both the retained employees and the terminated employee.

It is unlikely that many presently exempt employees who earn less than $913 per week will retain their exempt status if the proposed regulations are implemented. Most salaried employees enjoy some flexibility in their schedules that a guaranteed minimum salary allows. Salaried employees and employers often come to mutually beneficial understandings about work schedules and unforeseen circumstances. For instance, most employers are accepting of a salaried employee's occasional tardiness or need to leave early, and the employee still receives their full salary because, in general, deductions from salary are not allowed. Furthermore, employees often take pride in their salaried status and will view a conversion to hourly status negatively, perhaps even as a demotion. The one benefit such employees could theoretically achieve—additional income from overtime wages—is unlikely to occur. Employers are often

loath to pay overtime wages and prefer to hire part time employees or reassign duties to salaried employees to avoid paying an hourly worker overtime.

The proposed regulations may also be *ultra vires*, as was recently the case with an identical proposal concerning the minimum weekly salary required by the FLSA put forth by the United States Department of Labor ("DOL") under the Obama Administration. After the DOL proposed to increase the minimum weekly salary to $921 for EAP-exempt employees through notice and comment rulemaking, a diverse group of plaintiffs successfully challenged the law. The court held that increasing the minimum salary to such a high level essentially made the duties tests irrelevant and as a result made the test for the exemption one based only on salary level. Because the text of the FLSA addresses the exemptions only in terms of duties, and not a high salary, the DOL's rulemaking was flawed and an injunction was put in place to prevent the proposed regulations from being implemented. *See Nevada v. United States Dept. of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). Because the proposed PMWA regulations increase the minimum salary to the same high level, and because the PMWA only discusses duties, and not salary, in defining the EAP exemptions, there is no reason to expect a different outcome if a suit were brought to enjoin the proposed regulations. And because it is almost certain that a court challenge will be filed, implementing the proposed regulations will simply result in litigation costs for both employers and the Commonwealth despite a virtually certain outcome.

In 2017, a bill was introduced in the Maryland Senate to revise the Maryland Wage and Hour statute by increasing the minimum weekly salary for EAP-exempt employees to $913 per week.[1] When the bill was reviewed by the eleven-member Maryland Senate Finance Committee, it was unanimously given an unfavorable

[1] http://mgaleg.maryland.gov/2017RS/bills/sb/sb0607f.pdf

classification and withdrawn by its sponsor.[2] The fiscal policy note that was prepared for the committee noted that businesses that provide the following services would be most affected by the bill: professional and technical services, health care services except for hospitals, and retail trade.[3] It further noted that the proposed law's largest impact as a share of payroll would be in the food services and drinking places industry. These are precisely the kinds of businesses that will be unwilling to pay a higher salary or overtime wages and instead will seek to hire part time workers. When a change in the law will result in serious consequences to the business climate of a state, it is more properly considered by elected officials and brought about legislatively, rather than by rulemaking. The Maryland senators properly concluded that the proposed change to the minimum salary requirements was unlikely to benefit Maryland's economy.

PROPOSED ALIGNMENT OF THE PMWA'S DUTIES TEST REGULATIONS WITH THOSE OF THE FLSA

The proposed rulemaking suggests that "more closely" aligning the duties tests found in the PMWA's regulations with similar FLSA regulations will provide "clarity to employees and employers." I cannot stress how important this goal is to my clients. The FLSA duties test regulations have been the subject of extensive litigation and discussion, much of it based on nuances, intensive fact analysis, and reference to other sections of the regulations. Because this body of caselaw represents concrete answers and directives from courts about this difficult area of the law, it would be extremely valuable if it could be applied to duties-test questions and disputes arising under the PMWA. Although the goal of "more closely" aligning the state and federal regulations

[2] http://mgaleg.maryland.gov/2017RS/votes_comm/sb0607_fin.pdf
[3] http://mgaleg.maryland.gov/2017RS/fnotes/bil_0007/sb0607.pdf

is laudable, unfortunately the proposed regulations do not go far enough—the language used in the proposed PMWA regulations does not identically track the language used in the FLSA regulations and some important regulations are still missing.

Differences Remain Between the
FLSA Regulations and the Proposed PMWA Regulations

My comparison of the proposed PMWA regulations to the FLSA regulations reveals that differences remain between them. For example, under the proposed regulations, to qualify for the administrative exemption, an employee would need to "customarily and regularly" exercise discretion and independent judgment with respect to matters of significance, whereas the FLSA regulations only require that an exempt administrative employee's duties "include" the exercise of discretion and independent judgment with respect to matters of significance. The proposed regulations therefore require an additional inquiry—not simply if an employee has the power to exercise such discretion and independent judgment, but how frequently he or she does so. Furthermore, even if such an inquiry were made, there is no guidance or language in the proposed regulations that would assist employers and employees to understand what "regularly" means in this context.

For example, an office administrator for a small accounting firm may have the authority to select and purchase new computers and software for billing purposes within the firm, but only needs to do so once every three years. Under the FLSA regulations, this fact would weigh in favor of finding the duties test for the exemption is met because her duties "include" the exercise of discretion with respect to a matter of significance, whereas under the proposed PMWA regulations this fact creates confusion because, on one hand, she can exercise such discretion, but on the other hand, she does so relatively infrequently. This difference also renders court opinions analyzing the

FLSA administrative exemption irrelevant because the exemption is defined differently in the proposed PMWA regulations.

Differences Exist Between the FLSA Regulations and the
PMWA and Its Current Regulations That Are Not Addressed By the Proposed Rulemaking

Other obvious differences between the two sets of regulations are not addressed by the proposed regulations. For example, the requirements for the Outside Sales Exemption under the PMWA refer to the selling of "articles or goods" and "obtaining orders or contracts for the use of facilities," but there are no regulations further defining the exemption. 43 P.S. § 231.85. The FLSA regulations further define "outside sales" as the sale of title to intangible property and expressly includes in its definition solicitations for advertising in newspapers and freight for transportation companies. 29 C.F.R. § 541.501. Therefore, under Pennsylvania law—even if the proposed regulations are adopted—there is still a question as to whether salespersons selling advertising space, intellectual property, and other intangibles are exempt, even if they spend 80% of their time away from the employer's workplace engaged in selling. Given that the DLI recognizes that aligning the two sets of regulations will provide clarity to employees and employers, it should address all inconsistencies between them.

Some Critical FLSA Regulations Are Completely
Absent From the Current and Proposed PMWA Regulations

The proposed regulations also fail to address significant gaps in the existing PMWA regulations. For instance, the FLSA's Computer Professional Exemption, which permits an employer to pay certain computer professional employees a flat rate of $27.63 per hour for all hours worked (i.e., without paying an overtime premium for hours worked in excess of forty in a workweek) is found nowhere in the current or proposed regulations; therefore, Pennsylvania employers who apply this exemption

and the employees who enjoy this high minimum hourly rate may not be able to continue to do so. In my experience, many of the employees covered by this exemption work on a project by project basis and may work a very large number of hours for several weeks and subsequently work fewer than forty hours per week for several weeks. Typically, these employees earn more than the $56,365 per year that they would earn if they were covered by another exemption and $27.63 per hour were used to calculate an annual salary, demonstrating that this exemption actually provides these employees with more income than they might otherwise earn. Incorporating the FLSA's Computer Professional Exemption would ensure that many Pennsylvania employees and employers are able to continue to take advantage of this mutually agreeable pay structure.

Three other exemptions missing from the PMWA regulations are worth mentioning. First, the Highly Compensated Employee exemption found in the FLSA regulations is not available in the current or proposed PMWA regulations. *See* 29 C.F.R. § 541.601. In my experience, this exemption is not frequently used by employers; however, adopting it in the proposed regulations would provide certainty to those Pennsylvania employers who may be applying it to some of their employees.

Second, an Administrative Exemption for Educational Establishments, while briefly mentioned in the PMWA itself, is not defined in the PMWA regulations. The FLSA regulations provide a detailed description of this exemption and its requirements. 29 C.F.R. § 541.204. Including a regulation that clearly defines this exemption would better align the two laws and provide certainty to the many Pennsylvanians who work in schools and universities.

Finally, the PMWA regulations do not provide for a limited exemption from overtime when a healthcare employer and an employee agree to apply the "8/80" rule.[4] Under the FLSA, such employers and employees enjoy a degree of scheduling flexibility by extending the "workweek" to a 14 day period during which all hours over 8 in one day *and* all hours over 80 in the extended workweek are paid at the overtime rate. Both healthcare employers and their employees would enjoy the benefits of this flexibility if the DLI were to adopt this regulation. At least one court has determined that, absent any regulation permitting this arrangement in the PMWA, using the "8/80" rule in Pennsylvania is improper. *Turner v. Mercy Health Sys.*, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Phila. Ct. Com. Pl. 2010). This is an example of the confusion and litigation that can arise when state and federal laws are in conflict.

A striking omission from both the existing and proposed PMWA regulations is the lack of any definition of how an employee is paid on "a salary basis." This is significant because to qualify for the EAP exemptions under the FLSA and the PMWA, both the duties test and the salary basis test must be met. "Salary basis" is defined and extensively explained in the FLSA regulations and is a frequently litigated issue. Payment on a salary basis under the FLSA involves nuanced rules that must be followed exactly or the exemption is lost—regardless of duties performed by the employee—and the employee is owed overtime compensation. Although the PMWA regulations require that EAP-exempt employees be paid on a salary basis, there are no regulations explaining, or even defining, what that means. By adopting the FLSA regulations on this topic, the DLI would immediately provide certainty for employers

[4] I note that both the Computer Professional Exemption and the "8/80" Rule found in the FLSA were statutory amendments passed by Congress; to the extent DLI cannot create these exemptions via rulemaking, a legislative effort to harmonize the PMWA and the FLSA may be necessary and should be explored.

that not only have they properly classified employees as exempt because of their duties, but that they are also correctly paying them on a salary basis. Aside from incorporating identical language from the FLSA regulations into the proposed PMWA regulations concerning the duties tests as discussed above, in my opinion this is the most significant problem with the PMWA's regulations that DLI could remedy.

Another difference between the state and federal regulations was the subject of a recent court case. In *Chevalier v. Gen. Nutrition Ctrs.*, 177 A.3d 280 (Pa. Super. 2017), the employer paid the plaintiff in pursuant to the Fluctuating Workweek Method ("FWW Method") found in the FLSA's regulations. *See* 29 C.F.R. § 778.114. The employee filed suit claiming that the PMWA did not recognize the FWW Method and that he was owed additional overtime compensation, and the court agreed. This is precisely the kind of omission from the PMWA regulations that will continue to create havoc for Pennsylvania employers until it is remedied by abandoning many of the present PMWA regulations and incorporating verbatim all relevant FLSA regulations.

The Benefits of Harmonizing
the PMWA Regulations with the FLSA Regulations

The differences, inconsistencies, and omissions between the FLSA regulations and the PMWA's existing and proposed regulations addressed above are exactly the type that will generate extensive litigation as attorneys wrestle over their purported impact on an employee's classification. This will result in increased litigation expenses for employers, which in turn will cause lower profits and potentially job losses or delay salary/wage increases. Furthermore, if the proposed regulations are adopted, the differences that still exist between the FLSA and the PMWA regulations will cast doubt on whether federal court opinions—of which there are many—can be looked to for guidance in interpreting the PMWA. Federal courts have extensively examined nearly every FLSA regulation, whereas there are relatively few state or federal court

interpretations of the PMWA and its regulations. Both employees and employers would benefit from this large body of federal caselaw when evaluating whether current or proposed pay structures are proper under state law, but this will not be possible if differences remain between state and federal regulations.

The best solution is to adopt the FLSA's regulations verbatim and expressly state that it is the intention of DLI to incorporate the FLSA's regulations into those of the PMWA so that employers and employees will have the benefit of federal cases interpreting and applying the language that governs both the FLSA and PMWA. The direct reference to, and adoption of, portions of federal regulations by Pennsylvania agencies is not a unique concept. For example, in discussing workplace exposure recordkeeping requirements, Pennsylvania law requires and employer to keep such records "to the extent that it is required by OSHA under 29 C.F.R. § 1910.20(g)." 34 Pa. Code § 315.2.

Furthermore, by fully adopting pay scenarios such as the "8/80" rule, the Highly Compensated Employee Exemption, and the FWW Method, Pennsylvania employers will not be surprised to find that their good-faith use of a pay policy expressly permitted by the FLSA is, in fact, improper under Pennsylvania law, as was the case in *Turner* and *Chevalier*. The current language in the proposed regulations that is similar—but not identical—to language in the FLSA regulations (such as the proposed PMWA duties tests for the EAP exemptions) *should be revised to incorporate identical language from the FLSA if DLI truly seeks to "align" the two laws.*

CONCLUSIONS

Thank you for the opportunity to provide comments on the proposed regulations. I have included a chart of the FLSA regulations that I believe should be incorporated into the proposed PMWA regulations. In conclusion, I suggest that DLI:

- Adopt the duties tests found in the FLSA regulations verbatim as the duties tests for the PMWA.
- Adopt additional FLSA regulations verbatim to better define and explain the PMWA's terms and requirements, such as the FLSA's salary basis test, and incorporate other FLSA regulations—where possible—to better align the two laws
- Avoid any changes to the minimum salary required to meet the EAP exemptions under the PMWA.

Sincerely,

Michael B. Howard, Esq.

FLSA Regulations That Should Be Incorporated Verbatim Into the PMWA Regulations

* Indicates that these regulations may require the General Assembly to pass underlying legislation before they can be implemented.

29 C.F.R. Section to Be Incorporated	Title
§ 541.0	Introductory statement
§ 541.1	Terms used in regulations
§ 541.2	Job titles insufficient
§ 541.3	Scope of the [EAP] exemptions
§ 541.4	Other laws and collective bargaining agreements
§ 541.100	General rule for executive employees
§ 541.101	Business owner
§ 541.102	Management
§ 541.103	Department or subdivision
§ 541.104	Two or more employees
§ 541.105	Particular weight
§ 541.106	Concurrent duties
§ 541.200	General rule for administrative employees
§ 541.201	Directly related to management or general business operations
§ 541.202	Discretion and independent judgment
§ 541.203	Administrative exemption examples
§ 541.204	Educational establishments
§ 541.300	General rule for professional employees
§ 541.301	Learned professionals
§ 541.302	Creative professionals
§ 541.303	Teachers
§ 541.304	Practice of law or medicine
§ 541.400*	General rule for computer employees
§ 541.401*	Computer manufacture and repair
§ 541.402*	Executive and administrative computer employees
§ 541.500	General rule for outside sales employees
§ 541.501	Making sales or obtaining orders

29 C.F.R. Section to Be Incorporated	Title
§ 541.502	Away from employer's place of business
§ 541.503	Promotion work
§ 541.504	Drivers who sell
§ 541.600	Amount of salary required
§ 541.601	Highly compensated employees
§ 541.602	Salary basis
§ 541.603	Effect of improper deductions from salary
§ 541.604	Minimum guarantee plus extras
§ 541.605	Fee basis
§ 541.606	Board, lodging or other facilities
§ 541.607	Automatic updates to amounts of salary and compensation required
§ 778.113	Salaried employees – general
§ 778.114	Fixed salary for fluctuating hours
§ 778.601*	Special overtime provisions available for hospital and residential care establishments