PCUA Pennsylvania Credit Union Association

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Independent Regulatory Review Commission

August 22, 2018

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

Re: Comments on the Department of Labor and Industry's Proposed Rulemaking for 34 PA Code, Chapter 231 Re: Overtime Pay; Minimum Wage #12-106 (IRRC number 3202)

Dear Mr. Smolock:

The Pennsylvania Credit Union Association (PCUA) appreciates this opportunity to comment on the PA Department of Labor & Industry's (DLI) Proposed Amendments to 34 Pa. Code Chapter 231 regarding Overtime Pay. The stated goals of the proposed regulation are 1) to update the salary level at which salaried workers may become exempt to more accurately match the duties they perform; and, (2) to update the duties for each Executive, Administrative, and Professional (EAP) exemption to be consistent with Federal regulations interpreting the Fair Labor Standards Act (FLSA). PCUA applauds DLI's efforts to ensure that Pennsylvania's workers are fairly-compensated; however, the proposed regulation is too extreme in its required salary adjustments, which could, in the long term, hurt more workers than it helps. Additionally, the proposed regulation fails at its other goal – to provide consistency with the Federal regulation.

PCUA is a state-wide advocacy organization that represents a majority of the nearly 400 credit unions located in the Commonwealth of Pennsylvania. Credit unions are not-for-profit, mutually owned financial cooperatives that do not issue capital stock. Profits made by credit unions are returned to members in the form of higher dividends on savings, lower interest rates, and expansion of services.

A core mission of credit unions is to promote thrift and teach the wise use of credit. Because credit unions are not-for-profit and have low overhead costs, they are usually able to offer lower interest rates on loans and higher dividends on members' shares (savings). Those same values apply to the compensation of credit union employees. Salary and benefits are formulated with the best interests of credit union members in mind. PCUA is quite concerned that the proposed rule poses a significant threat to credit union operations and consumer access to financial services.

Proposed Salary Levels

The PA DLI proposed regulation updates salary thresholds at which salaried workers may become exempt. The proposed regulation incorporates a gradual increase over a three-year period and following that gradual increase, automatic salary increases would occur every three years, based on the 30th percentile of weekly earnings of full-time, non-hourly workers in the Northeast Census region in the second quarter of the prior year as published by the U.S. Department of Labor (DOL), Bureau of Labor Statistics.[1]

Salary levels in the current regulation are $155 per week (using the "long test") for individuals performing executive or administrative duties and $170 per week (using the "long test") for individuals performing professional duties. For the executive, administrative, and professional exemptions (EAP), the "short test" salary is currently $250 per week.[2]

The proposal eliminates the dual test and raises the salary level to $610 per week the first year for all of the exemption categories; $766 per week the second year; and, $921 per week the third year. In the first year, employers will be required to increase salaries by 34% over the current federal salary threshold. By year three, the salary threshold is 102% over the current threshold. When the U.S. Department of Labor (DOL) published its final rule in May 2016 increasing the salary threshold for the EAP exemptions from $455 per week to $913 per week, it was met with much criticism. Eventually, the Rule was challenged in Federal Court and the Court issued an Order on August 31, 2017 finding the Rule invalid.

In that case, the Court found that the DOL's Final Rule increasing the salary threshold to the level proposed in the Rule was in opposition to Congress's intent for employees to be exempt from overtime pay based on the duties that they perform. Due to the extreme jump in the salary threshold, the Court said the "Department creates a Final Rule that makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Nevada, et al v. U.S. Dept. of Labor*, 2017 WL 3780085 (E.D. Texas Aug. 31, 2017). PA DLI's proposed rule will produce the same result. Employees who should be exempt from overtime pay due to the duties that they perform will be made hourly because the salary threshold is too high for small businesses to meet.

These extreme increases will undoubtedly cause many credit unions to make tough decisions regarding staff. Many of our credit unions reached out to us with their concerns with this proposal. Some of the credit unions indicated that they will be forced to reduce staff in an effort to accommodate the salary adjustments to other employees. Some credit unions will shift employees to an hourly wage which is generally not well-received by employees and can have a negative effect on professional development for those employees. Any of these changes to a credit union's workforce not only effects the individual workers and the credit union itself, but ends up having effects on the local economy as well.

Some credit unions told us that they may need to increase interest rates or fees in order to increase salaries to the proposed levels. When credit unions and other small businesses are forced to raise prices or reduce employees, Pennsylvania will suffer a negative economic impact, resulting in stagnant growth, higher unemployment, failing businesses, and the inability to attract new businesses to the Commonwealth.

We urge DLI to adopt a different statistical base for determining the salary thresholds. Being part of the Northeast census data means that salaries from large cities such as Boston and Manhattan

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[1] The Northeast region includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

[2] Although the PA salary levels have not been updated since 1977, the U.S. DOL updated its salary levels in 2004 to $455 per week or $23,660 annually.

are a part of the figure being used for the salary threshold. Many of our credit unions are located in rural areas and other non-metropolitan areas where they strive to serve the underserved. It would be unfair to require a credit union with one or two employees and serving members in a rural part of Pennsylvania to pay a salary that is determined based on salaries from some of the largest urban centers in the country.

Our credit unions also suggested stretching out the time period longer than three years to remediate the dramatic increase found in the first year's threshold increase. Small businesses do not grow at the same rate as large businesses and a 34% increase in a salary or two for a small business or credit union has a much greater impact on the bottom line than it might for a larger business. Of the 384 credit unions headquartered in Pennsylvania, 321 or 83% of the credit unions in Pennsylvania have total assets less than $100 million. The PA DLI should develop appropriate wage rules for small businesses and non-profits taking account of relevant factors such as number of employees, urban versus rural locations, and net revenue.

We also encourage DLI to eliminate the automatic salary threshold increases every three years. It is difficult to predict what will be happening with the economy in the future. The first automatic increase would occur approximately six years after the effective date of the Rule. The economy can change significantly over a six-year period and we would suggest eliminating the automatic increase in favor of an automatic review.

Duties Test

One of the goals of DLI is to make the duties test of the PA Rule align with the duties test of the Federal regulation. We applaud this effort as it is a burden for our credit unions to comply with two different standards; however, as proposed, the rule still has several areas where there are differences between the Federal Rule and PA's proposed rule. For example, as proposed, the PA Rule continues to have a requirement for executive and administrative exempt employees to customarily and regularly exercise discretionary powers, a requirement that does not exist in the Federal law.

We urge DLI to delay any changes to Pennsylvania's overtime rule until the Federal rule has been amended. On July 26, 2017, the U.S. Department of Labor (DOL) published a Request for Information (RFI), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. There are indications that the DOL is preparing to issue a Notice of Proposed Rulemaking in October.[3]

Alternatively, Senator Lisa Baker has proposed State Senate Bill 587 which would align Pennsylvania's duties test with the federal regulation by proposing that state law related to overtime would be interpreted in accordance with federal law. Several other states have made similar revisions to their overtime rules. The bill is currently awaiting the Senate Labor and Industry Committee's consideration. Adopting Senator Baker's bill would provide consistency to Pennsylvania's employees and businesses as only one standard would in place.

[3] See RIN: 1235-AA20 – The 60-day comment period ended on September 25, 2017 and a Notice of Proposed Rulemaking is indicated for October 2018.

Conclusion

For the reasons mentioned set forth above, we urge DLI to reconsider the scale used in calculating the salary thresholds; exempt small businesses and non-profits; lengthen the three-year schedule of salary increases; and, eliminate the automatic increases.

Additionally, we strongly encourage DLI to consider adopting provisions found in State Senate Bill 587 or to delay its rulemaking until the Federal guidelines have been established. It is an undue burden on Pennsylvania's credit unions and other small businesses to have competing standards in this very important regulation. Credit unions strive to provide their employees with appropriate salary and benefit plans; however, the cost of compliance should not cause a credit union or other business to lose valuable long-term employees.

If you have any questions regarding the comments in this letter, please contact us at your convenience.

With best regards,

Patrick C. Conway

Patrick C. Conway
President & CEO

cc: Association Board
Government Relations Committee
Regulatory Review Committee
State Credit Union Advisory Committee