NELP NATIONAL EMPLOYMENT LAW PROJECT

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Christine L. Owens
Executive Director

www.nelp.org

NELP National Office
75 Maiden Lane
Suite 601
New York, NY 10038
212-285-3025

Washington DC Office
2040 S Street NW
Lower Level
Washington, DC 20009
202-640-6520

California Office
2030 Addison Street
Suite 310
Berkeley, CA 94704
510-982-5945

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000

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Mr. Bryan Smolock, bsmolock@pa.gov
Director, Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas St
Room 1301
Harrisburg Pa. 17121

Re: Comments in Support of the Department of Labor and Industry's proposed amendments to 34 Pa. Code Chapter 231 to clarify the definitions of Executive, Administrative, and Professional salaried workers who are exempt from minimum wage and overtime pay requirements. Minimum Wage Act #12-106 (IRRC #3202)

Dear Mr. Smolock:

The National Employment Law Project (NELP) submits these comments to the Department of Labor and Industry's (the Department) proposed amendments to 34 Pa. Code Chapter 231 to clarify the definitions of Executive, Administrative, and Professional salaried workers who are exempt from receiving minimum wage and overtime pay (EAP exemptions).

NELP is a non-profit research, policy, and advocacy organization that for nearly 50 years has sought to ensure that all workers, especially those most vulnerable to workplace exploitation or abuse, receive the basic workplace protections guaranteed by our nation's labor and employment laws, including the Pennsylvania Minimum Wage Act of 1968 ("the Act") (43 P.S. §§ 333.105(a) (5) & 333.109). Our work entails direct interaction with low and middle-wage earners who have been denied minimum wage and overtime pay they have earned, and we work closely with worker centers, labor unions, lawyers and other economic fairness advocates who promote and protect the rights and interests of workers. NELP's *National Wage & Hour Clearinghouse*, at https://www.just-pay.org/, serves more than 1,000 members, including organizers, scholars, policymakers, lawyers, and others who work in multiple forums across the nation work to cement basic wage and hour protections, including the Act's 40-hour workweek and overtime pay guarantees, for all workers who are or should be covered by the Act.

NELP and our partners and constituents have a direct and sustained interest in achieving full adherence to the hours-of-work standard contained in the Act to ensure proper coverage of a large and fast-growing low-wage workforce and to support the goals of overtime rules that promote spreading employment.

The Department proposes to advance the Act's goals through an updated bright- line salary test and revisions to the current duties tests that will more effectively differentiate between salaried executive, administrative and professional employees who ought to be overtime-protected and those who should properly be classified as exempt. For this bright-line test to serve as a meaningful proxy for coverage, it must represent a compensation level commensurate with a high degree of discretion and flexibility in a position requiring the performance of duties typically associated with exempt EAP status. Set at an appropriate level, it will necessarily guarantee overtime—and minimum wage—protections to a much larger share of salaried employees than are currently protected. NELP estimates that 465,115 Pennsylvania workers will benefit from the Department's proposal.[1]

A sound salary test for exemption, and the ensuing expansion of automatic coverage will mitigate decades of neglect in maintaining basic protections for most workers; and help to begin reversing decades of wage declines that have harmed America's middle class. Under the Regulatory Review Act, the Independent Regulatory Review Commission's goal is to determine whether a proposed regulation is in the public interest.[2] The first and primary concern is whether the regulation complies with the agency's statutory authority and the legislative intent.[3] If the Commission determines the regulation meets those requirements, it then considers the economic impacts and the clarity, feasibility, and reasonableness of the regulation.[4]

I. The Department's proposed regulations defining the EAP exemption reinforce and advance the purposes of the Act's overtime provisions.

The Minimum Wage Act begins with a declaration of policy in which the Pennsylvania legislature stated its intention to protect employees from "unreasonably low" wages "not

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[1] Keystone Research & National Employment Law Project, "Wolf Proposal Would Restore The Pennsylvania and U.S. Chambers of Business and Industry agree with our estimate that the proposed rule would affect roughly a half million Pennsylvania workers. In fact, the PA Chamber estimate, cited to source by a U.S. Chamber economist, Ronald Bird (https://www.uschamber.com/ronald-bird), projects that slightly more Pennsylvania workers would be affected, and in our view benefited, (505,194) than our estimate. See Comment of Pennsylvania Chamber of Business and Industry, p. 4. Available at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf

[2] 71 P.S. §745.5b.

[3] 71 P.S. §745.5b(a).

[4] 71 P.S. §745.5b(b).

fairly commensurate with the value of the services rendered."[5] At the same time it adopted a broad rule guaranteeing overtime pay to most workers, the legislature also recognized that some white-collar employees enjoy executive decision-making authority, bargaining power, and discretion over time and work, along with higher pay, that justifies exempting them from overtime pay and minimum wage coverage.[6]

Despite steadily improving job growth and a declining unemployment rate, real wages for all but the highest-paid workers have remained stagnant for decades, in part because of the growth in involuntary part-time and other forms of insecure employment.[7] At the same time, an astounding 25 percent of salaried employees report they regularly work 60-plus hours each week, and another 25 percent say they work between 50 and 59 hours weekly[8]. In an economy characterized by too many workers with fewer hours than they want and need, while others are putting in excessive overtime hours for which they receive no pay at all, the Department must strike a sounder balance in defining and delimiting the EAP exemptions, to ensure it is once again advancing the purposes of the Act.

The proposal from the Department does just that. It harmonizes the overtime threshold and job duties tests with both the original intent of the legislature and economic and workplace realities. Under the current regulations in Pennsylvania, last updated in 1977, the minimum annual salary threshold for the exemption is either $8,060 or $13,000, depending on job duties.[9] These amounts are so low they are below the minimum wage of $15,080 annually for a full time worker, so they have become entirely irrelevant in determining exempt status, and cannot in any scenario truly describe an executive, administrative or professional employee.

If the Department had tied the regulation thresholds to inflation, the thresholds would now equal $34,718.48 and $55,997.56, respectively, in today's dollars. Because of the outdated threshold amounts, no worker is automatically eligible for overtime under Pennsylvania law. Even under the higher Fair Labor Standards Act (FLSA) test of $23, very few workers are eligible for overtime without application of the fact specific duties test. In 1975, 62 percent of full-time salaried workers were automatically eligible for overtime nationally, but in 2015, only eight percent of salaried workers are eligible for overtime nationally.[10] According to the Pennsylvania Chamber of Business, today only 4.3 % of Pennsylvania

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[5] 43 P.S. § 333.101 (1968).
[6] 43 P.S. §§ 333.104-105 (1968)
[7] DaSilva, Drew, For most U.S. workers, real wages have barely budged in decades, Pew Research Center (August 7, 2018).
[8] Saad, Lydia, The Forty-Hour Workweek is Actually Longer—by Seven Hours, Gallup (August 2014).
[9] 34 Pa. Code Sections 231.82-231.84
[10] Eisenbrey, Ross, The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979, and What the New Proposed Overtime Rules Mean for Workers, Economic Policy Institute (June 1975).

salaried workers are automatically eligible for overtime.[11] Moreover, because of inflation, the current thresholds now represent a large reduction in purchasing power from the 1977 thresholds. The increased thresholds suggested by the Department, $31,720 when the regulation is enacted and rising to $47,892 in two years would merely return these standards to a level more consistent with the purpose of the Minimum Wage Act's overtime protections.

II. The bright-line salary test the Department proposes creates an effective, efficient and predictable means to define and delimit the EAP exemption.

The Department's aim in the proposal is to minimize reliance on the fact-bound and easily manipulated duties tests to define which employees are subject to the EAP exemptions, and instead to establish a more realistic, objective and predictable salary threshold as the touchstone for coverage under the Act for the EAP exemptions.[12] Setting an objective salary threshold at an appropriate compensation level and avoiding over-reliance on subjective duties tests will ease a proper application of the exemptions and eliminate unnecessary litigation around duties of lower-paid workers who should not be exempted in the first place.

As the Department recognizes, the Pennsylvania EAP exemptions were established to mirror the federal EAP exemptions in existence in 1977.[13] A salary threshold was first introduced into the Fair Labor Standards Act (FLSA) EAP exemption in 1938. It was an effective proxy for capturing the kinds of executive, administrative and professional work the duties tests are designed to measure, and to create a simple way to identify those workers properly covered by overtime protections[14]. The federal Department of Labor ("DOL") has long recognized that the salary paid to an employee is the "best single test" of exempt status under these so-called "white-collar" exemptions, and that the salary level test furnishes a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment."[15]

A salary level is a good indicator of whether a worker should be exempt from the overtime requirements of the Act as a white-collar employee, because higher-paid salaried EAP employees typically have greater discretion and independent judgment in their jobs and more economic power to bargain for better pay or working conditions. DOL concluded in 2016, "[t]he fact that an employee satisfies the duties test, especially the more lenient

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[11] See Comment of Pennsylvania Chamber of Business and Industry, p. 3. Available at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf.

[12] Department of Labor and Industry, Regulatory Analysis Form, p. 2 (June 12 2018).

[13] Department of Labor and Industry, Regulatory Analysis Form, p. 2 (June 12 2018).

[14] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees 81 Fed. Reg. 32395 (May 23, 2016) and 5 FR 4077 (Oct. 15, 1940)

[15] Id at 32400-01

standard duties test[16], does not alone indicate that he or she is a bona fide executive, administrative, or professional employee."[17] A salary level must be robust, as the DOL's Weiss Report of 1949 found; lower salary thresholds lead to "increasing misclassification" of employees as exempt under the EAP definitions.[18] A robust salary threshold, on the other hand, simplifies compliance, reducing the need to make subjective duties-based assessments on whether to exempt or not to exempt.

Because the current salary thresholds for the EAP exemptions is so low and has not risen since 1977, the sweep of the exemptions has grown continuously, with a rising number of workers subject to the exemptions each year as the salaried workforce grows. As DOL has found in the past, the salary threshold "can be of little help in identifying" bona fide EAP employees when "large numbers" of traditionally nonexempt workers in high wage areas earn in excess of the salary level.[19]

While it is conceivable that a rigid duties test with fixed elements required for exemption could provide the type of bright-line borders needed to harmonize the EAP exemptions with the overarching purposes of the Act, it is hard to imagine achieving the same degree of objectivity that a robust salary test provides. Of course, as we discuss below, including bright line criteria in a duties test—such as requiring that at least a certain share of an employee's work is in exempt duties—tightens application of the exemption and leads to less misclassification. Nevertheless, to maximize the likelihood that workers who should receive overtime pay are not improperly exempted and to minimize employers' potential exposure for improper classification, it is much more efficient to streamline decision-making using a realistic, objective and predictable salary test as a proxy for coverage. The Department's proposals are sound and completely within its statutory discretion.

III. The Department's salary threshold proposal is within the low range, for today's labor market, and its proposals for indexing are sound.

The Department proposes to set the salary threshold at the 30th percentile of weekly earnings for full-time salaried employees in the Northeast, and phase that amount in over multiple years. When the final regulation is published, that would be $610 a week, $766 one year after the date of publication and $921 effective two years after the date of publication. The Department's proposed salary threshold and annual indexing are entirely reasonable and consistent with the purposes of the Act.

Businesses in Pennsylvania subject to the FLSA are subject to the higher salary level of $455 per week, or $23,660 per year. However, even that salary test is so low that it allows employers to exclude workers earning less than the poverty level for a family of four from overtime protection. In addition, because exempt EAP employees are not given additional

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[16] This is the more lenient standard duties test the Department is proposing to adopt.
[17] Id at 32413.
[18] Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Presiding Officer Harry Weiss, U.S. Department of Labor (June 30, 1949),
[19] Weiss Report Id. at 10.

pay for their hours worked over 40, the current salary threshold means that some workers classified as exempt who put in substantial overtime may be paid little more than the minimum wage. An assistant retail or fast food manager who is paid $25,000 annually and works an average of 60 hours per week would have an effective hourly rate of pay that is just above $8.00.

Given the level and nature of duties legitimately associated with the EAP exemptions, it would be entirely reasonable to conclude that the salary level at which the exemptions apply should be adequate to support a basic lifestyle for a typical middle class family; however, that is far from the case today. According to the Economic Policy Institute's Family Budget Calculator, the income needed to support a two-parent, two-child family in Pennsylvania, sorted by county, range are from $68,601 to $104,775 with the median landing at approximately $79,000.[20] The National Low Income Housing Coalition reports that a household in Pennsylvania must earn at least $40,616 a year to afford median rental costs for an adequate two-bedroom apartment.[21]

An overtime salary threshold that would protect overtime pay for salaried employees earning less than $47,892 in 2021 is an entirely reasonable level, given costs associated with maintaining a basic, yet modest middle class lifestyle. Denying employees earning less than this amount the right to earn extra pay for extra hours—in essence, requiring them to work more for less—is a pay cut that erodes their ability to maintain an appropriate standard of living for themselves and their families.

The PA Chamber of Business & Industry claims that the proposed Pennsylvania threshold (30th percentile of Northeast region) is above the salary level proposed by the USDOL and struck down as unlawful (the 40th percentile of the South threshold)[22]. While this was true in 2016, it was not in 2017[23] Because of the long phase-in of the proposed Pennsylvania threshold, it will be lower than the federal threshold until at least until 2023. If the 30th percentile of the Northeast continues to be lower than the 40th percentile of the South after 2017—, which is likely—the proposed Pennsylvania threshold will always be lower than the proposed USDOL threshold.[24]

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[20] Economic Policy Institute Family Budget Calculator shows what families need to get by in every part of Pennsylvania, March 6, 2018, available at: https://www.keystoneresearch.org/media-center/press-releases/economic-policy-institute-family-budget-calculator-shows-what-families-n.

[21] National Low Income Housing Coalition, Out of Reach – The High Cost of Housing (2018) at 201, available at: http://nlihc.org/sites/default/files/oor/OOR_2018.pdf.

[22] See Comment of Pennsylvania Chamber of Business and Industry, p. 2 and 6-8. Avaliable at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf.

[23] See the most recent data currently available, at https://www.bls.gov/cps/research_nonhourly_earnings_2017.htm.

[24] Since the gap between wages in the South and the Northeast United States been closing over the past two decades, the 30th percentile of the NE is likely to remain lower than the 40th percentile of the South subsequent to 2017. The median wage of the South was 79.9

While we believe the threshold selected by the Department is reasonable, we believe that there is a strong case for the Department to set a higher level, using for example, one of the two following options:

- The 40th percentile of weekly earnings for full-time salaried employees in the Northeast, phased in over multiple years. Such a figure would be the Northeast region equivalent of the United States Department of Labor's very moderate 2016 proposal, and would result in a weekly salary of $1,089 in 2017 dollars or $56,628 per year.[25]
- A weighted average weekly threshold of $1,122, derived from updating DOL's 1975 benchmark, which achieved automatic overtime coverage for 65 percent of salaried workers. In contrast, DOL's 2016 salary threshold, similar to the Departments proposal, automatically covered only 44 percent of salaried workers.[26]

A higher salary threshold would restore the effectiveness of the exemption's boundary as a sound proxy for adequately separating out employees who are likely to be performing duties that comport with the exempt duties in the EAP exemptions.

IV. Indexing automatically to update the salary level threshold is a fair, predictable, and efficient way to ensure that the scope of the exemptions continues to keep pace with the Act's intended reach.

The Department proposes to index the salary thresholds to rise automatically every three years pegging them to the 30% percentile of weekly earnings of full time non-hourly workers in the Northeast. That methodology would fulfill the goals of providing predictability for employers and employees and eliminate the need for regular rulemaking to update the salary levels. The Department retains the statutory authority to update the scope of the EAP exemptions, as discussed above. Indexing would simply be a means to ensure the threshold remains current rather than continuously erode. The department is acting reasonably and is entirely within its statutory authority to adopt indexing as a means to "define and delimit" the EAP exemptions.

The Department's proposal to index the salary threshold also make good policy sense, as it provides predictability for employees and employers and ensures stability because it does not depend on constant rulemaking. History has shown that the current method of setting fixed levels results in outdated thresholds and subjects a ballooning number of workers to employer misclassification as exempt. Both Pennsylvania's and the federal government's

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percent of the median wage of the NE in 1988 and 87.6 percent of the median wage of the NE in 2017. Source: Current Population Survey.

[25] Labor Force Statistics from the Current Population Survey, Research Series on deciles of usual weekly earnings of non-hourly full-time workers, available at: https://www.bls.gov/cps/research_nonhourly_earnings_2017.htm

[26] U.S. Department of Labor, Bureau of Labor Statistics, Quarterly Census of Employment and Wages (QCEW), average weekly wage of all workers in Pennsylvania, available at https://data.bls.gov/cgi-bin/dbdown/en.

below poverty-level salary threshold is a potent example of this problem. Since 1977, Pennsylvania has not updated its salary thresholds and, prior to the federal government's 2016 regulation, the FLSA level has been updated only once since 1975. There is no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. Pennsylvania's failure to update the salary level on a regular basis has caused the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions. Thus, not only does the Department have the authority to index the salary threshold to adjust salary levels appropriately, indexing is by far the most reasonable, efficient and predictable way to ensure that the standard for exemption remains true to the statute's intended purposes.

We also believe that indexing the threshold to wages is a sound public policy for four reasons:

- the wage level is a less volatile method for incremental regular updates; inflation adjustments are more volatile because they are based on prices in our economy, while salaries tend to inch upward on a more consistent trajectory;
- because the Act sets a minimum wage standard, it makes policy sense to reference the increase in the salary threshold to wages, not prices;
- it is reasonable that the salary threshold would rise along with the rise in wages overall, because the exemptions are intended to cover only the higher-paid employees in the workforce, and finally,
- the growth in wages is more predictable and thus a better policy choice for the EAP exemptions.

In sum, indexing the salary threshold to wages is an effective way to ensure that tests for determining coverage under the Act are closely aligned with wage growth and wage patterns throughout the economy. We have experienced a long enough history of routine misalignment of EAP salary thresholds with the purposes of the Act and with prevailing economic and workplace circumstances. Now is the time to align this crucial wage standard, finally, with wages across the economy.

While NELP agrees with the Department's proposed indexing methodology, another option would be to use data from the Quarterly Census of Employment and Wages (QCEW) program from the U.S. Bureau of Labor Statistics. Every year in early June, QCEW data on the average weekly wage of all workers in Pennsylvania in the prior year is released (BLS series ID ENU4200040010). This series yields similar values to the series in the proposal, and will continue to be updated on a regular basis. In 2017, the average weekly wage of all workers in Pennsylvania was $1038, or $53,924 for a full-year worker. As with the current proposal, the overtime threshold could be phased in to this level over a period of three years, and indexed to this series on January 1 of each their year thereafter.
Some commentators have argued that the Department's proposal to recalibrate the salary threshold in the future based on the 30th percentile of the BLS survey of full-time salaried employees will inadvertently trigger a "ratcheting effect" that will result in a rapid increase

of that benchmark.[27] It predicts this will happen because it predicts that a significant portion of the workers in the BLS survey will be converted to hourly status by their employers, causing them to be excluded from the survey pool in the future, skewing the pool towards much more highly compensated employees, leading the 30th percentile benchmark to rapidly escalate. However, this argument is without basis as the U.S. Department of Labor explained in detail in response to similar questions regarding its proposal.[28]

As the US DOL explained, the predicted result is very unlikely to occur for several reasons. First, BLS looked at historical trends in salary levels after 2004, when it significantly increase the overtime salary threshold, and found no evidence of the predicted pattern. Second, US DOL found that more than 75% in the BLS pool consist of non-exempt employees, such as salaried blue-collar employees, that will be unaffected by the threshold change and whose employers have no incentive to convert them to hourly. Third, even among the "white collar" currently overtime exempt employees in the pool, US DOL found that 61% do not regularly or even occasionally work overtime – and so their employers will have no incentive to convert them. Fourth, even among the remaining 39% who do occasionally or regularly work overtime, US DOL found that employers would not necessarily need to convert them to hourly employees to begin complying with the new overtime threshold, since it is clear that non-exempt employees are permitted to be paid on a salary basis – provided that they are paid overtime for any overtime hours worked. For all of these reasons, US DOL found that the predicted ratcheting affect was unlikely to occur.[29]

V. Pennsylvania Workers will benefit from this proposal.

While it is impossible to predict exactly what employers will do in response to the rule changes, history shows that employers will likely make a number of adjustments. Illustrative studies of employer behavior from Goldman Sachs looking at historical employer behavior following the federal government's 2004 rule changes, and from the National Retail Federation (NRF) predict that:

- Some employers will raise salaries for employees near the new threshold in order to maintain those employees as exempt;[30]
- Some employers will continue to demand that workers newly reclassified as non-exempt perform overtime, and those workers will be compensated for that extra work;

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[27] See, for example, Comment of Pennsylvania Chamber of Business and Industry, p. 9. Available at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf.

[28] 81. Fed. Reg. at 32,441.

[29] 81. Fed. Reg. at 32,441.

[30] See, e.g.,Goldman Sachs letter to investors: http://www.businessinsider.com/overtime-rules-will-affect-payrolls-more-than-pay-2015-7.

- Other employers will reduce hours for workers working more than 40 hours in a week and shift work to under-40 hour employees and hire additional workers, too – the NRF predicted that 117,000 new jobs would have been added and Goldman Sachs' study predicted 120,00 jobs; [31]
- And some employers could lower the wages of some salaried properly exempt workers to save on overall payroll costs, and continue to require them to work long hours.

Once this proposal is finalized, workers will benefit. Some workers will see more money in their pockets: either a bump in their salary above the new level, or time-and-a-half pay for any overtime hours. The increased income resulting from this proposal may result in reduced need for social assistance (and by extension reduce social assistance expenditures by the government). Even workers covered by FLSA can earn as little as $455 per week or $23,660 annually and be exempt. If this worker resides in a family of four and is the sole earner, the family will be eligible for many social assistance programs. Thus, transferring income to these workers may reduce eligibility for government social assistance programs and government expenditures.[32] In addition, when workers incomes rise, so does consumer spending and tax revenues of the State and its local governments.

For overworked employees who see no additional compensation for their hard work, reduced hours will be a good thing. Working long hours is correlated with an increased risk of injury or health problems. It also prevents workers from spending time with their families and in their communities. Long work hours are related to stress and injuries at the workplace [33] Long hours also contribute to a significant increase in risk of contracting specific chronic diseases, such as chronic heart disease, non-skin cancer, arthritis, and diabetes.[34] As weekly work hours increase, so too does the risk for diagnosis of hypertension[35], and mortality rates rise by nearly 20 percent.[36]

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[31] The National Retail Federation's report, Rethinking Overtime (https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf) estimates that 117,000 jobs will be created in the retail and restaurant sector alone. Goldman Sachs says 120,000 jobs will be created. See also Susann Rohwedder & Jeffrey B. Wenger, The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage, RAND Labor & Population (August 2015), at p. 37.

[32] Benefits for which currently exempt EAP workers may qualify include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and school breakfasts and lunches.

[33] Galinsky, E., Bond, J. T., Kim, S. S., Backon, L., Brownfield, E., & Sakai, K. (2005), Overwork in America: When the way we work becomes too much. New York: Families and Work Institute.

[34] Association Between Long Work Hours and Chronic Disease Risks over a 32 Year Period, Presentation at American Public Health Association Meeting on November 18, 2014, on National Longitudinal Survey of Youth.

[35] Yoo et al. Effect of Long Working Hours on Self-reported Hypertension among Middle-aged and Older Wage Workers, Annals of Occupational and Environmental Medicine 2014,

Costs of work-related stress to American businesses due to absenteeism and employee turnover alone exceed $300 billion annually.[37] Another study this year found that the estimated annual health care expenditures related to workplace stress could be as high as $190 billion per year, with long hours, shift work, and work-family conflict all factoring into the cost.[38]

In 2014, approximately 70 percent of women with children were either working or looking for work.[39] On the days they did household activities, women spent an average of 2.6 hours on such activities, while men spent 2.1 hours.[40] The combination of hours at work and at-home afterhours work leaves families with little non-work time, generating work-family conflict that increases the odds of self-reported poor physical health by about 90 percent.[41] However, by encouraging employers to build greater efficiencies into their organizations or share work more broadly among employees to avoid overtime pay premiums, the Department's proposal has the potential to alleviate work-family conflict-related stresses too. As Professor Lonnie Golden found, using data from the General Social Survey (GSS) to analyze whether salaried workers stand to lose flexibility by gaining overtime protections:

> Because salaried workers in the affected pay brackets already work mandatory overtime at the same frequency as hourly workers and more days of overtime in general than hourly workers, raising the overtime threshold for them would not increase and in fact could decrease the work stress and work-family conflict associated with mandatory overtime.[42]

The last option (reducing wages for some salaried employees) is a possibility and some employers may implement it. However, at a time when the labor market is tightening, and even notoriously low-wage employers are voluntarily raising their starting and minimum wages because they need to compete to attract and retain a qualified workforce, we believe that reducing nominal wages of workers would result in exceedingly bad morale and

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26:25; Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.

[36] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.

[37] European Agency for Safety and Health at Work, Calculating the costs of work-related stress and psychosocial risks, 2014, citing 2001 estimated data compiled by Rosch.

[38] Goh, J, Pfeffer, J, & Zenios, S. (2015) The Relationship Between Workplace Stressors and Mortality and Health Costs in the United States. Management Science.

[39] Bureau of Labor Statistics, Employment Characteristics of Families – 2014. Released April 2015.

[40] Bureau of Labor Statistics, American Time Use Survey – 2014 Results, Released June 2015.

[41] Goh, J, Pfeffer, J, & Zenios, S. (2015) Workplace stressors & health outcomes: health policy for the workplace. Behavioral Science & Policy, 1(1), pp 43-52.

[42] Golden, Lonnie, Flexibility and overtime among hourly and salaried workers, Economic Policy Institute (September 30, 2014).

higher-than-normal turnover.[43] We also believe that many employers are well aware that this is a foolhardy business practice, and though many of their representatives in national organizations issue such doomsday prophesies, employers are simply too smart and too dependent on good personnel to implement such shortsighted and self-defeating strategies.

VI. The proposal will lead to less misclassification of workers and decreased litigation.

Misclassification of workers as exempt from overtime under the EAP exemptions remains a significant problem. A Rand study using relatively recent 2014 survey data to estimate the share of salaried workers misclassified as exempt from overtime finds that among hourly-paid employees who work over 40 hours in a week, 19.0 percent were paid less than the "time-and-a- half" standard for overtime.[44] Among salaried workers, those purportedly earning above a specified threshold and having professional-level duties that together exempt them from overtime compensation rules, 11.5 percent did not actually meet the exemption criteria and were thus misclassified. Some examples of this misclassification and of close cases that may or may not have been misclassification are cited.[45]

Increasing the salary level will decrease the litigation risk created when employers must apply the duties test to employees. As the federal DOL noted in 2015, the number of wage and hour lawsuits filed in federal courts increased substantially in the period between 2001 and 2012, from approximately 2,000 to approximately 8,000 per year[46]. Stakeholders advised the Government Accountability Office that one of the reasons for the increased litigation was employer confusion about which workers should be classified as EAP

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[43] "Wal-Mart Raising Wages as Market Gets Tighter," The Wall Street Journal, Feb. 19, 2015, http://www.wsj.com/articles/wal-mart-plans-to-boost-pay-of-u-s-workers-1424353742; "T.J. Maxx, Marhall's to Hike Minimum Wage for Workers," CNN Money, Feb. 25, 2015, http://money.cnn.com/2015/02/25/news/companies/tj-maxx-minimum-wage/index.html; "McDonalds to Raise Pay at Outlets it Operates," The New York Times, April 1. 2015.

[44] Susann Rohwedder and Jeffrey B. Wenger, The Fair Labor Standards Act Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage, RAND Labor & Population (August 2015), available at http://www.rand.org/content/dam/rand/pubs/working_papers/WR1100/WR1114/RAND_WR1114.pdf.

[45] See, for example: Kelly-Myers v. Mercy Health System of Southeastern Pennsylvania, Slip Copy (2017) 2017 Wage & Hour Cas.2d (BNA) 347,299;
Calli v. ARC Maintenance, Inc., (2016) 2016 Wage & Hour Cas.2d (BNA) 16,044;
Galdo v. PPL Electric Utilities Corporation, 2016 Wage & Hour Cas.2d (BNA) 32,851;
Sloane v. Gulf Interstate Field Services, Inc., Slip Copy (2018) 2018 Wage & Hour Cas.2d (BNA) 63,593;
Rifai v. CMS Medical Care Corporation, 2016 Wage & Hour Cas.2d (BNA) 55,373, 2016 A.D. Cases 57,401.

[46] See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38515 at 38531, July 6 2105.

exempt. [47]Setting an appropriate salary level and maintaining the salary level with automatic updates will assure that the salary level will once again serve as a clear and effective line of demarcation, thereby reducing the potential for misclassification and litigation. The DOL has long recognized that the salary tests "have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary."[48] Thus, reduced litigation will be one of the beneficial impacts of the proposal.

VII. The decision of one district court judge in Texas invalidating the Obama Overtime Rule is not a reason to dispense with the Department's proposed rule.

On August 31, 2017, a federal judge in Texas purported to invalidate the Obama overtime rule in a far-reaching and frankly unworkable decision. This decision, currently on appeal, is not a basis to dispense with this proposal. In his zest to overturn the Obama rule, the judge created a nearly impossible test for ANY rule that relies in part on a salary threshold to pass legal muster.

The judge's principle quarrel with the Obama rule was that it made some workers automatically eligible for overtime based solely on their salary. However, that is exactly what an overtime salary threshold is supposed to do. That is exactly what the Pennsylvania regulation has intended to do since its enactment in 1977. Moreover, it is what every other federal overtime salary threshold has been intended to do since 1938. The Texas district judge also misunderstood how the Obama rule operated, reasoning that it made job duties irrelevant; but in reality, job duties would have still determined overtime eligibility for 6.5 million workers who did not fall under the salary threshold under the Obama rule. As the DOL concluded, "[u]nder the Final Rule, 6.5 million white collar workers who earn above the required salary level do not satisfy the standard duties test, representing 47 percent of the total number of white collar workers who fail the duties test. For these overtime-eligible salaried workers, the standard duties test rather than the salary test will dictate their exemption status.[49]

Most importantly, the judge was concerned that the Obama rule gave 4.2 million workers new overtime protections, even though their jobs had not changed. There is no basis in law for invalidating any rule because of its impact. Even as a policy, the judge didn't recognize that the 2016 rule's greater impact was created by errors in the 2004 rule, which made too many workers ineligible.

Moreover, overtime rules always protect some new workers. Although the judge attempted to limit his ruling to the 2016 rule, the 2004 federal rule similarly affected 1.3 million workers. His analysis therefore calls into question the ability to use any realistic salary-

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[47] Id.

[48] 81 FR 32500 quoting Weiss Report at 8.

[49] 81 Fed Reg at 32413.

level test as part of the criteria for determining overtime eligibility. Not surprisingly, the U.S. Department of Labor has appealed the judge's decision despite its intention to take a fresh look at the 2016 rule.

The district court's decision, now on appeal, therefore provides no basis to dispense with this proposal.

VIII. Many commentators' opposition to the Proposal is based upon a misunderstanding of how the overtime provisions of the Act operate.

Many commentators have expressed concerns that they cannot afford to raise the salaries of their employees now classified as exempt to the proposed salary level. However, they do not seem to understand that employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may: (1) increase the employee's salary to the new salary level to retain his or her exempt status; (2) pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked; (3) reduce or eliminate overtime hours; (4) reduce the employee's base salary (provided that the employee still earns at least the applicable hourly minimum wage) and pay overtime for hours worked over 40 in the workweek; or (5) use some combination of these responses.

Some commentators have expressed concerns about the possibility of increased costs with some or all these options. However, for the small costs that employers may incur, they also have options in how to adapt to those small increased costs. They can find efficiencies in their business practices, spread employment by hiring additional workers, pass some costs onto consumers, or decrease profits. It is up to employers to figure out what approach makes the most sense for their business in light of the conditions in their industry. Other commentators have expressed concern over the amount of the increase. It is true that this proposal will, over two years, increase the salary level by 268% over the irrelevant below the minimum wage state level and 102% over the current federal level. However, the 2004 federal rule increased the salary level almost 300% (from $155 to $455) and yet no commentator (to our knowledge) has provided examples of hardships business experience in adapting to that change.

IX. Many commentators' opposition to the Rule is based upon a misunderstanding of how the recordkeeping provisions of the Act operate.

Some commentators have argued that the proposal will be difficult for employers to implement because they will have to track workers' hours if they decide not to raise salaries above the threshold. The opponent employer's purported record-keeping concerns seem to be predicated on the notion that businesses are not *already* required to record the work hours of employees classified as exempt executives, administrators, or professionals. In this regard, however, the employers seriously misinterpret the Act.

Neither the Act nor its accompanying regulations contain any suggestion that an employer is excused from keeping basic payroll data for overtime-exempt employees.[50]On the contrary, the Act's record-keeping mandate intended to, among other things, assist the Department in the event of an investigation[51]. Since many investigations concern alleged white-collar misclassification, it makes good sense for employers to be expected to maintain basic timekeeping data for all employees. Such a practice enables the Department to assess damages in the event of a misclassification determination.

In fact, it seems especially reckless for an employer to fail to track the work hours of purportedly exempt workers whose earnings fall well below the average salary. Agency investigations and judicial outcomes (including multi-million-dollar settlements) make it clear that such low-salary employees are particularly likely to be the subjects of misclassification investigations and lawsuits. An employer who neglects its basic record-keeping obligations in the face of such investigatory and litigation risk is following a reckless course, which should not be condoned by the Department.

Furthermore, almost every employer already has systems and policies in place for dealing with overtime-eligible employees so the rule is not introducing any new obligations for employers or requiring them to adopt new systems. These existing systems can be used for newly overtime-protected employees impacted by the proposal. There is no requirement that employees "punch in" and "punch out."

Employers and employees have flexibility in designing systems to make sure appropriate records are kept to track overtime hours.[52] As long as records are complete and accurate as to the number of hours worked each day, employers may use any method they choose. For an employee who works a fixed schedule, an employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule. Only when the employee deviates from the schedule is the employer required to record the changes to the hours worked. For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee.

Therefore, an employer could allow an employee to provide just the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period. Many employees, both exempt and non-exempt, who maintain flexible work schedules track their daily and weekly hours by simply recording their hours worked for the employer.

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[50] See 43 P.S. sec. 333.108; 34 Pa. Code sec. 331.31.
[51] See 43 P.S. sec. 333.107; 34 Pa. Code sec. 231.35.
[52] See 34 Pa. Code sec. 231.31(6) (merely requiring employer to maintain record of "[t]he number of hours worked daily and weekly").

X. The Proposed Rule does not reduce employee's flexibility.

Some employers expressed the view that eligible employees will lose flexibility. However, the act does not require minimum or maximum hours for a shift, or prohibit split shifts. There is no requirement that a worker must have a predetermined schedule or restrictions on where the work is performed. There is also no restriction on when the work may be performed. Nor does the Act require overtime-eligible workers to punch a clock. Any employer in compliance with the Act can provide its employees with flexibility.

For example, take an overtime-eligible employee with a flexible schedule that does not require that the employee work particular hours but requires that she work at least 40 hours per week. In a particular week, the employee might leave early on Monday to go to her daughter's soccer game, finish some work from home late Monday night, stay late on Tuesday and Wednesday to catch up on a priority project, leave on Thursday midafternoon to attend a gym class and then return to work. Her employer does not require her to "clock in or out" each time she comes to work or leaves. The employer must keep an accurate record of the number of daily hours worked by the employee, as it would for any employee. By the end of each pay period, the employee provides her employer with the total number of hours she worked each day, including the number of overtime hours, if any.

XI. Employer's concern about "employee morale" is misplaced.

Some employers expressed the view that employees believe that being paid hourly denotes a loss in status and employee morale will decrease if this proposal is finalized. However, nothing in the proposal requires employers to convert salaried employees to hourly pay status even if they become eligible for overtime.

Employers have the authority to determine how to structure the pay plans of the newly overtime-eligible employees, and employers need not structure their pay plans in a manner that results in the potentially-adverse effects that the employers identified. Salaried workers may be paid overtime and overtime-eligible workers may be paid a salary. Employers are not required to change employees' pay basis from salaried to hourly simply because they are no longer exempt. Employers may continue to pay employees a salary, even when the employees are entitled to overtime pay if they work in excess of 40 hours per week. Moreover, even if newly overtime- eligible employees are converted to hourly status, employers are not required to dock such employees for the hours they take off.

In NELP's experience, most people want to be – and should be – paid fairly and adequately for the hours they work. NELP has repeatedly heard from workers and their representatives that employees' status is derived from how fairly they are treated on the job, much they make and how much responsibility they have, not whether they are paid on a salary or hourly basis. They do not equate overtime compensation with a loss of status. DOL made similar conclusions in 2016 when they observed, "The Department believes that for most employees their feelings of importance and worth come not from their FLSA exemption status but from the increased pay, flexibility and fringe benefits that

traditionally have accompanied exempt status, as well as from the job responsibilities they are assigned. None of these are incompatible with overtime protection."[53]

Other commentators have claimed that raising the salary threshold will result in workers being demoted and denied opportunities for advancement. This is completely in the hands of employers, and need not be a reality for employees. An employer that understands the value and potential of its employees can continue to create promotion opportunities, advancing employees to lower- and middle management jobs with added duties and responsibilities—and surely should not demote valuable employees just because of a rules change governing their overtime classification. That same employer can bestow upon them whatever job titles are appropriate. The only difference is that once this proposal becomes operational, those same employees, who are learning new skills and advancing their careers, can't be forced to work long hours for free in order to gain that added experience unless their earnings exceed the salary threshold, and their work is characterized by the independent judgment and discretion required for exemption. The proposal does not require any demotions, changes in title, or other form of diminution of an employee's status and stature within a workplace. As with the employer who decides to lower hourly rates to account for the proposed changes, the employer who resorts to demotions will also surely find that its actions have overwhelmingly negative consequences.

XII. The Department's proposal does not inappropriately reduce the role of the duties test.

Some commentators have opposed the proposal on the basis that it substantially reduces the importance of the duties test[54]. Others argue that the salary level is so high that there will be some workers who would pass the duties test but will be overtime eligible.[55] Both arguments should be rejected. Instead of a liability, reducing reliance on the duties test is a plus, both for employers and for employees. As discussed above, it has long been recognized that a robust salary level is the "best single test" of exempt status under these "white-collar" exemptions. Application of the duties test is often a subjective based assessment that often leads to misclassification of overtime-eligible employees as exempt[56]. Since the Pennsylvania salary levels are below the minimum wage, there has been, in effect, only a duties test under the Act. Thus as discussed above, reducing reliance on the duties test will lead to more appropriate classification under the Act.

Nor is it true, as a factual matter that the duties test is irrelevant. As discussed above, in 2016 when DOL proposed to raise the salary level to a level similar to this proposal, it determined that 47 percent of the total number of white collar workers who fail the duties test earned above that salary level. For these overtime- eligible salaried workers, the duties

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[53] 81 Fed. Reg. 32419

[54] http://www.irrc.state.pa.us/docs/3202/COMMENTS_LEGISLATIVE/3202%2007-12-18%20REP%20ROB%20KAUFFMAN.pdf.

[55] http://www.irrc.state.pa.us/docs/3202/COMMENTS_LEGISLATIVE/3202%2007-31-18%20SEN%20KIM%20WARD.pdf.

[56] Id.

test rather than the salary test would dictate their exemption status. Moreover, since the Department is proposing to eliminate the long test, there will be employees who would have failed the long test (and been overtime eligible), but will not fail the more lenient standard duties test (and be exempt). A robust salary level is necessary to protect them. Thus, the duties test remains important, but not will no longer be the exclusive test under the Act.

In another comment, it is argued that three occupations – Social and Community Service Managers, Human Resources Specialists, and Accountants/Auditors – would be probably be exempt under the administrative and executive duties tests yet have starting salaries in Pennsylvania that are below the Department's proposed threshold of $48,256. The claim is that this casts doubt on the appropriateness of the proposed threshold. This argument is not persuasive for several reasons. For starters, one of the occupations that is cited, Social and Community Service Managers, are largely employed by state and local governments, which as noted below, are completely exempt from the PMWA's overtime requirements. It is also worth noting that only "entry-level" salaries for these positions are cited – implicitly acknowledging that many or most jobs in the identified occupations likely pay more than the proposed threshold. But even if it were true that many workers in these occupations earned less than the proposed threshold, that would be of no moment. By its nature, the threshold is an approximation, and there will inevitably be job where workers would arguably be exempt duties test yet fall below the threshold.

Moreover, in the case of the simplified duties test, the entire justification for the simplified test is for it to be used in combination with a robust salary threshold so that the combined effect of the two will be to ensure that an appropriate segment of the labor force remains subject to overtime protections. Thus, under the simplified duties test, the foundational assumption is that the test will be over-inclusive in the range of jobs that it exempts, but that the salary threshold remedies that over-inclusiveness. The salary threshold makes up for the overly broad simplified duties test by ensuring overtime coverage for low-paid workers who are not protected under the simplified test. For all of these reasons, the examples cited do not call into question the proposed threshold.

XIII. The Department should not adopt the out-of-date federal salary level or simply inflate the 1977 long test salary level.

Some commentators have suggested that Pennsylvania adopt the DOL's 2004 salary level or simply inflate the 1977 long test levels to 2018. [57]Both options are untenable. When the DOL's proposed updating the 2004 salary level in 2015, there was broad consensus, even among business commentators that the 2004 level, which is below the poverty level for a family of four, was too low and needed to be increased[58]. Using inflation to update the

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[57] See http://www.irrc.state.pa.us/docs/3202/COMMENTS_LEGISLATIVE/3202%2007-12-18%20REP%20ROB%20KAUFFMAN.pdf

[58] See 81 FR 32405 "The overwhelming majority of commenters agreed that the standard salary level needs to be increased, including many commenters writing on behalf of

salary level runs counter to the purposes of the test, which is to determine at what level of wages (not prices) employees are most likely to fail or pass the duties test. Even if inflation was a viable methodology, the Department is proposing to eliminate the lower salary level, but more stringent duties, long test. Thus using the long test salary level would only replicate what the DOL has acknowledged was a flaw in their 2004 rule.[59]

XIV. The Department should not wait for the DOL to act.

Pennsylvania should not wait for the federal government to reconsider the 2016 Rule. It is unclear, when, if ever, the DOL will propose a new overtime rule. While the DOL Regulatory agenda currently lists January 2019 as the date for a proposed rule, it initially indicated there would be a fall 2018 release.[60] The expected dates for regulations are routinely pushed back, often several times, at DOL. The DOL is also working on at least three other Wage Hour regulations. Those include rules on tip pooling, exemptions to child labor rules, and other revisions to the law governing time-and-a-half overtime calculations. All three were added to the regulatory agenda after the overtime rule was, and yet they are slated for release before the overtime rule in 2019.[61] This further increases the prospect that a new proposal, if any, is not forthcoming anytime soon. Moreover, it is unlikely that such a controversial new overtime rule would be released before there is a confirmed Wage and Hour Administrator, and confirmation of the current nominee is nowhere in sight.

XV. The Department could better align the duties test for executive, professional and administrative employees with the federal tests but need not and should not incorporate every federal white-collar exemption.

Several commentators have complained that the Department's proposal does not align the proposed changes to the white-collar exemptions exactly with all the federal white-collar exemptions. However, the proposal never intended to adopt the federal regulations in toto. The Department has only proposed to align the duties test with the federal regulation in effect since 2004 "by simplifying the duties determination with one standard test and defining other duties to appropriately classify exempt and non-exempt employees." [62]

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employers, such as the Business Roundtable, Catholic Charities USA, College and University Professional Association for Human
Resources (CUPA–HR), CVS Health, the National Restaurant Association (NRA), and the Northeastern Retail Lumber Association".

[59] 81 FR 32403

[60] "Defining and Delimiting the Exemptions for Exectuive, Administrative, Professional, Outside Sales, and Computer Employees," Unified Agenda of Regulatory and Deregulatory Actions (Fall 2017),
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1235-AA20.

[61] "Defining and Delimiting the Exemptions for Exectuive, Administrative, Professional, Outside Sales, and Computer Employees," Unified Agenda of Regulatory and Deregulatory Actions (Spring 2018),
https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1235-AA20.

[62] Department of Labor and Industry, Regulatory Analysis Form, p. 2 (June 12 2018).

While the Department could better align the basic duties tests for the executive, professional and administrative exemptions with the federal duties tests for those exemptions, it need not and should not mirror the federal regulations exactly. Many aspects of the federal regulations such as the highly compensated exemption, the computer professional exemption, the outside sales exemption are beyond the scope of this rulemaking as they were not proposed and the public had no notice that they should comment on those exemptions. Thus, adoption of those regulations would likely violate the Administrative Procedures Act.

Nor should the Department adopt in its final regulation those portions of the federal exemptions that do not deal with duties. For example, the federal exemption for teachers, lawyers and doctors does not include a salary basis. The Department is not proposing to align the Pennsylvania salary tests with the federal salary tests so alignment with these provisions was not subject to comment either.

In addition, the Department may not have the authority to adopt some of those exemptions through regulation. For instance, the federal computer professional exemption is in regulation because of federal legislation. A 1990 enactment expanded the federal EAP exemptions to include computer systems analysts, computer programmers, software engineers, and similarly skilled professional workers, including those paid on an hourly basis if paid at least 61/2 times the minimum wage. See Sec. 2, Public Law 101–583, 104 Stat. 2871 (Nov. 15, 1990). The compensation test for computer-related occupations was subsequently capped at $27.63 an hour (61/2 times the minimum wage in effect at the time) as part of the 1996 FLSA Amendments, when Congress enacted the new section 13(a)(17) exemption for such computer employees. Until and unless the Pennsylvania adopts similar legislation, such an exemption should not be adopted through regulation.

Finally, it is not necessary to define every aspect of the duties tests in regulation. The Department has other mechanisms for providing guidance. In addition, where a Pennsylvania law tracks the language of a federal law, Pennsylvania courts will look to federal authority for guidance on the meaning of the Pennsylvania law. See Commonwealth v. Garrison, 386 A.2d 971, 976 n.5 (Pa. 1978). Thus, to the extent the duties test for the executive, professional and administrative exemptions "substantially parallel" the FLSA duties tests courts can look to the FLSA tests for guidance.

XVI. The Department should ignore the comments of political subdivisions of the State as they are not subject to the Act and therefore their employees will not be affected by the proposal.

Several political subdivisions of the State (supported by the Pennsylvania Chamber)[63] have commented in opposition to the proposal on the seeming belief that their employees are

[63] See Comment of Pennsylvania Chamber of Business and Industry, p. 4. Avaliable at http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-22-18%20PA%20CHAMBER.pdf.

affected[64]. Their comments should be ignored since the employees of political subdivisions of the state are not covered by the Act and are therefore not affected.

The Act's definition of "employer" "includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee."[65] While an express exemption had been earlier removed, in 1976 the Attorney General, in Opinion 76-29, ruled the commonwealth and its political subdivisions were not under the Act because the "commonwealth and its political subdivisions are not included in the definition of the word "employer."[66]

Decisions on an analogous Pennsylvania statute, the Minimum Wage Payment and Collection Law, 43 P.S. § 260.1 et seq., have held that where the legislature has omitted government entities from coverage in the language of the statute, courts should not read the statute to include these entities. See Philipsburg-Oseceola Educ. Ass'n by Porter v. Philipsburg-Osceola Area School Dist., 159 Pa. Commw. 124, 633 A.2d 220, 223 (Pa. Cmwlth. 1993) (holding that school districts are not employers under Pennsylvania's Minimum Wage Payment and Collection Law); Huffman v. Borough of Millvale, 139 Pa. Commw. 349, 591 A.2d 1137, 1138-39 (Pa. Cmwlth. 1991) (holding that municipal corporations such as boroughs are not employers under the Minimum Wage Payment and Collection Law). In the only case interpreting the status of political subdivisions under the under the Act, a Federal District Court concluded the same. See. See Morrow v. County of Montgomery, 2014 U.S. Dist. LEXIS 13093 (E.D. Pa. Jan. 31, 2014). Therefore, these comments should be ignored.

Thank you for the opportunity to submit these comments and do not hesitate to contact me for further information.

Very truly yours,

Christine L. Owens

Executive Director
National Employment Law Project

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[64] One Commentator, the Pennsylvania Association of Boroughs recognized that that the Act has been interpreted not to cover them, but requested a specific regulatory exemption nevertheless. See, http://www.irrc.state.pa.us/docs/3202/COMMENTS_PUBLIC/3202%2008-17-18%20PA%20STATE%20ASSOC%20OF%20BORO.pdf.

[65] 43 P.S. § 333.103.

[66] 1976 Pa. AG LEXIS 30; 1976 Op. Atty Gen. Pa. 92