WINEBRAKE & SANTILLO, LLC | **Fighting For Fair Wages**

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August 22, 2018

By Email:

Bryan Smolock (bsmolock@pa.gov)
Director
Jennifer Buchanan Rapach (jerapach@pa.gov)
Director of Policy
Pennsylvania Department of Labor & Industry
Bureau of Labor Law Compliance
651 Boas Street, Room 1301
Harrisburg, PA 17121

Re: Comments of Winebrake & Santillo, LLC
Amendments to 34 Pa. Code Chapter 231 Regarding Overtime Pay

Dear Mr. Smolock and Ms. Rapach:

I write on behalf of Winebrake & Santillo, LLC ("W&S") to comment on the Department's proposal to amend the Pennsylvania Minimum Wage Act ("PMWA") regulations so that, among other things, salaried employees classified as overtime-exempt "executives," "administrators," and "professionals" will be guaranteed annual compensation of at least $47,892/year. As discussed below, W&S ***supports*** the proposed amendment based on our interactions with hundreds of Pennsylvania clients who have worked tens of thousands of overtime hours without receiving any extra overtime pay.

A. Our firm has handled hundreds of overtime rights cases.

Since its founding in January 2007, W&S has exclusively represented employees in employment rights litigation. W&S is a pure contingency fee law firm and is "at risk" in every matter it handles. W&S never requires a client to pay an hourly fee or retainer. If a matter does not result in a money recovery, W&S recovers nothing.

Many of W&S's overtime rights cases are class or collective actions seeking damages on behalf of groups of employees. To date, W&S has resolved 152 separate class/collective actions in courts throughout the United States. In addition, W&S has successfully resolved hundreds of "individual" overtime rights cases in which a single plaintiff (or a small group of named plaintiffs) alleges violations of federal or state employment laws.

At the United States Court of Appeals, W&S lawyers have argued cases resulting in precedential opinions in the area of overtime rights law: See Mazzarella v. Fast Rig Support, LLC, 823 F.3d 786 (3d Cir. 2016); Resch v. Krapf's Coaches, Inc., 780 F.3d 869 (3d Cir. 2015); McMaster v. Eastern Armored Services, 780 F.3d 167 (3d Cir. 2015); Knepper v. Rite Aid Corp., 675 F.3d 249 (3d Cir. 2012).

B. Increasing the salary threshold is consistent with Pennsylvania's tradition of providing employees with benefits that are more generous than those available under the Federal Fair Labor Standards Act ("FLSA").

Pennsylvania courts consistently hold that the PMWA is *more protective* of employee rights than the FLSA. As the Pennsylvania Supreme Court has observed, the FLSA "establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded." Bayada Nurses, Inc. v. Dept. of Labor & Industry, 8 A.3d 866, 883 (Pa. 2010). In sum,

> the FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees; and it is not mandated that state regulation be read identically to, or *in pari materia* with, the federal regulatory scheme.

Id.; see, e.g., Verderame v. Radioshack Corp., 31 F. Supp. 3d 702 (E.D. Pa. 2014) (refusing to impose FLSA overtime calculation method on PMWA claim); Chevalier v General Nutrition Centers, Inc., 177 A.3d 280 (Pa. Super. 2017) (same).

The above principle is ignored by various commentators (some of whom, ironically, are quick embrace principles of "federalism" when it suits their economic interests). I hope the Department will not let these detractors steer the Commonwealth away from its proud tradition of extending overtime rights beyond federal law.

C. Increasing the salary threshold will promote certainty and decrease litigation.

Our law firm has handled well over 100 cases in which salaried Pennsylvania employees asserted that they were misclassified as overtime-exempt under the white collar exemptions to the PMWA and FLSA. The outcome of these cases almost always turns on competing arguments over the employees' "duties." Our clients argue that their duties are not "executive,' "administrative," or "professional." The employer argues the opposite. We have won, lost, and settled these types of cases.

These "white collar misclassification" cases have required the expenditure of thousands of attorney hours and millions of dollars in legal fees paid to the employers' lawyers and our law firm (when our clients have won or settled).

I conservatively estimate that, if the PMWA carried a $47,892/year salary threshold, ***over 70%*** of the above lawsuits would never have been filed. That's because a meaningful salary threshold creates a "bright-line" standard that employers can easily understand and apply. Employees earning less than $47,892 will either (i) be classified as non-exempt (in which case there will be no "misclassification" lawsuit) or (ii) be classified as exempt (in which case any violation will be so apparent that the lawyers will have nothing to fight about in litigation).

Make no mistake: imposing a $47,892/year salary threshold on the PMWA's white-collar exemptions will severely decrease the amount of overtime rights litigation in Pennsylvania. Lawyers love uncertainty, and, in the area of overtime rights law, the highly-subjective "duties" test spawns uncertainties that result in big disagreements, big lawsuits, and big lawyer fees. As long as the salary threshold is so low that it never impacts the classification analysis, workers' rights and corporate lawyers will continue to fight and fight and fight. And those fights don't come cheap.

D. "Executives," "Administrators," and "Professionals" deserve a little RESPECT.

So many of our firm's current and former clients have worked excessive hours without overtime pay in exchange for very low salaries. The "Account Manager" who works for a cleaning contractor and spends all her time mopping floors and cleaning bathrooms. The "Store Manager" who works at the small convenience store and spends all his time working the cash register. The "Assistant Branch Manager" who works at the local bank and spends all her time doing the same work as the hourly tellers. The "Assistant Manager" who flips burgers at the fast food restaurant.

In denying overtime pay to our clients, the employer labels them "Executives" or "Administrators" or "Professionals." But labels don't put food on the table or pay the mortgage or cover the student loan. And ***real*** "Executives," "Administrators," and "Professionals" don't earn $28,000 or $33,000 or even $40,000 per year.

The overtime-exempt "Executives," "Administrators," and "Professionals" our law firm represents struggle to make ends meet. Some of them get food stamps. Some of them receive publicly funded or subsidized health care benefits. Some of them lack bank accounts and must cash their settlement checks at the local check cashing business.

Several of the businesses and "entrepreneurs" opposing the proposed regulations argue that government should stay out of their business affairs. Ironically, however, businesses that pay workers salaries as low as $25,000 are already feasting on government services. These businesses pay inadequate wages and then rely on taxpayers to subsidize the wages through Obamacare, the CHIP program, food stamps, and reduced school lunches.

Increasing the salary threshold to $47,892/year is a matter of respect for thousands of salaried Pennsylvania employees who work long hours and struggle to make ends meet and for the millions of taxpayers who are subsidizing these corporate pay practices.

E. Increasing the salary threshold will benefit *ALL* employees.

The PMWA's overtime pay mandate is intended to benefit the *entire* workforce, not just the recipients of overtime pay. As explained by Judge Wettick in a 2014 opinion:

> The purpose of the [PMWA's overtime mandate] is to increase employment, reduce overtime, and adequately compensate employees who must work more than a standard forty-hour workweek. *The means for achieving this goal is to require sufficient extra pay*

for overtime work such that employers will hire new employees in lieu of requiring existing employees to work overtime.

Chevalier v. General Nutrition Centers, Inc., 42 Pa. D. & C.5th 1, 26-27 (Pa. Common Pleas, Allegheny Cty. 2014) (emphasis supplied).

Importantly, when employers can easily shift all of the overtime work onto the backs of salaried employees who receive either limited or no overtime pay, the PMWA's remedial purpose of spreading work hours across the workforce is undermined. Under these circumstances, the PMWA "provide[s] very little financial incentive to expand the workforce rather than pay substantial hours of overtime to existing employees at lower rates per hour." Chevalier, 42 Pa. D. & C.5th at 27.

Based on the above, increasing the salary threshold to $47,892/year is crucial to the PMWA's purpose of spreading work hours across the entire workforce. Under the current salary level, it's far too easy for employers to pay workers a low salary, classify them as overtime-exempt, and assign them all the overtime work. This practice greatly benefits the employer, who escapes the PMWA's overtime pay mandate. But it is terrible for *both* the salaried employee (who must work many extra hours without any extra pay) and for the hourly employee (who is deprived of the opportunity to work extra hours).

The above practice is especially rampant in the retail and fast food industries. In both of these industries, the corporate office requires each individual store to comply with strict payroll budgets and staffs the store with several hourly employees and one or two salaried-exempt employees. The salaried-exempt employees usually get a fancy job title like "Store Manager" or "Assistant Store Manager."

In the above scenario, paying overtime premium compensation to the store's hourly employees will put the store over its payroll budget. There is only one way for the store to both make its payroll budget and remain adequately staffed: the salaried Store Manager and Assistant Store Manager must work *very* long hours. Since these Managers do not get overtime pay, there is no impact on the payroll budget.[1]

Of course, there is nothing "managerial" about the work these salaried Managers perform. Rather, they work alongside their hourly co-workers, performing the same customer service and manual labor tasks.

This business model (which our firm has repeatedly encountered) is profoundly unfair. In some of our cases, the exempt Manager's effective pay rate has been *lower* than the pay rate of the hourly employees. For example, we have had cases where clients have routinely worked an average of 70 hours per week in exchange for salaries in the range of $30,000 per year. These clients were effectively making as little as $8.24 per hour [($30,000 *divided by* 52 weeks) *divided by* (70 hours)].

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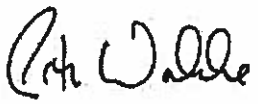
[1] Several courts have recognized the unfairness of this business model. See, e.g., Marzuq v. Cadete Enterprises, Inc., 807 F.3d 431, 440-41, 446 (1st Cir. 2015); Morgan v. Family Dollar Stores, Inc. 551 F.3d 1233, 1252 (11th Cir. 2008).

The above business model has had devastating consequences on some of our law firm's retail clients. Increasing the salary threshold will alter the economics in a manner that benefits all employees. Employers choosing to retain the above business model will at least need to pay the Manager a $47,892/year salary (which results in a respectable effective hourly wage). Or the employer may decide to classify the Manager as non-exempt (either salaried or hourly) and spread the overtime work across the entire workforce. Either scenario would be a great improvement over the *status quo*.

Thank you for considering my comments and for considering these long-overdue improvements to the PMWA regulations.

Respectfully,



Pete Winebrake